

# Michigan Law Review

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Volume 112 | Issue 7

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2014

## Presidential Inaction and the Separation of Powers

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## PRESIDENTIAL INACTION AND THE SEPARATION OF POWERS

Jeffrey A. Love\*  
Arpit K. Garg\*\*

*Imagine two presidents. The first campaigned on an issue that requires him to expand the role of the federal government—maybe it was civil rights legislation or stricter sentencing for federal criminals. In contrast, the second president pushes policies—financial deregulation, perhaps, or drug decriminalization—that mean less government involvement. Each is elected in a decisive fashion, and each claims a mandate to advance his agenda. The remaining question is what steps each must take to achieve his goals.*

*The answer is clear, and it is surprising. To implement his preferred policies, the first president faces the full gauntlet of checks and balances—from the formal requirements of bicameralism and presentment to the modern congressional vetogates. And yet the president aiming to govern by inaction faces virtually none. Instead, to get the federal government out of a particular issue, the second president needs only to ensure that existing laws are not implemented. Critically, he can achieve this goal without the help of Congress or the courts; he can simply direct his executive agencies accordingly.*

*It wasn't supposed to be this way. James Madison famously articulated a functional account of our governmental structure that would use overlapping authority to prevent any single branch from unilaterally making policy. No doubt Madison and the other Federalists had in mind runaway action; after all, the principal concern in Madison's day was a Congress run amok. But the core principle at play admits of no such restriction. In the modern administrative state, the president's refusal to enforce duly enacted statutes—what we call “presidential inaction”—will often dictate national policy but will receive virtually none of Madison's checks and balances. This asymmetry between action and inaction cannot be justified if we are to remain faithful to the notion that interbranch competition is the core virtue of our constitutional regime.*

*Yet the stakes are even greater than a need to update our theory of the separation of powers. Unchecked inaction fuels an imbalanced political structure that endows the modern executive with more power to change the scope of government than the Framers—or even the architects of the New Deal—ever imagined. This imbalance amounts to a thumb on the scale, allowing presidents to abandon unilaterally the governmental functions to which they are*

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\* J.D., Yale Law School, 2012.

\*\* J.D., Yale Law School, 2012. The authors thank Leah Bellshaw, Josh Chafetz, Bill Eskridge, Eric Fish, Heather Gerken, Lauren Gilbert, Daniel Hemel, Daryl Levinson, Philip Levitz, Michael Love, Jerry Mashaw, Jennifer Nou, David Rubenstein, Brian Soucek, Nisha Tamhankar, Daniel Winik, and David Wishnick for their helpful comments on an earlier draft.

*opposed. In other words, it creates a structural bias against government intervention. The separation of powers is, of course, intended to create friction, to make it difficult to pass legislation. We consider this a feature of our system, not a bug. But once legislation is enacted, the president is obligated to enforce it. Put simply, if the president does not want to enforce a law, he must advocate for its repeal. He may not simply ignore it.*

*The relative institutional capacities of the various players make the solution clear: our approach would call on Congress to assume the role of robust adversary to the president, a role it can serve far better than the courts. Moreover, examining interbranch relations with inaction in mind would offer new insights on old problems, from statutory interpretation to federalism.*

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## INTRODUCTION

Imagine two presidents. The first campaigned on an issue that would require him to expand the role of the federal government—maybe it was civil rights legislation or stricter sentencing for federal criminals. In contrast, the second president pushed policies—financial deregulation, perhaps, or drug decriminalization—that would mean less government involvement. Each is elected in a decisive fashion, and each claims a mandate to advance his agenda. The remaining question is what steps each must take to achieve his goals.

The answer is clear, and it is surprising. To implement his preferred policies, the first president faces the full gauntlet of checks and balances—from the formal requirements of bicameralism and presentment to the modern congressional vetogates—because his agenda requires him either to push for new laws or to extend the reach of existing administrative agencies. In either case, he will need congressional authorization and funding, not to mention the judiciary's acquiescence. Conversely, to get the federal government out of a particular issue, the second president faces virtually no checks; he needs only to ensure that existing laws are not implemented. Critically, he can achieve this goal without the help of Congress or the courts; he can simply direct his executive agencies accordingly. The hurdles that the two presidents will face are thus drastically different. Whereas the first president cannot act alone, the second is free to engage in what amounts to unilateral policymaking through *inaction*, free from the usual constitutional and political constraints.

This state of affairs may sound far-fetched, but it is very real: in just the past two years, numerous policy proposals and real-life decisions have drawn on the president's power to make policy through inaction. During the 2008 presidential campaign and early in his first term, for example, President Obama suggested that he would not prosecute individuals purchasing and selling medicinal marijuana in states that had legalized it. By 2011, he had mostly reversed his position,<sup>1</sup> but when the people of Washington and Colorado legalized all marijuana use in 2012 (based in part on concerns about federalism and prosecutorial discretion),<sup>2</sup> activists began to call on the president to decline to enforce federal marijuana laws in those states despite the clear dictates of the Controlled Substances Act ("CSA").<sup>3</sup>

Inaction similarly became a matter of contention during the 2012 campaign. In August, presidential candidate Mitt Romney declared that his first executive act would be to waive all state obligations under the Affordable

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1. See Tim Dickinson, *Obama's War on Pot*, ROLLING STONE, Mar. 1, 2012, at 32, available at <http://www.rollingstone.com/politics/news/obamas-war-on-pot-20120216> (detailing in full the scope of the Obama Administration's reversal and discussing present raids on medicinal marijuana dispensaries).

2. Paul Elias, *President's Pot Comments Prompt Call for Policy*, ASSOCIATED PRESS (Dec. 15, 2012, 3:05 PM), <http://bigstory.ap.org/article/presidents-pot-comments-prompt-call-policy>.

3. *Id.*

Care Act (“ACA”). That is, despite clear statutory language requiring that the state governments take certain measures—for example, either joining the federal insurance exchange or setting up their own insurance exchanges—as president, Romney would not have enforced that statute against the states.<sup>4</sup>

Perhaps the most prominent example of unilateral policymaking through inaction, however, arose in May 2012, when President Obama directed his Department of Homeland Security not to bring immigration enforcement proceedings against certain undocumented immigrants.<sup>5</sup> The decision, dubbed Deferred Action for Childhood Arrivals (“DACA”), effectively implemented portions of the Development, Relief, and Education for Alien Minors (“DREAM”) Act, a legislative proposal that would grant amnesty to some immigrants. Although the Obama Administration had pushed Congress to enact the law, the Senate never gave it an up-or-down vote. Almost a year after it had become clear that the DREAM Act would not succeed, the administration moved unilaterally to achieve the law’s aims.<sup>6</sup> Since no recent president has resisted the allure of inaction, we need not look far to find prominent examples.

It wasn’t supposed to be this way. James Madison famously articulated a functional account of our governmental structure that would use overlapping authority to prevent any single branch from unilaterally making policy. Indeed, the essence of Madisonian government is that to function smoothly, the federal government’s “several constituent parts [must], by their mutual relations, be the means of keeping each other in their proper places.”<sup>7</sup> No doubt Madison and the other Federalists had in mind unilateral policymaking by action rather than inaction; after all, the principal concern in Madison’s day was a Congress run amok. But the core principle at issue—the idea that no branch should be allowed to dictate policy for the whole nation—admits of no such restriction.

Indeed, modern presidents can usurp authority by both action and inaction. The sheer size of the modern federal government, along with the reach of the president’s administrative agencies, presents the twenty-first-century president with unprecedented power to implement his agenda by directing his agents to act and, critically, not to act. When President Bush directs his Environmental Protection Agency to pursue his own goals at the expense of enforcing congressional mandates,<sup>8</sup> for example, or when any president makes policy by choosing not to enforce duly enacted statutes, he

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4. Mitt Romney, Republican Presidential Candidates Debate in Ames, Iowa (Aug. 11, 2011), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=90711> (“And if I’m president of the United States, on my first day, I’ll direct the secretary of HHS to grant a waiver from Obamacare to all 50 states.”).

5. Julia Preston & John H. Cushman, Jr., *Obama To Permit Young Migrants To Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1, available at <http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html>.

6. *Id.*

7. THE FEDERALIST NO. 51, at 288 (James Madison) (Clinton Rossiter ed., 1999).

8. See discussion *infra* Sections II.A–B.

encroaches on Congress's authority to make law. The rise of the modern administrative state has thus placed the spotlight on a new problem for the Madisonian separation of powers—the problem of presidential inaction—and the challenge is clear: there is no theoretical difference between the role of presidential action and inaction in the constitutional scheme. Any complete constitutional theory must deal with both forms of presidential policymaking.

The prevailing conception of the relationship between the branches fails to account for this reality. Scholars and theorists from our country's founding to the present have focused almost entirely on the problem of presidential aggrandizement through *action*. They wring their hands when the president acts beyond the presumed limits of federal statutes,<sup>9</sup> when the commander-in-chief pursues warlike activities without congressional approval,<sup>10</sup> and when the administrative state grows beyond the bounds of legislative oversight.<sup>11</sup> And yet they seem to worry far less—and in some cases not at all—when the president *fails* to enforce statutes, when he prosecutes a war *less* zealously than Congress wanted, or when he *does not* regulate in a particular area.

Not everyone has overlooked this fact. To his credit, in his concurrence in *Heckler v. Chaney*, Justice Marshall recognized the similarities between presidential action and inaction as a matter of the separation of powers. Although the Court stopped short of allowing judicial review of a president's decision not to enforce a law,<sup>12</sup> Marshall emphasized the functional similarities between “negative” and “affirmative” orders,<sup>13</sup> noting that “one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.”<sup>14</sup> Following Marshall's example, modern administrative law scholars have recognized that presidents can make policy through inaction. They have failed, however, to appreciate the constitutional implications of this insight.<sup>15</sup>

This is not to say that presidential overreach is not worth studying. Indeed, a president's decision to enforce a federal law beyond what Congress intended raises serious separation-of-powers questions. But it is not self-evident that we should worry *more* when a president takes affirmative steps

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9. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994).

10. See, e.g., Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004).

11. See, e.g., JERRY L. MASHAW, *GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997).

12. 470 U.S. 821, 825–27 (1985).

13. *Id.* at 851 (Marshall, J., concurring in the judgment) (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 143 (1939) (Frankfurter, J.)) (internal quotation marks omitted).

14. *Id.*

15. See discussion *infra* Section II.B.

that go beyond congressional authorization than when he chooses *not* to enforce duly enacted statutes. At least at first glance, the president seems to violate the will of Congress—and to dictate policy unilaterally—whether he enforces a federal law more or less vigorously than Congress intended. The Clinton Administration’s over-enforcement of the Voting Rights Act of 1965 (“VRA”),<sup>16</sup> for example, seems no more problematic than the second Bush Administration’s under-enforcement of the same statute.<sup>17</sup>

Because presidential inaction is undertheorized, the interventions that have poked at the periphery of the problem have remained underdeveloped. For example, in the hours after President Obama announced the DACA policy, news websites were awash with arguments that the president was acting beyond his “prosecutorial discretion.”<sup>18</sup> In the months following the decision, a group of immigration officials even sued to make the president enforce existing immigration laws.<sup>19</sup> And yet no one presented a cogent argument for why his conduct was constitutionally problematic. Recently, Professor Price and Professors Delahunty and Yoo have begun to go down this road, arguing that the president violates his duty under the Take Care Clause when he uses prosecutorial discretion to decline to enforce statutes with which he disagrees.<sup>20</sup> That line of inquiry is worth pursuing, but this Article makes the case that the formal historical-textual argument cannot be all there is; without a broader functional theory, one cannot account for the

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16. See *Miller v. Johnson*, 515 U.S. 900 (1995) (accusing the Department of Justice of pursuing a “black-maximization” strategy).

17. See discussion *infra* Section II.B. In a sense, the similarities and differences between action and inaction are a well-trodden subject. We encounter them in criminal law and philosophy in the distinction between killing someone and letting him die. See generally Judith Jarvis Thomson, *Turning the Trolley*, 36 PHIL. & PUB. AFF. 359 (2008); Richard Trammell, *Saving Life and Taking Life*, 72 J. PHIL. 131 (1975). They arise in the constitutional-design distinction between positive and negative rights. See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986). They even crop up in American constitutional law, in the state action doctrine and the *DeShaney* line of cases. See *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189 (1989); see also Charles L. Black, Jr., *The Supreme Court 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 14*, 81 HARV. L. REV. 69 (1967); Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985). Scholars and judges seem to understand the general difficulty of policing ubiquitous inaction, the complexity of identifying workable baselines, and the inevitability of resource constraints. But the separation-of-powers literature so far has all but completely failed to recognize the unique constitutional valence of *executive policymaking* through inaction.

18. See, e.g., Ariane de Vogue, *Legal Challenges to Immigration Announcement*, ABC NEWS (June 15, 2012, 5:39 PM), <http://abcnews.go.com/blogs/politics/2012/06/legal-challenges-to-immigration-announcement>.

19. See Complaint at 1–3, *Crane v. Napolitano*, No. 3:12-cv-03247-O (N.D. Tex. Aug. 23, 2012).

20. Zachary Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. (forthcoming 2014); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013). But see Lauren Gilbert, *Obama’s Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255, 284–89 (2013) (arguing that the “Take Care” reasoning is unpersuasive, at least in the immigration context).

nuances distinguishing permissible discretion from unconstitutional inaction. A formalist, for example, might deem President Obama's June 2013 decision to delay the implementation of the ACA's employer mandate to be a form of unconstitutional executive inaction;<sup>21</sup> we think it makes little sense to suggest that the president's decision violated the separation of powers, in part because the decision was functionally intended to *strengthen* legislation Congress duly enacted.<sup>22</sup>

This Article aims to provide the vocabulary to make these important distinctions by describing the problem of presidential inaction in a functional manner (how does inaction affect a president's ability to usurp the role of Congress?) rather than by wooden textual analysis (what does the Take Care Clause have to say about the subject?). It seeks to recover and extend Marshall's insight, to re-envision the law and theory of separation of powers by placing presidential action and inaction on the same plane, as theoretically similar modes of presidential decisionmaking that both require traditional checks and balances. Indeed, when the president intentionally abandons his duty to enforce the laws passed by Congress, he is unilaterally making policy for the whole nation,<sup>23</sup> contrary to Madison's vision that national policy would be the product of interbranch cooperation and competition. If our system is to encourage such a collaborative governing process, Madison's theory of the separation of powers—at its heart a functional framework—must be updated to account for presidential inaction.

Once it is acknowledged that presidential inaction demands some form of checks and balances, the Constitution's failure to provide this counterweight becomes striking. Existing doctrine and institutional design draw a sharp distinction between action and inaction: judges are loath to review executive refusals to act, and Congress is often impotent (and, in some cases, unwilling) to step in to defend its preferred policies from executive inertia.<sup>24</sup> Constitutional law and politics thus have no way to take into account what has become a fundamental aspect of modern American government. Indeed, today's checks and balances may be better characterized as merely "action to counteract action." In one sense, then, this Article is part of a larger project:

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21. See Michael W. McConnell, *Obama Suspends the Law*, WALL ST. J., July 9, 2013, at A13, available at <http://online.wsj.com/news/articles/SB10001424127887323823004578591503509555268>.

22. We discuss the constitutional implications of this timely example in Section II.C.

23. There are, of course, nuances to this argument. We discuss them in depth in Part II.

24. Two obvious counterexamples come to mind: the controversy surrounding the Congressional Budget and Impoundment Control Act of 1974 and the Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). We think these are rare exceptions that prove the rule. Unlike most cases of inaction, President Nixon's decision to impound funds was very public, and so Congress had no trouble identifying the issue and mustering support to rein him in. Similarly, President Bush's decision regarding regulation of automobile emissions fell short of the Clean Air Act's clear baseline level of required regulation. These two factors—publicity and clarity of delegation—play an important role in our theory of inaction, and we discuss them more fully in Parts II and III.



the attempt to link constitutional theory to the realities of modern administration.

Our functional approach, moreover, offers new perspectives on a variety of problems. Whereas the scholars who have noted presidential inaction—most notably Price, Yoo, and Delahunty—have merely pointed out that such nonenforcement may be unconstitutional, we do not stop there. Instead, we go on to use the structural principle underlying our theory to propose new, more sensible approaches.

Indeed, the stakes are even greater than a need to update our theory of the separation of powers. Unchecked inaction fuels an imbalanced political structure that endows the modern executive with more power to change the scope of government than the Framers—or even the architects of the New Deal—ever imagined. A president pursuing action faces the full gauntlet of Madisonian checks and balances, from the formal requirements of bicameralism and presentment to the modern, functional congressional vetogates;<sup>25</sup> the president governing by inaction faces virtually none. This places a thumb on the scale, allowing presidents to abandon unilaterally the governmental functions to which they are opposed. In other words, it creates a structural bias against government intervention. The separation of powers is, of course, intended to create friction, to make it difficult to pass legislation. We consider this a feature of our system, not a bug. But once legislation is enacted—once both houses of Congress pass a law and the president signs it—the president is obligated to enforce that law. Put simply, if the president does not want to enforce a law, he must advocate for its repeal. He may not simply ignore it. Yet in the current scheme such inaction remains unchecked, leaving us with a broken system of government in which duly enacted laws are not faithfully executed.

This Article proceeds in four parts. Part I makes the case that by Madison's functional account, presidential inaction should be understood as a separation-of-powers problem. Of course, not every instance of inaction is constitutionally problematic. Part II thus identifies the type of inaction that raises separation-of-powers concerns. In essence, constitutional concerns arise when the president unilaterally establishes policy for the nation. Part III then reveals that despite the fact that the separation-of-powers scheme should theoretically keep inaction in check, the current system does not provide for this balance in practice. The tools that Congress and the courts use to police presidential action are powerless to confront the failures to act that we deal with here.

Finally, Part IV turns to the implications of our observations for constitutional law and doctrine. To be sure, unchecked inaction calls into question the way we think about Congress's role. But more insidiously, it threatens

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25. See William N. Eskridge, Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. (forthcoming) [hereinafter Eskridge, *Vetogates and American Public Law*]; William N. Eskridge, Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–48 (2008) [hereinafter Eskridge, *Vetogates, Chevron, Preemption*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992).

the constitutional equipoise the Framers envisioned. It does so by allowing the second president we met at the outset—the one who wants the federal government out of a particular issue—to pursue his own policy goals in a way that the first president may not; this asymmetry results in a bias toward smaller government that our conventional concept of checks and balances does not tolerate and cannot counter. Part IV also explores some ways institutional designers might overcome this theoretical failure, most notably by granting Congress greater power—and greater incentives—to police executive inaction. A complete understanding of the constitutional dimensions of presidential inaction allows us to better engage with the question of whether such inaction is, in fact, impermissible and, if so, what Congress and the courts might do about it.

### I. CONSTITUTIONALIZING INACTION

Madison famously articulated a functional account of our constitutional structure, explaining that the Framers envisioned a government based on overlapping authority to prevent any single branch from governing unilaterally. Because Madison's theory is a functional one, it should be able to account for a single branch's self-aggrandizing decisions regardless of how this aggrandizement is achieved. In particular, the system of checks and balances that the Framers envisioned should prevent the president from making policy unilaterally, whether through action or inaction.

Madison's account and those of the modern separation-of-powers scholars, however, focus only on the problem of policymaking through action. Administrative law scholars, by contrast, have recognized that presidents can make policy through inaction, but they have not considered the constitutional consequences of this fact. In this Part, we argue that in order to be consistent with Madison's theory of separation of powers, our system of checks and balances must take into account executive refusals to act. In short, we constitutionalize the problem of presidential inaction.

#### A. *Madison's Theory: A Functional System of Checks and Balances*

The Framers' theory of checks and balances is a functional one designed to prevent one branch of government from unilaterally dictating national policy.<sup>26</sup> By giving “those who administer each department the necessary constitutional means and personal motives to resist encroachments of the

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26. To be sure, the Framers were evidently more worried about an overreaching Congress than an executive run amok. See *THE FEDERALIST*, *supra* note 7, No. 48 (James Madison). But that focus was premised on the political realities of the time, not on any reasoned belief that the executive branch was the right place to vest discretion. To the extent that there is any “original understanding” of the separation of powers, it is that “if either one grows too strong we might be in trouble.” Greene, *supra* note 9, at 125. The Framers' support for a strong executive depended on the limited powers they gave to the president, as well as on the need for an executive strong enough to counteract an overreaching legislature. In the post–New Deal world, however, these factual assumptions have been undermined. *Id.* Thus, the president must also be the focus of the modern “aggrandizement” inquiry.

others,” the Framers sought to create a system in which competition among the branches would limit overreach by any one of them—in which “[a]mbition [would] be made to counteract ambition.”<sup>27</sup> Madison thus gave form to Montesquieu’s great insight<sup>28</sup> by empowering each branch to keep the power of the others in check; for example, Congress would check the president to protect its own role as lawmaker (e.g., by withholding funding for unauthorized acts<sup>29</sup>), just as the president could veto congressional actions that encroach on his role as chief executive.<sup>30</sup>

Of course, writing in 1787, Madison understandably used language focused on government action. Having just fought a war to throw off the shackles of a tyrannical monarch, the Founders considered their greatest threat a government that encroached on individual liberties.<sup>31</sup> But Madison’s theory was, at its heart, a functional one. Indeed, “the great problem” the Framers sought to solve was designing institutions of governance that would provide “practical security” against the excessive concentration of political power in one branch of government.<sup>32</sup> For Madison, constitutional provisions clearly delineating limited domains of authority for each branch were of limited utility, for “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.”<sup>33</sup> Thus, by Madison’s conception of the branches’ respective roles, the ability of a president to dictate national policy unilaterally is precisely what the separation of powers was meant to prevent.<sup>34</sup>

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27. THE FEDERALIST, *supra* note 7, No. 51, at 289–90 (James Madison). In other words, “[i]f one branch fell under the control of a would-be monarch or tyrannical cabal, the other branches might provide a check by using their constitutional powers to block oppressive measures.” Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2319 (2006).

28. “When the legislative and executive powers are united in the same person or body . . . there can be no liberty . . .” THE FEDERALIST, *supra* note 7, No. 47, at 271 (James Madison) (quoting Montesquieu) (internal quotation marks omitted).

29. See U.S. CONST. art. I, § 8, cl. 1.

30. See *id.* art. I, § 7, cl. 2.

31. See THE FEDERALIST, *supra* note 7, No. 51, at 291–92 (James Madison).

32. *Id.* No. 48, at 276 (James Madison); see also Levinson & Pildes, *supra* note 27, at 2316.

33. THE FEDERALIST, *supra* note 7, No. 48, at 281 (James Madison).

34. As Professor Strauss puts it, the overarching aim of the separation of powers is “to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous struggle.” Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984). For a clear statement of the modern, functional account of the separation of powers, see generally Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1527–31 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); and Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

Because Madison's theory is functional, it should apply whenever a president makes a decision—whether realized through action or inaction—that has the effect of dictating policy without the blessing of Congress and the courts. In most cases, inaction is likely to serve the same policymaking goals—and to pose the same constitutional questions—as action. Indeed, in the abstract, inaction and action are two sides of the same coin: any refusal to act may quickly be recast as a decision to do something.<sup>35</sup> A president's choice to stop enforcing the Defense of Marriage Act ("DOMA")<sup>36</sup> is indistinguishable in the abstract from a president's choice to enforce a law allowing same-sex couples the benefits of marriage.<sup>37</sup> Inaction, in short, is no different from action in any fundamental, constitutional sense.<sup>38</sup>

Still, inaction may initially appear less troubling than action because inaction is mostly responsive. That is, a president can use it only to thwart Congress's affirmative plans. By contrast, when the president claims new areas of authority for himself by taking advantage of broad delegation or by employing novel constitutional theories, he has the freedom to set policy on any issue and is not confined to areas where Congress has already legislated.

Contemporary political realities make it clear, however, that inaction provides just as much opportunity for entrepreneurial executive policymaking as action does. With the rise of the modern administrative state, the opportunities for a president to engage in widespread policymaking through inaction have grown exponentially. The last five decades have witnessed an enormous expansion in federal legislation across a variety of domains, and today the federal government is intimately involved in the day-to-day regulation of environmental issues, civil rights, criminal law, and even so-called moral issues.<sup>39</sup> At the same time, since the New Deal, Congress has granted the president and his agencies virtually plenary power to enforce federal laws, and the courts have been loath to disturb this balance of power by

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35. Cf. Frances Howard-Snyder, *Doing vs. Allowing Harm*, STANFORD ENCYCLOPEDIA PHILOSOPHY (May 14, 2002) (updated Dec. 20, 2011), <http://plato.stanford.edu/archives/win2011/entries/doing-allowing>.

36. Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2012)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

37. There are certainly counterarguments—for example, the argument that action infringes on individual liberty in a way the Framers worried about, while inaction does not. See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 662–65 (1985). But none of these objections negates the fundamental point that constitutional theory should not make such a sharp distinction between the two.

38. This is not to say that inaction is no different from action as a practical matter. For example, as the Court noted in *Chaney*, inaction is difficult to detect, and it is not obvious what should trigger review of the executive's refusal to act. *Heckler v. Chaney*, 470 U.S. 821, 831–33 (1985). We discuss the prudential aspects of presidential inaction in the remainder of this Article.

39. See, e.g., RANDALL G. HOLCOMBE, FROM LIBERTY TO DEMOCRACY: THE TRANSFORMATION OF AMERICAN GOVERNMENT 210–49 (2002).

applying the nondelegation doctrine.<sup>40</sup> Against this backdrop, modern presidents enjoy unprecedented opportunities to use inaction to make policy in every realm—by failing to appoint agency heads, refusing to enforce certain laws, or instructing their agencies not to regulate despite a congressional mandate. In so doing, presidents claim the very power of unilateral policymaking that Madison sought to combat. Moreover, assuming, as the Framers did, that presidents are driven by a “lust for self-aggrandizement,”<sup>41</sup> one would expect them to seek to impose their will on the system in any way possible.

Because inaction can be just as effective a policy tool as action, no functional rationale can explain why Congress and the courts are willing and able to step in when the president engages in unilateral policymaking through action but not when he does so through inaction. If runaway presidential action requires checks and balances, then, some form of interbranch competition must exist to combat inaction that similarly results in executive encroachment. In this regard, one need only look to some of the Supreme Court’s most famous separation-of-powers decisions for affirmation that as a general matter, any branch’s self-aggrandizement is unconstitutional. Consider *Clinton v. City of New York*, in which the Supreme Court struck down the Line Item Veto Act<sup>42</sup> because “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”<sup>43</sup> This power is left to Congress under Article 1, Section 7, and executive repeal usurps that authority. Or take the legislative veto case, *INS v. Chadha*, in which the Supreme Court found that the House of Representatives’ one-house legislative veto of an executive immigration decision was unconstitutional because it bypassed the requirements of bicameralism and presentment.<sup>44</sup> Such action encroached on the president’s power to veto legislative enactments; by skirting the Constitution’s requirements, Congress had violated the separation of powers.

As these cases demonstrate, the Constitution clearly prohibits one branch from usurping the authority of another.<sup>45</sup> Accordingly, when it comes to self-aggrandizing executive inaction, the underlying purpose of checks and balances should apply equally to all presidential policymaking,

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40. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

41. BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 59 (1967).

42. Pub. L. No. 104-130, 110 Stat. 1200 (1996).

43. *Clinton v. City of New York*, 524 U.S. 417, 438 (1998) (emphasis added).

44. 462 U.S. 919 (1983).

45. Of course, *Clinton* and *Chadha* are notoriously formalistic decisions. That is, they stand most clearly for the simple proposition that executive or legislative action that violates the formal requirements of the Constitution is necessarily invalid. But the fact that the cases are usually read formally—and indeed that they were meant to be read that way—does not undermine their value as we begin to think about the same relationships from a functional perspective.

notwithstanding formal distinctions between action and inaction. Put another way, Madison's account of legislative-executive separation of powers works properly only if the branches have the tools to police the boundaries of *all* of their coordinate branches' decisions, no matter their form. It is thus impossible to embrace Madison's account of legislative-executive separation of powers without accounting for inaction.

Yet neither the judiciary nor the academy has embraced this conclusion. Indeed, as the next Section reveals, constitutional lawyers have thoroughly considered the consequences of a president who employs power beyond his authority, but they have not considered the implications of a president implementing policies by consciously choosing not to exercise his executive power at all. And while administrative law scholars have, in the narrow context of their own field, recognized that the executive often decides against enforcing laws, their work overlooks the constitutional dimensions of such inaction.

### B. *The Missing Theory of Inaction*

Although a considerable amount of constitutional-law jurisprudence and scholarship has been devoted to separation-of-powers questions, both judges and academics are curiously silent when it comes to the constitutional implications of a president's decision not to enforce a law. Consider, for example, the seminal formulation of modern separation-of-powers doctrine: Justice Jackson's famous concurrence in the *Youngstown* case. Jackson recognized that although the Constitution divided authority among the branches, it made this authority overlapping, thus creating interdependence and competition that would protect against tyranny by any single branch.<sup>46</sup> This account underlies his famous tripartite theory of presidential power, and yet that theory focused entirely on the problem of presidential *action*.<sup>47</sup> To wit, Jackson suggested that the reach of executive power depends on whether the president "acts" with Congress's authorization.<sup>48</sup> What *Youngstown* did not address, though, is whether it is constitutional for a president to choose *not* to act pursuant to congressional authorization.

Constitutional legal scholarship similarly fails to take up this issue, focusing solely on issues associated with presidential action. Most pointedly, Professor Sunstein argues that constitutional "dangers [are] thought to lie principally in governmental action rather than failure to act."<sup>49</sup> While other scholars are not as direct, it is clear that they share Sunstein's primary concern with executive action. For example, Professor Ackerman suggests that

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46. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.")

47. *See id.* at 635–38.

48. *Id.*

49. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433 (1987).

we overhaul several of the essential features of our system of government to prevent “a vicious cycle” in which “Presidents break legislative impasses by ‘solving’ pressing problems with unilateral decrees that often go well beyond their formal constitutional authority.”<sup>50</sup> Ackerman is plainly concerned with executive action, and he never suggests any concern over a president “solving pressing problems” by failing to act.

Professor Greene’s analysis of the constitutional dimensions of the rise of the administrative state is similarly focused on runaway action.<sup>51</sup> Greene notes that agencies are progressively able to reach beyond their congressional authorization because Congress is generally unable to override a presidential veto of any legislation sanctioning agencies.<sup>52</sup> But his discussion of executive overreach presumes that the problem occurs only when a president *acts* beyond Congress’s intent. Indeed, the mechanism he describes does not function when the executive refuses to regulate; when the president’s choice is inaction, there can be no entrenching veto because Congress has not passed any new law.<sup>53</sup> In essence, by focusing on the issue of bureaucratic *growth*, which is an inherently action-oriented problem, Greene’s work largely ignores the problem of inaction.

Strauss’s theory of the separation of powers also focuses on the problem of presidential action. Strauss accepts as uncontroversial that Congress’s power of the purse and veto-override prerogative are sufficient to protect against executive aggrandizement.<sup>54</sup> But these tools are largely impotent in the face of presidential inaction, which requires no funding and does not involve a veto. Thus, Strauss fails to consider the potential impropriety of presidential inaction as a constitutional matter.

If constitutional lawyers have overlooked the problem of presidential inaction, it should then be no surprise that virtually every solution to executive aggrandizement proposed in the literature similarly disregards inaction. Indeed, Ackerman—writing mainly about executive war powers—proposes that congressional legislation delegating power to the president be subject to default sunset provisions and supermajority requirements for reauthorization.<sup>55</sup> Yet these solutions would be entirely ineffective as a response to the problem of presidential inaction. Ackerman’s proposal would not be responsive, for example, if the president failed to execute a war Congress had authorized by statute. In other words, if Congress wanted to remain in Afghanistan through 2013 but President Obama withdrew all combat troops

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50. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 647 (2000).

51. See Greene, *supra* note 9, at 125–26.

52. *Id.*; cf. MASHAW, *supra* note 11, at 193 (explaining the rise of administrative policymaking as following, in part, from the president’s power to veto congressional attempts to correct agency overreach); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994) (focusing on the constitutional reasons for administrative expansion).

53. That is, Congress cannot respond by legislating to counter the president’s decision. See *infra* Section II.C.

54. See Strauss, *supra* note 34, at 578.

55. Ackerman, *supra* note 10, at 1047.

sooner than that, a sunset provision on the Iraq War authorization would be of no use.<sup>56</sup> Greene's solution to the entrenchment concern outlined above is similarly unresponsive to inaction. He proposes that we allow concurrent resolutions to block executive regulations<sup>57</sup>—effectively a legislative veto. This solution, however, focuses exclusively on the promulgation of new regulations; a concurrent resolution to “block” executive inaction would face very different obstacles. Greene's tool would thus prove entirely ineffectual with regard to presidential inaction.<sup>58</sup>

In sum, constitutional law scholars' focus on action is evident in the problems they identify and in the solutions they propose. Because these scholars have missed the constitutional valence of presidential inaction, we are left with a theory of the separation of powers that cannot account for the constitutional concerns inaction raises.

Administrative law scholars, by contrast, have readily recognized that unilateral policymaking can happen through inaction. But these scholars view the problem entirely through the lens of the Administrative Procedure Act (“APA”),<sup>59</sup> which prohibits executive inaction in certain circumstances.<sup>60</sup> As a result, although administrative law scholars acknowledge that inaction can be impermissible as a *statutory* matter, they ignore the core *constitutional* concerns.

Indeed, beginning in the 1980s, while the Reagan Administration pursued its political preference for deregulation through various administrative decisions, scholars began to highlight that the executive branch could engage in policymaking through administrative inaction.<sup>61</sup> In particular, administrative law scholars realized that President Reagan had reined in the power of the federal government not only by repealing some existing regulations but also by simply failing to enforce others, and these scholars alleged that such deregulation and inaction were both prohibited by the APA.<sup>62</sup> At first, courts were receptive to these concerns. In the *State Farm* case, the Supreme Court even went as far as to prevent the Reagan Administration from deregulating

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56. To be sure, the president's inherent power over foreign relations poses different questions, but the assumption that a president's decision to pursue a war and his decision not to do so are different as a matter of constitutional law is a vestige of the impoverished distinction between action and inaction that we discuss here.

57. Greene, *supra* note 9, at 126.

58. The inability of Congress to check presidential inaction is a point we discuss in greater detail in Section III.B.

59. 5 U.S.C. §§ 501–59, 701–06 (2012).

60. *See id.* § 706(1).

61. *See, e.g.*, Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 508 (1985) (“Deregulation, originally effected through legislative amendment, increasingly became the product of administrative inaction, delay, and repeal. President Reagan's Executive Order 12,291 . . . greatly accelerated the shift to administrative deregulation.” (footnotes omitted)).

62. *See, e.g.*, Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SUP. CT. REV. 177, 212 (“[S]ubversion may result from deregulation and inaction as much as from regulation itself.”).



the auto industry on the grounds that such deregulation violated the APA.<sup>63</sup> When faced with the question of the Reagan Administration's failure to *enforce* existing regulations, however, the Court held in *Heckler v. Chaney* that such agency inaction is presumptively unreviewable under the APA.<sup>64</sup>

Scholars immediately objected to the breadth of this claim, recognizing that agency action, deregulation, and inaction are functionally identical. Since *Chaney*, administrative law scholars have called for one primary solution: judicial review of agency inaction under the APA.<sup>65</sup> Sunstein, for instance, proclaims that “[t]he concerns that support the APA’s presumption of reviewability appear no less applicable to review of inaction than to review of action.”<sup>66</sup> Then—Professor Merrick Garland similarly suggests—albeit a bit more cautiously—that inaction should be treated the same as deregulation, but he also recognizes that inaction raises unique prudential concerns.<sup>67</sup> Yet in more than three decades of unchecked presidential policymaking through inaction,<sup>68</sup> no administrative law scholar has recognized, or least none has ever articulated, the constitutional dimensions of the problem. Instead, these scholars have attempted to read and interpret the APA in a way that would justify an administrative solution to the problem.<sup>69</sup> But in so doing, they have missed the larger issue: the problem of presidential inaction may be statutory, but it is also deeply constitutional.

That judges and scholars have failed to recognize the separation-of-powers concerns raised by the possibility of an executive engaging in unilateral policymaking through inaction suggests a fundamental oversight in the prevailing theories about the role of the president in our constitutional structure. We do not allege that the constitutional lawyers mentioned so far would deny that inaction is possible or that administrative law scholars would contend that it is not a constitutional problem. Our point is simply that although inaction is possible and potent, the legal community has

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63. See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41–42 (1983).

64. 470 U.S. 821 (1985).

65. See, e.g., Sunstein, *supra* note 37, at 660–75; see also Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657 (2004); Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253 (2003).

66. Sunstein, *supra* note 37, at 656.

67. Garland, *supra* note 61, at 579; see also *id.* at 516 (describing the prudential reasons—“the inadequacy of the agency record and the problem of allocating agency resources”—why courts find deregulation easier to review than inaction).

68. See Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807, 810 (2010).

69. See Bhagwat, *supra* note 65, at 182–83 (arguing for judicial review of agency inaction under a more deferential standard of review than action); Bressman, *supra* note 65, at 1696–97 (calling for judicial review of even arbitrariness claims, but under the structure of the political question doctrine); Cheh, *supra* note 65, at 265, 286 (recognizing “[t]he [m]odern [f]ace of [e]xecutive [i]naction” as a “[p]olitical [t]actic” and suggesting that courts must “police nonenforcement”).

largely missed its constitutional dimensions.<sup>70</sup> As a result, current theories fail to provide a complete account of the ways in which the modern executive can evade the Constitution's checks and balances. Moreover, these theories lack a coherent plan for addressing the problem's consequences.

In this Article, we begin to remedy that deficiency. In a world in which presidential administration is the policymaking norm<sup>71</sup> and yet Madisonian checks are valued, presidential inaction can, at least in principle, violate the most basic structural features of our constitutional order. The following Part extends that insight, proposing a means to identify the *kind* of presidential inaction that should cause constitutional concern.

## II. IDENTIFYING IMPERMISSIBLE PRESIDENTIAL INACTION

Not every instance of presidential inaction violates the structural dictates of the Constitution. After all, Congress tends to grant the executive wide authority to choose how—and often whether—to enforce a statute. Other factors may also play a role; for example, the Constitution gives the president virtually unmitigated power over wide swathes of federal policy, including the expansive realms of foreign affairs and criminal prosecutions. Recognizing, in light of the president's broad enforcement discretion, that not every instance of executive inaction *necessarily* violates the separation-of-powers principles the Framers outlined, in this Part we identify the characteristics that distinguish permissible discretion from impermissible abdication of duty and thus the factors that determine whether a particular presidential decision needs to be checked.

Although we do not think it necessary to define the bounds of impermissible inaction precisely—this is a political question better left to Congress to sort out for itself (possibly with the help of the courts)—a definition in broad strokes will be useful to the reader going forward. Because we offer only a general definition, we do not purport to be able to identify impermissible inaction with perfect accuracy in every case. Instead, this Part merely highlights the factors that will allow decisionmakers to identify the executive decisions that risk undermining the constitutional order. We use these factors to illustrate the important role inaction plays in American policymaking.

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70. This may be changing. Delahunty and Yoo, *supra* note 20, and Price, *supra* note 20, have begun to look at inaction as a possible violation of the Take Care Clause, although, as we contend above, their formal argument seems inadequate to deal with the realities of constitutional practice. In a slightly different context, Benjamin Ewing and Professor Kysar recently argued that the courts should respond to *legislative* inaction. See Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 *YALE L.J.* 350 (2011). We share a common premise with Ewing and Kysar: the need for a constitutional theory that accounts for the problem of inaction. Indeed, for those persuaded by Ewing and Kysar on the problem of *legislative* inaction, *executive* inaction seems to be an easier case.

71. Greene, *supra* note 9, at 123–24.

At its most basic level, the executive inaction we focus on is a president's determination on policy grounds<sup>72</sup> that a specific law should no longer be enforced. We consider *policy-motivated* inaction problematic because it reflects a likelihood that the president's decision constitutes unilateral policymaking of the kind that informed Madison's separation-of-powers theory.

Three main questions guide the inquiry into whether a president's decision constitutes policy-motivated inaction. First, has the president's level of enforcement failed to meet some statutory baseline—language in a duly enacted law that requires the president to act? If such a baseline exists, the inaction in question is presumptively (although not definitively) invalid. If, instead, the statute vests the executive with wide discretion to choose how or whether to enforce the law, it would be wrong to call a failure to enforce problematic. In other words, the determination that an instance of presidential inaction contravenes a statutory baseline is necessary for the decision to warrant constitutional concern. It is not sufficient, however, to trigger review on its own. Second, does the president have a constitutionally justified rationale for failing to enforce a law? If such a justification exists, the constitutional issues inaction raises can essentially be trumped by constitutionally enshrined discretion, even where enforcement falls below a statutory baseline. Third, is there evidence to suggest that inaction is the result of the president's own policy preferences? Just as a court looks to extrinsic factors to divine the intent of the actors in a suit alleging unconstitutional discrimination or a crime, evidence of a president's *a priori* preferences can demonstrate the true motivations behind presidential inaction.

#### A. Identifying the Statutory Baseline

The statutory baseline is important for a basic reason: it represents the text we as a polity have agreed to obey. Indeed, Article 1, Section 7 of the Constitution establishes a rule of recognition<sup>73</sup> defining what it means for a particular requirement to be “law.” Once a statute has gone through the proper constitutional process—that is, once it has passed both houses of Congress (“bicameralism”) and the president has signed it (“presentment”)—it is recognized as the law of the land. Absent competing constitutional rights and responsibilities,<sup>74</sup> it must be enforced by its terms. Accordingly, constitutional concerns arise when the president fails to meet the baseline for enforcement as established by the relevant duly enacted statute.<sup>75</sup>

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72. “Policy” is a bit of a blunt term for our specific purposes. We simply mean to express the idea of the president's policy platform. That is, if the president had complete say over which laws should exist, would he support a specific law? If not, the objection sounds in “policy” and is the source of our concern.

73. See H.L.A. HART, *THE CONCEPT OF LAW* 100 (3d ed. 2012).

74. See discussion *infra* Section II.B.

75. It will become clear in the following pages that the baseline does not always emanate clearly from a statute. The baseline for enforcing the Voting Rights Act, for example, is found in the attorney general's construction of the law. In such cases, it is still the underlying statute

Of course, the reality of modern lawmaking is that Congress vests broad enforcement discretion in the executive,<sup>76</sup> and thus in many instances a president's inaction will fall entirely and explicitly within Congress's authorization.<sup>77</sup> What is important here, though, is that Congress tends to give discretion to the president in defined terms; statutory grants of power allow for a range of enforcement, which entail minimum requirements (the executive "shall" do something) and maximum authority (the executive "shall not" do more), as well as options in between (the president "may" do what he wants, within the defined range).<sup>78</sup> Thus, when the president chooses to enforce a law below the maximum authority, or when he declines to exercise some authority Congress permitted him, this is inaction, but it is expressly allowed. Only when the president falls below the *minimum* requirement and fails to do what Congress has *required* must one begin to question whether such inaction is constitutional.

The events leading up to the Supreme Court's decision in *Massachusetts v. EPA*<sup>79</sup> provide the clearest—and perhaps the most prominent—example of a president disregarding a clear statutory baseline in the past twenty years. In 1999, in response to growing concern over climate change, a group of environmental advocates asked the EPA, which is required by the Clean Air

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that provides the baseline; Congress implicitly incorporated the regulations into the baseline when it reauthorized the Act. See *Lorillard v. Pons*, 434 U.S. 575 (1978). In the context of DOMA, the baseline is inherent and, it might be argued, comes from the Constitution itself. In all of these cases, the importance of the baseline depends on its constitutional provenance.

76. See, e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 823 ("For both political and institutional reasons, Congress has until recently relied almost entirely on the discretionary model in delegating authority to regulatory agencies." (footnote omitted)); see also Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 TEX. L. REV. 1175, 1198 (1981); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxyoron*, 12 INT'L REV. L. & ECON. 239, 250–52 (1992).

77. Take, for example, the Federal Food, Drug, and Cosmetic Act, which grants the Food and Drug Administration ("FDA") broad discretion to ensure public safety and prevent false advertising. See, e.g., 21 U.S.C. §§ 372, 378 (2012). Congress fully contemplated and duly authorized the FDA to exercise discretion to enforce (or not to enforce) the Act. See *id.* §§ 371 to 379d-5. Note that Marshall concurred in the judgment in *Heckler v. Chaney*, in which the Court rejected a legal challenge to the FDA's decision not to enforce its normal licensing protocols for lethal injection drugs. Marshall did so on precisely these grounds: he argued that the FDA's inaction was within the bounds of the original congressional mandate. 470 U.S. 821, 840–41 (1985) (Marshall, J., concurring in the judgment).

78. A well-known example is the statute at issue in *Overton Park*, which provided that the secretary of transportation "shall not approve" construction through a public park unless "no feasible and prudent" alternative was available. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411–13 (1971) (quoting 23 U.S.C. § 138 (1964 & Supp. V)) (internal quotation marks omitted).

79. 549 U.S. 497 (2007). Although *Massachusetts v. EPA* was a controversial, 5–4 decision, six Supreme Court justices recently reaffirmed their commitment to its holding in *American Electric Power Co. v. Connecticut*, 131 S. Ct. 2527 (2011). Since only eight justices participated in the *American Electric* decision, moreover, it is likely that seven justices in fact support the *Massachusetts v. EPA* holding.

Act to regulate certain “air pollutants,”<sup>80</sup> to classify vehicle emissions as such.<sup>81</sup> The EPA rejected the petition, stating in part that regulating carbon dioxide was outside of its statutory authority.<sup>82</sup> After the advocates sued to force the EPA to regulate vehicle emissions, however, the Supreme Court held that the language in the Clean Air Act “unambiguous[ly]” covers greenhouse gas emissions from vehicles.<sup>83</sup> The Court held, moreover, that because carbon emissions did in fact meet the definition of “air pollutants” as set out in the Clean Air Act,<sup>84</sup> the plain language of the Act *obligated* the EPA to regulate.<sup>85</sup>

In rejecting the EPA’s explanation for declining to regulate vehicle emissions, the Court drew on the principle that enforcement must not fall below a clear statutory baseline (if one exists). Indeed, the Court recognized that Congress explicitly required that presidents regulate air pollutants that meet certain requirements; the statute left it to the executive to decide how—but, crucially, not *whether*—to do so. As the Court put it, “the President[’s] . . . authority does not extend to the refusal to execute domestic laws” that require specific action.<sup>86</sup> The EPA’s decision not to regulate thus provides a clear example of executive inaction that is presumptively invalid.

Unsurprisingly, the Clean Air Act is not the only statute to set a baseline by which one can determine whether a president’s decision not to enforce a law constitutes impermissible executive inaction. Take, for example, the CSA, which bans the possession, cultivation, and distribution of specified substances, including marijuana,<sup>87</sup> and does not distinguish between personal, professional, and medical use; all such uses are presumptively illegal. Contrary to this federal provision, in 2012 the people of Washington and Colorado legalized all marijuana use, and many advocates called on the Obama Administration to consider refusing to enforce federal drug laws in these states.<sup>88</sup> But such inaction would violate the CSA: in 2005, in *Gonzalez*

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80. The Clean Air Act requires the federal government, via the EPA, to regulate “air pollutant[s] . . . which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006).

81. *Massachusetts v. EPA*, 549 U.S. at 510.

82. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925–29 (Sept. 8, 2003).

83. *Massachusetts v. EPA*, 549 U.S. at 528–29 (describing the Act’s definition as “sweeping”).

84. *Id.* at 529.

85. *See id.* at 528–29.

86. *Id.* at 534. While the Court’s intervention in *Massachusetts v. EPA* might indicate that the problem of executive inaction can be adequately policed under the status quo, it is the exception that proves the rule. Judicial checks on executive inaction are quite weak, *see infra* Section III.A, and this case is famous as an outlier. What is more, the Supreme Court did not actually force the EPA to regulate; it remanded for further review. *Massachusetts v. EPA*, 549 U.S. at 534–35.

87. Pub. L. No. 91-513, tit. II, §§ 401, 404, 84 Stat. 1242, 1260–62, 1264–65 (1970) (codified as amended at 21 U.S.C. §§ 841, 844 (2012)).

88. *See Elias, supra* note 2.

*v. Raich*, the Supreme Court articulated a clear statutory baseline requiring enforcement of the Act's provisions even for noncommercial interstate use.<sup>89</sup> The Court reasoned that Congress intended the CSA to be a "comprehensive regime" for drug regulation,<sup>90</sup> that is, one that disallowed any categorical exception.<sup>91</sup> Thus, after *Raich*, the statutory baseline was clear: the president must enforce the CSA in all circumstances.<sup>92</sup>

The Clean Air Act and the Controlled Substances Act both illustrate that a statutory baseline can help determine when executive inaction is presumptively impermissible. By the same token, though, statutory baselines can be used to identify inaction that falls wholly within the president's discretion, as granted by Congress. Consider, for example, President Obama's recent decision not to bring enforcement proceedings against certain undocumented immigrants,<sup>93</sup> which some have argued is unconstitutional.<sup>94</sup> To be sure, the decision effectively implemented portions of a failed legislative proposal—the DREAM Act<sup>95</sup>—thus making President Obama's decision an apparent case of unilateral policymaking through inaction. Unlike the statutes described above, however, the relevant immigration laws grant the attorney general discretion at virtually every stage in the immigration process—including removal proceedings—starting with explicit discretion not to initiate such proceedings in the first place and extending to the power to grant relief to immigrants found to be removable.<sup>96</sup>

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89. 545 U.S. 1, 32–33 (2005).

90. *Raich*, 545 U.S. at 12.

91. *Id.* at 13 ("To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."). Note that by singling out the "closed regulatory system" language, the Court made clear that no *categorical* exceptions are permissible while implicitly permitting *individualized* exceptions as part of the executive's prosecutorial discretion.

92. Indeed, President Obama seems to recognize as much. Regarding marijuana, the president said the following: "This is a tough problem, because Congress has not yet changed the law . . . I head up the executive branch; we're supposed to be carrying out laws . . . How do you reconcile a federal law that still says marijuana is a federal offense and state laws that say that it's legal?" Kevin Liptak, *Obama: Enforcing Pot Laws in States That Have Legalized It Not a Top Priority*, CNN POLITICAL TICKER, (Dec. 14, 2012, 9:37 AM), <http://political-ticker.blogs.cnn.com/2012/12/14/obama-enforcing-pot-laws-in-states-that-have-legalized-it-not-a-top-priority/> (internal quotation marks omitted).

93. Preston & Cushman, *supra* note 5.

94. *E.g.*, Delahunty & Yoo, *supra* note 20.

95. The DREAM Act would have granted amnesty to undocumented immigrants who were brought to the United States as children and have never committed a felony. For the most recent form of the Act, see DREAM Act of 2011, S. 952, 112th Cong. (2011).

96. See Gilbert, *supra* note 20, at 256 ("DACA fell squarely within Executive enforcement powers under an expansive interpretation of congressional and Executive authority that has deep roots in [among other things] . . . the broad delegation of powers by Congress to the Executive under the Immigration & Nationality Act."); David A. Martin, Essay, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167 (2012), <http://yalelawjournal.org/2012/12/20/martin.html>.

Indeed, in *Arizona v. United States*, the Supreme Court recognized this expansive grant of discretion to the executive with regard to immigration, holding that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials.”<sup>97</sup> While this case did not present the issue of categorical under-enforcement of immigration laws, Arizona did argue that Congress intended a greater level of enforcement than the administration had pursued. The Court rejected that argument, though, explaining that Congress expressly granted broad discretion to the executive.<sup>98</sup> By the Court’s reasoning in *Arizona*, Congress did not establish a baseline for enforcement in the immigration statutes, let alone one clear enough to invalidate the deferred action policy. Thus, unlike the under-enforcement of the Clean Air Act and the Controlled Substances Act, President Obama’s decision not to enforce certain immigration laws does not appear to violate a statutory baseline and thus probably does not constitute impermissible presidential inaction.

As the examples above show, a statutory baseline is critical to identifying impermissible inaction; with this anchor, one may begin by comparing the president’s chosen level of enforcement to the relevant statutory requirement. If enforcement fails to meet the baseline, then the president has thwarted the will of Congress and, as a result, has engaged in presumptively impermissible inaction. To be sure, in some instances the president’s failure to enforce a law may not be policy motivated; other factors may necessitate—or at least excuse—under-enforcement. To more precisely identify when executive inaction raises separation-of-powers concerns in those circumstances, we turn to our second factor: whether a president chooses to under-enforce a law for reasons unrelated to his specific policy goals.

### B. *Legitimate Reasons for Inaction*

When a president chooses to enforce a law below the statutory baseline, the presumption is that he has engaged in impermissible unilateral policymaking. But this presumption is rebuttable: there are many reasonable excuses for a failure to act.<sup>99</sup> For example, resource constraints might require

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97. 132 S. Ct. 2492, 2499 (2012).

98. See *id.* at 2502–07.

99. Although we refer to “reasonable” excuses and “good” reasons for inaction throughout the rest of this Article, these adjectives are not intended to imply that some policies—whether pursued through action or inaction—are “good” or “bad” in a political or policy sense but rather in a constitutional sense. It should go without saying that a policy that is unconstitutional can still be a “good” policy and that there are any number of “bad” but constitutional ideas. See, e.g., Jennifer Senior, *In Conversation: Antonin Scalia*, NEW YORK, Oct. 14, 2013, at 22, 24, available at <http://www.nymag.com/news/features/antonin-scalia-2013-10/> (“A lot of stuff that’s stupid is not unconstitutional. I gave a talk once where I said they ought to pass out to all federal judges a stamp, and the stamp says—*Whack!* [*Pounds his fist.*]—STUPID BUT CONSTITUTIONAL. . . . [*Laughs.*] And then somebody sent me one.” (emphasis in original)).

that the president under-enforce some laws, even below statutory baselines.<sup>100</sup> This observation is accurate as a historical matter.<sup>101</sup> Indeed, some argue that resource allocation is inherent in the president's constitutional role as the federal government's chief executive and in the concept of prosecutorial discretion.<sup>102</sup> As the executive, the president is *supposed* to make the hard resource-balancing decisions that cannot be entrusted to a 538-person political body that will rarely be able to reach consensus on micro decisions, not to mention a group that will invariably want the best for its members' individual constituencies.<sup>103</sup> Moreover, it would be illogical to hold the president responsible where Congress has failed to provide sufficient resources to fund all of its legislative priorities. These constitutional and pragmatic principles may trump even legitimate concerns about inaction.

A similar conflict may arise where enforcing a congressional mandate interferes with one of the president's Article II powers.<sup>104</sup> When such conflicts are in play, a president may pursue a policy of inaction without triggering separation-of-powers concerns. A good example is the foreign affairs power: if Congress mandated that the president engage in treaty negotiations with another country or required that he send troops to a particular theater of war, the president could argue in good faith that refusing to do so was a means to defend the powers duly granted to him by the Constitution.<sup>105</sup> Where there is such tension between competing constitutional principles, resolution tends to be left to the political process.<sup>106</sup> In short, when a president can point to appropriate reasons for under-enforcing a law, one cannot

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100. See Frank H. Easterbrook, *On Not Enforcing the Law*, REGULATION, Jan.–Feb. 1983, at 14, 15.

101. Cf. L. Harold Levinson, *Balancing Acts: Bowsher v. Synar, Gramm–Rudman–Hollings, and Beyond*, 72 CORNELL L. REV. 527, 547 (1987) (describing President Nixon's attempt to cut specific programs in order to spend within his budget).

102. Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 253 n.192 (2005) (reviewing HAROLD J. KRENT, *PRESIDENTIAL POWERS* (2005)) (“In other words, the President is to carry out his duties the best he can given the constraints of time, resources, and funding. When he does this, he fulfills his constitutional obligations.”).

103. See Strauss, *supra* note 34, at 642.

104. Cf. *M.B.Z. ex rel. Zivotofsky v. Clinton*, 131 S. Ct. 2897 (2011) (granting certiorari and asking the parties to brief the question of whether the Foreign Relations Authorization Act “impermissibly infringes the President’s power to recognize foreign sovereigns” (internal quotation marks omitted)). Note that the president must distinguish the Take Care Clause, which requires the executive to enforce congressional statutes, from other Article II powers, which reflect the independent powers of the president. See U.S. CONST. art. II.

105. Cf. Gilbert, *supra* note 20, at 263 (arguing that even if DACA runs contrary to Congress’s will, it may be justified “under an interpretation of Congressional and Executive authority over immigration that has deep roots in the plenary power doctrine”).

106. Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 YALE L.J. 597, 597 (1976) (“That there are political questions—issues to be resolved and decisions to be made by the political branches of government and not by the courts—is axiomatic in a system of constitutional government built on the separation of powers.”).



say that he has necessarily engaged in unilateral policymaking through inaction.

At the same time, the absence of any such reasons for inaction can support the presumption that a president's failure to carry out the law constitutes impermissible unilateral policymaking.<sup>107</sup> Take, for example, the Bush Administration's under-enforcement of Section 5 of the VRA.<sup>108</sup> Section 5 forbids certain "covered" jurisdictions from implementing a change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first (1) obtaining a declaratory judgment from the District Court for the District of Columbia establishing that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or (2) submitting the change to the attorney general and receiving no objection within sixty days.<sup>109</sup> While this text may not reveal a clear baseline enforcement requirement, regulations state that

the Attorney General *shall* make the same determination that would be made by the court in an action for a declaratory judgment under section 5: whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.<sup>110</sup>

Therefore, just as a federal court has an affirmative obligation to ensure that any submitted change complies with the statutory requirements protecting minority voting power, the same obligation is imposed on the attorney general. The congressional baseline in this context is thus a requirement that the attorney general object when submissions have the purpose or effect of denying or abridging the right to vote on account of race.

During the second Bush Administration, however, the Civil Rights Division of the Department of Justice consciously chose not to meet this requirement. Evidence of that decision abounds. One need only look to the

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107. Of course, we recognize that proponents of executive power might argue for the opposite presumption. We believe, however, that our suggested presumption is more typical of legal analysis. Indeed, a timely and excellent example of an argument that a particular nonenforcement decision could not plausibly be justified on resource-allocation grounds and thus constituted a policy-motivated action can be found in Justice Scalia's dissent in *Arizona v. United States*, 132 S. Ct. 2492, 2520–21 (2012) (Scalia, J., concurring in part and dissenting in part). In any event, this objection amounts to an argument over burden shifting, and it does not undermine the thrust of our argument.

108. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)). In the time since the first draft of this Article was posted, the Supreme Court struck down Section 4 of the VRA as unconstitutional, thus depriving Section 5 of its operative effect. *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2631 (2013). This does not affect the discussion here, as we consider the historical enforcement of the provision, not its prospective application.

109. Voting Rights Act § 5, 79 Stat. at 439.

110. 28 C.F.R. § 51.52(a) (2013) (emphasis added).

systematic, quantitative data to comprehend the scope of the administration's inaction with respect to the VRA: throughout its two terms, the administration severely understaffed the unit tasked with reviewing preclearance submissions. Between 2001 and 2006, the number of preclearance submissions had increased by over 70 percent,<sup>111</sup> but the staff had been cut to one-third of its previous level.<sup>112</sup> During this period, preclearance approval rates fell to their lowest in the history of the VRA, and only one out of every 2,000 submissions received an objection during the administration's first five years in office, compared to one out of every five hundred during the previous fifteen years.<sup>113</sup> It is thus reasonably clear that the administration chose not to enforce Section 5 relative to the apparent baseline requirement.

Turning to whether this choice was policy motivated, the answer seems clear: there is no evidence of any resource constraints that could justify the decision to under-enforce federal civil rights laws.<sup>114</sup> Indeed, between 2001 and 2005, the congressional appropriation for the Civil Rights Division in particular grew from \$92 million to \$108 million.<sup>115</sup> The number of full-time employees in the Voting Rights Section, furthermore, grew from 104 to 109 between 2001 and 2004.<sup>116</sup> Nor is there evidence that enforcing the Voting Rights Act conflicted with any of the president's other constitutional

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111. *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 242 (2007) (responses to questions posed to Wan Kim, Assistant Attorney General) ("While 7,080 submissions were received in 2006, only 4,121 submissions were received in 2001 . . .").

112. *Id.* at 115, 118 (statement of Joseph Rich, former Voting Section chief). Requests by the career staff to increase the number of analysts for preclearance submissions were denied. *Id.* at 118.

113. Richard L. Hasen, *Congressional Power to Renew the Preclearance Provisions of the Voting Rights Act After Tennessee v. Lane*, 66 OHIO ST. L.J. 177, 192 & fig.3 (2005). The National Commission on the Voting Rights Act, an ad hoc coalition of civil rights organizations, focused on broader measures of Section 5 enforcement and independently concluded that overall enforcement had significantly declined from 2001 to 2005. See NAT'L COMM'N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982–2005, at 75–77 (2006), available at [http://www.lawyerscommittee.org/admin/voting\\_rights/documents/files/0023.pdf](http://www.lawyerscommittee.org/admin/voting_rights/documents/files/0023.pdf).

114. Goodwin Liu, then a professor and now a justice on the California Supreme Court, offered the theoretical defense that the Bush Administration was, in fact, reallocating resources toward alternative enforcement priorities, including human trafficking and religious discrimination. Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81 (2009). Given the scope of the politicization of the Civil Rights Division, however, he too ultimately concludes that the Bush Administration appears to have acted "on political whim." *Id.* at 81–82. It should be noted that Justice Liu's essay hints at the deep checks-and-balances concerns that motivate this Article, but he limits the scope of his analysis to the Civil Rights Division.

115. See U.S. COMM'N ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT (2005), available at <http://www.usccr.gov/pubs/crfund06/crfund06.pdf>.

116. *Id.*

prerogatives.<sup>117</sup> The lack of evidence explaining President Bush's decision to under-enforce Section 5 thus suggests that the choice was motivated by policy concerns.

### C. *Extrinsic Evidence of Policy Goals*

While the second factor focuses on evidence that presidential inaction is *not* motivated by policy goals, the third factor looks for the converse: evidence that a president chooses inaction precisely *because of* his policy priorities. Specifically, the third factor identifies instances in which the outcome of a president's under-enforcement is consistent with his public policy statements. Such a state of affairs could signal that he chose inaction in order to promote his own policy goals at the expense of Congress's,<sup>118</sup> a decision that would raise separation-of-powers questions. Of course, extrinsic evidence cannot prove a causal connection between policy preference and inaction, but it does provide support for an inference that the president's inaction was policy motivated.<sup>119</sup> (For the statistically inclined, such evidence allows the observer to update her priors on the issue.) Such inaction amounts to unilateral policymaking and thus raises the separation-of-powers concerns outlined above.

Returning to the Voting Rights Act, extrinsic evidence of President Bush's political agenda further demonstrates that the White House's decision to under-enforce Section 5 was motivated by policy concerns. Indeed, the decision coincided with public statements suggesting that the administration viewed religious-freedom claims as more worthy of the Justice Department's attention than voting-rights suits, not because resources were limited or because the VRA raised constitutional concerns but *as a policy matter*.<sup>120</sup> It is thus even more evident that the administration's decision to

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117. Although the Supreme Court has raised constitutional concerns with respect to Section 5, *see* *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009), there is no evidence that the law's constitutionality played a role in the administration's decision.

118. Whether the aims of the enacting Congress or the current Congress are more relevant is a question that lies beyond the scope of this Article.

119. Our methodology draws on analogues in other areas of law. Most familiarly, in criminal law, public statements about a criminal goal can be taken as evidence of criminal intent. And in antitrust, courts infer collusion when parallel conduct is accompanied by certain other facts and circumstances called "plus factors." *See, e.g.,* *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1242–43 (3d Cir. 1993).

120. *See* Dahlia Lithwick, *Guilt by Association: Senate Blocks Obama's Pick to Head the Civil Rights Division Because He's Fought for Civil Rights*, SLATE (Mar. 5, 2014, 5:59 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2014/03/debo\\_adegbile\\_senate\\_blocks\\_obama\\_s\\_pick\\_to\\_head\\_the\\_justice\\_department.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2014/03/debo_adegbile_senate_blocks_obama_s_pick_to_head_the_justice_department.html) ("It is not a secret that the Civil Rights Division in the Bush years reflected the deeply held conviction that voting rights and anti-discrimination law were no longer American problems or priorities. Indeed the Bush Justice Department's priorities perfectly presaged the reality of today's civil right debate: The only real discrimination in America is directed toward religion . . ."); *cf.* Charles C. Haynes, *Fighting Religious Discrimination: Bush Administration's Quiet Campaign*, FIRST AMENDMENT CENTER (Mar. 4, 2007), <http://www.firstamendmentcenter.org/fighting-religious-discrimina>

under-enforce Section 5 amounts to a unilateral decision to take the law off the books.

Yet perhaps a clearer example of the probative value of extrinsic evidence of policy goals is the EPA's rationale for refusing to regulate carbon dioxide as a greenhouse gas. Recall that in the run-up to *Massachusetts v. EPA*, the EPA stated explicitly that it would not classify automotive emissions as the kind of "air pollutant" that triggers the Clean Air Act's requirements.<sup>121</sup> Responding to advocates' petitions asking it to define carbon dioxide as a regulable pollutant, the EPA argued that such regulation would be bad policy.<sup>122</sup> Specifically, the agency claimed that the regulation would conflict with the administration's views on the science behind climate change, interfere with its approach to domestic fuel-efficiency standards, and threaten President Bush's foreign policy negotiations on environmental matters.<sup>123</sup> Given the administration's explicit acknowledgment of the policy motivations behind the EPA's decision not to regulate, it is undeniable that this was an instance of impermissible inaction. Of course, not every case will present such clear-cut evidence that the president has chosen inaction in order to pursue his policy agenda. Still, such extrinsic evidence can help to make the case when the executive falls below the statutory baseline for enforcement.

One additional virtue of considering extrinsic evidence of policy goals is that such evidence may exculpate certain conduct that appears at first to be constitutionally problematic. For example, in July 2013, unsettled by questions about cost and complexity,<sup>124</sup> the Obama Administration announced that it would delay enforcement of the ACA's "employer mandate" until 2015.<sup>125</sup> Recognizing that Obama had effectively changed the law unilaterally, legal scholars and political journalists immediately voiced concern, alleging that the president was not "taking care" to enforce the law.<sup>126</sup> There is something to this argument: the text of the ACA states relatively clearly that the employer mandate was to become effective in 2014,<sup>127</sup> so the president's

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tion-bush-administration%E2%80%99s-quiet-campaign (describing the Department of Justice's increased enforcement of federal religious-rights legislation).

121. See *supra* text accompanying notes 80–82.

122. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929–31 (Sept. 8, 2003). The heading of the section describing this ground for the EPA's decision is labeled "Different Policy Approach." *Id.* at 52,929. Moreover, the ruling explicitly states that the "EPA disagrees with the regulatory approach urged by petitioners" and instead "agree[s] with the President." *Id.*

123. *Id.* at 52,929–31.

124. See Valerie Jarrett, *We're Listening to Businesses About the Health Care Law*, WHITE HOUSE BLOG (July 2, 2013, 6:00 PM), <http://www.whitehouse.gov/blog/2013/07/02/we-re-listening-businesses-about-health-care-law>.

125. See *id.*

126. See McConnell, *supra* note 21; Ezra Klein & Evan Soltas, *Wonkbook: Governing by Waiver*, WASHINGTON POST WONKBLOG (Aug. 8, 2013, 8:10 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/08/08/wonkbook-governing-by-waiver>.

127. See Nicholas Bagley, *Does the Administration Have the Legal Authority to Delay the Employer Mandate? And What If It Doesn't?*, INCIDENTAL ECONOMIST (July 3, 2013, 12:42 PM),

critics were correct to point out that his decision entailed a level of enforcement that fell short of the statutory baseline. Yet President Obama's decision was meant to serve the goals of the enacting Congress, in this case the smooth implementation of major recent legislation. So it seems odd to call this impermissible inaction.

Indeed, the core of this Article's constitutional argument is that the executive must not be allowed to thwart the will of Congress by refusing to enforce the law. In this case, it is almost nonsensical to suggest that President Obama's hostility toward the ACA—his signature legislative achievement—motivated him to use the power of nonenforcement to skirt the requirements of Article I, Section 7 of the Constitution. Instead, the decision to delay the employer mandate was prompted by a belief that a reasonable delay would enhance the effectiveness of the law.

#### D. DOMA: Impermissible Inaction in Action

Taking the three factors outlined above and applying them to a single case, we can identify a very recent example of executive inaction that was clearly driven by policy goals. In 2011, President Obama announced that his administration would no longer defend Section 3 of DOMA against constitutional challenges, although it continued to enforce the law.<sup>128</sup> At first glance, it might seem odd to describe a decision that involves continued enforcement of a law as one where the president has chosen inaction. But we focus on the president's decision not to defend DOMA in the context of the federal government's duties regarding defensive litigation. Evaluated in this context and against the appropriate baseline, the decision not to defend Section 3 clearly constituted policy-motivated inaction.

Returning to the first factor, in the context of defensive litigation, there is a long-standing baseline of enforcement pursuant to which the Department of Justice "generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality,"<sup>129</sup> out of respect for congressional will.<sup>130</sup> Moreover, if the Justice Department decides that it will not defend a particular law, tradition dictates that the attorney general must write a letter to the Speaker of the House informing him or her of the

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<http://theincidentaleconomist.com/wordpress/does-the-administration-have-the-legal-authority-to-delay-the-employer-mandate-and-what-if-they-dont/>.

128. See *infra* note 134 and accompanying text. The Supreme Court ultimately struck down Section 3 of DOMA in *United States v. Windsor*, 133 S. Ct. 2675 (2013), and we draw on this decision where relevant.

129. Seth P. Waxman, Essay, *Defending Congress*, 79 N.C. L. REV. 1073, 1078 (2001).

130. See Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 12 (2000) ("If Presidents were to disregard laws . . . based solely on their own constitutional views, they would deprive Congress of the ability to enact effective legislation premised on its considered constitutional views to the contrary—even by a two-thirds majority over a constitutionally based veto."). *But see* Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507 (2012).

decision and the underlying rationale.<sup>131</sup> Of course, if a law is clearly unconstitutional, few would contend that the president is required to defend it.<sup>132</sup> But if a constitutional argument can be made for the law, the president and his attorney general have a duty to defend it.<sup>133</sup>

And yet, in February 2011, Attorney General Holder informed House Speaker Boehner that on the president's orders, the Justice Department would not defend DOMA.<sup>134</sup> In brief, the rationale was that President Obama believed that sexual orientation qualified as a suspect classification and thus triggered a heightened level of scrutiny under which DOMA would certainly fail.<sup>135</sup> Although there is much to be said in support of the administration's position, the argument unquestionably relies on a "contested theory of the constitutionality of laws regulating gay rights."<sup>136</sup> Indeed, in *Windsor*, the decision striking down Section 3 of DOMA, the Supreme Court expressed this very concern: "The Executive's failure to defend the constitutionality of an Act of Congress based on a constitutional theory not yet established in judicial decisions has created a procedural dilemma," Justice Kennedy wrote.<sup>137</sup> Although the Court categorized the problem as procedural because the question at issue related to Article III standing, the Court's discussion was imbued with constitutional implications. The Court recognized the "difficulty the Executive faces" when it "makes a principled determination that a statute is unconstitutional."<sup>138</sup> But the Court made it clear that the "appropriate" course of action is for the executive to "mak[e] the case to Congress for [its] amendment or repeal."<sup>139</sup> Otherwise, permitting the executive to refuse to defend laws as "a common practice in ordinary cases" would "pose[ ] grave challenges to the separation of powers" since the executive would "at a particular moment . . . be able to nullify

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131. 28 U.S.C. § 530D (2006).

132. See, e.g., Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613 (2008).

133. The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980).

134. Letter from Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, to John A. Boehner, Speaker, U.S. House of Representatives (Feb. 23, 2011), available at <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

135. *Id.* Congress hired a private group, represented by Paul Clement, to defend DOMA, but this defense was ultimately unsuccessful. See *United States v. Windsor*, 133 S. Ct. 2675 (2013).

136. Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011, 3:49 PM), <http://volokh.com/2011/02/23/the-executive-power-grab-in-the-decision-not-to-defend-doma>; cf. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (holding, for the first time in a federal court, that laws classifying on the basis of sexual orientation are subject to strict scrutiny), *aff'd on partial grounds sub nom.* *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012), *vacated on other grounds sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

137. *Windsor*, 133 S. Ct. at 2688.

138. *Id.* at 2689.

139. *Id.*

Congress' enactment solely on its own initiative."<sup>140</sup> It is particularly noteworthy that the Supreme Court admonished the Obama Administration for failing to defend Section 3 when, just a few pages later, it held that the administration was ultimately correct in concluding that Section 3 is unconstitutional. By failing to defend DOMA in the absence of binding precedent rendering it unconstitutional, therefore, President Obama fell short of the baseline requirement that the president defend a defensible act of Congress.

Turning to the second factor, there is no indication that President Obama acted pursuant to considerations other than his own policy goals. The attorney general's letter to Boehner did not mention any practical rationale for the administration's decision not to defend DOMA (e.g., lack of resources or competing constitutional commitments).<sup>141</sup> Nor were DOMA cases such an overwhelming part of the Justice Department's docket that one could infer a resource-based motivation.<sup>142</sup> Moreover, the department remained a party to the primary DOMA challenges making their way through the courts.<sup>143</sup> The decision to intervene—and, often, to litigate the merits while simply not *defending* the law—thus saved the administration virtually no time or other resources.

To the contrary, considering the third factor, there is extensive evidence of the policy motivations behind the president's decision. Indeed, the decision appears to stem from candidate Obama's 2008 open letter to the LGBT community, in which he called for DOMA's repeal.<sup>144</sup> Moreover, soon after the Obama Administration decided not to defend the law, the administration went on the record in support of repealing the Act<sup>145</sup>—this after extending employment benefits to same-sex partners of federal employees<sup>146</sup> and successfully pushing for the repeal of "Don't Ask, Don't Tell."<sup>147</sup> The

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140. *Id.* at 2688.

141. See Letter from Eric Holder to John Boehner, *supra* note 134.

142. The letter merely identifies two cases in which DOMA was challenged. *Id.* (citing Complaint for Declaratory and Injunctive Relief, *Pedersen v. Office of Pers. Mgmt.*, No. 310 CV 1750 VLB (D. Conn. Nov. 9, 2010), 2010 WL 4483820, and Complaint, *Windsor v. United States*, No. 1:10CV08435 (S.D.N.Y. Nov. 9, 2010), 2010 WL 5647015).

143. See *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013); *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 682 F.3d 1 (1st Cir. 2012), *aff'g* *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010), and *Massachusetts v. U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d 234 (D. Mass. 2010); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

144. Open Letter from Barack Obama to the LGBT Community (Feb. 28, 2008), available at [http://www.bilerico.com/2008/02/open\\_letter\\_from\\_barack\\_obama\\_to\\_the\\_lgb.php](http://www.bilerico.com/2008/02/open_letter_from_barack_obama_to_the_lgb.php).

145. Helene Cooper, *Obama to Support Repeal of Defense of Marriage Act*, N.Y. TIMES CAUCUS BLOG (July 19, 2011, 6:23 PM), <http://thecaucus.blogs.nytimes.com/2011/07/19/obama-to-support-repeal-of-defense-of-marriage-act>.

146. Memorandum on Extension of Benefits to Same-Sex Domestic Partners of Federal Employees, 2010 DAILY COMP. PRES. DOC. 450 (June 2, 2010), available at <http://www.gpo.gov/fdsys/pkg/DCPD-201000450/pdf/DCPD-201000450.pdf>.

147. Sheryl Gay Stolberg, *Obama Signs Away 'Don't Ask, Don't Tell'*, N.Y. TIMES (Dec. 22, 2010), <http://www.nytimes.com/2010/12/23/us/politics/23military.html>.

administration's consistent attempts to advance LGBT rights through various political means—executive order and legislative repeal—lend further support to the view that politics and policy motivated President Obama not to defend DOMA.

President Obama's decisions regarding DOMA show that these three factors can be useful in determining whether the president has engaged in policy-motivated inaction. But even as we set forth these principles for identifying such presidential inaction, we recognize that the real world is never so easily defined. No doubt the three factors do not definitively or exhaustively identify all cases of impermissible inaction.<sup>148</sup> After all, governing is a complex affair: resource constraints are ubiquitous, presidents are in the business of making decisions that serve their predetermined policy goals, and priorities and obligations will often conflict. Perhaps the best one can do is to observe that policy-motivated inaction exists on a spectrum. In some instances, it will be absolutely evident that the president has fallen short of a congressional baseline with no justifiable rationale. In others, even taking into account all of the available evidence, it will not be so clear. But at the very least, these factors can help us begin to identify cases in which a president uses inaction as a means of unilateral policymaking, which would then trigger separation-of-powers concerns.

As the examples in this Part have demonstrated, policy-motivated presidential inaction is identifiable, common, and prominent. Multiple presidents have pursued their policy goals by choosing not to enforce certain laws, even when there is a baseline requirement that they do so. The structure of the Constitution should enable each branch of government to resist such tyranny and encroachment from their coordinate branches.<sup>149</sup> But as the next Part suggests, Congress and the courts lack the tools to fight back when the executive uses inaction as a tool for self-aggrandizement.

### III. A PROBLEM WITHOUT ANY CHECKS

When the president wants to move beyond the legislative status quo, to do more than Congress has allowed in the past, Madison's scheme requires that he both win the support of the full Congress and convince the judiciary that his actions are legal. Moreover, he must avoid provoking the wrath of Congress after he makes a decision; the legislature may respond to action it

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148. We note that both the second and third factors are necessarily underinclusive. A president may be able to point to reasons for falling short of his enforcement duties unrelated to his policy goals, but in reality such reasons are merely a pretext for his true motivations. Similarly, a president may engage in impermissible inaction without any accessible evidence that it was policy motivated. These may or may not be instances of the inaction we find problematic, but disentangling the two factors and determining the true motivation for a particular decision not to act would be difficult and would no doubt obscure the clear case against policy-based inaction.

149. See *supra* Section I.A.



does not like with hearings, budget sanctions, or any number of other procedural tools. But where the president pursues policy through inaction, Congress and the courts are all but powerless to stop him.<sup>150</sup>

#### A. Weak Judicial Tools

In the vast majority of cases, doctrinal and prudential considerations will prevent the courts from enforcing limits on inaction. With respect to doctrine, the Supreme Court has narrowed the scope of APA review to the point that judicial review of agency inaction is virtually nonexistent. What is more, even if the law permitted broader judicial review, prudential concerns would likely prevent review: the particular institutional competency of the courts makes it unlikely that judges could ever serve as a meaningful check on a determined president's inaction.

As an initial matter, judicial review of *agency* inaction is almost nonexistent. It is true that the APA includes "failure to act" in its definition of "agency action."<sup>151</sup> Accordingly, the courts' power to review agency decisions<sup>152</sup> ostensibly includes the ability to review agency inaction. But current doctrine significantly curtails the scope of agency action that courts can plausibly review. First, under *State Farm* (the auto-deregulation case), the only agency decisions subject to APA review are those that actually and systematically deregulate; informal choices and one-off decisions not to enforce existing regulations fall outside the holding of the case.<sup>153</sup> Second, even if an instance of agency inaction satisfies that case's requirements for review, it will likely run up against *Heckler v. Chaney*. In *Chaney*, the Supreme Court

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150. We restrict the inquiry to legislative and judicial checks on executive power. To be sure, there are nonstructural checks on all executive decisions, the most obvious being the electorate's ability to vote out a do-nothing president. Four responses are readily apparent. First, if the only protection against presidential inaction is electoral politics, then, in Madisonian terms, there are no "checks" on presidential inaction. As Madison explains, "A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions." *THE FEDERALIST*, *supra* note 7, No. 51, at 290 (James Madison). The notion of separation of powers is a *supplement* to electoral politics. Second, the voters are going to have a hard time recognizing and policing inaction because the problem isn't always a do-nothing president. Presidents Bush and Obama have done a lot, but they have also failed to enforce some laws. Third, of course, the voters could have punished them for failing to enforce Section 5 of the VRA or refusing to defend DOMA if they wanted to, but (1) one-issue voters are rare and (2) there are undoubtedly fewer public instances of inaction that are unlikely to be subject to such a check. Fourth, even if the voters do punish an inactive president, this does not remove the bias in favor of inaction that we articulate below. See discussion *infra* Section IV.A. If one believes that at least some inaction will go unaddressed in a subsequent, more active administration, then a president's decision not to enforce a law will lead to less action in the long run than Congress intended when it passed each law, even if the do-nothing president and his party lose the White House.

151. 5 U.S.C. § 551(13) (2012).

152. *Id.* § 706.

153. See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

found that enforcement decisions are subject to prosecutorial discretion<sup>154</sup> and thus fall under the § 701(a)(2) exception to judicial review.<sup>155</sup> Moreover, the Court specifically held that most “failure[s] to act”—and certainly agency refusals to take enforcement action—are therefore presumptively unreviewable.<sup>156</sup>

Taking *State Farm* and *Chaney* together, the options for review of inaction are quite narrow. Of course, some inaction is still reviewable—*Massachusetts v. EPA* made this clear.<sup>157</sup> Because the plaintiffs in that case were able to convince the Court that regulation of “air pollutants” was not subject to agency discretion under the Clean Air Act, they were effectively able to neutralize *Chaney*’s presumption against reviewability.<sup>158</sup> But while some may view *Massachusetts v. EPA* as an indication that the courts can check executive inaction, that case is the exception that proves the rule. *Massachusetts v. EPA* was extremely high profile—the agency’s overt policy statements and the explosiveness of environmental regulation during the Bush years combined to place the issue firmly in the limelight—and this publicity ultimately prompted the Court to step in. In contrast, low-salience instances of executive inaction, of which there are surely many, will almost certainly go unchecked. Indeed, only a truly blatant case of executive inaction could even plausibly result in some judicial review, and even then, the review is likely to be minimal. For example, the Court in *Massachusetts v. EPA* merely remanded the case to the lower court for further review<sup>159</sup>—that is, it did not ultimately rule against the agency on the merits.

Surveying these and other doctrinal options for judicial review of agency inaction, Professor Staszewski concludes that “courts rarely order agencies to promulgate regulations or take enforcement action, and even when they require agencies to fulfill mandatory statutory obligations (such as meeting congressionally-imposed deadlines), courts are not ordinarily empowered to dictate the form that such actions must take.”<sup>160</sup> In short, current doctrine simply does not allow for robust judicial review of executive inaction.

Beyond these doctrinal limits, there are three prudential reasons why judicial review is a poor check on executive inaction, and these reasons are linked to the three phases of a potential lawsuit: justiciability, merits review, and remedy. First, it is difficult to define a “case” of inaction that is suitable for review. Second, courts face a series of line-drawing questions that make

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154. 470 U.S. 821, 831 (1985) (“[For] [r]efusals to take enforcement steps . . . we think the presumption is that judicial review is not available.”).

155. 5 U.S.C. § 701(a)(2) (exempting agency action that was “committed to agency discretion by law” from judicial review).

156. *Chaney*, 470 U.S. at 828, 831–33.

157. See discussion *supra* Section II.A.

158. See *supra* notes 83–85 and accompanying text. Some describe this type of case as judicial review of “nonpromulgation.” Deacon, *supra* note 68, at 805.

159. 549 U.S. 497, 534–35 (2007).

160. Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 381–82 (2009).

them particularly deferential to the executive on the merits. And third, judges are likely wary of granting a remedy that amounts to telling the executive how and when to act. Accordingly, even if we assume that judicial review of executive inaction is permissible, the courts prove a hollow hope.

### 1. Justiciability

When a president chooses not to enforce a law, it is often difficult to identify a way for potential plaintiffs to challenge this decision; there is no obvious “case or controversy”<sup>161</sup> that could be brought before the courts. On the one hand, it may be easy to plead that, for example, an agency has chosen not to enforce a law. On the other hand, the agency can just as easily respond that it has simply not enforced the law *yet*.<sup>162</sup> Indeed, the agency rulemaking process is notoriously prolonged, involving many levels of analysis and technical review.<sup>163</sup> Short of a statutory deadline or a clear statement from the agency that it will *never* regulate—recall the EPA’s 2003 statement along these lines<sup>164</sup>—Article III courts will lack jurisdiction to hear challenges to inaction. What is more, even putting constitutional concerns aside, courts’ general desire for a clear “case” will significantly weaken judicial review.<sup>165</sup> Of course, the APA does allow for judicial review of action that is “unlawfully withheld or unreasonably delayed.”<sup>166</sup> But prevailing precedent makes it exceedingly difficult to meet this burden of “unreasonable” delay, which will likely keep many cases of inaction out of court.<sup>167</sup>

Judicial economy poses an additional hurdle for differentiating between acceptable delay and impermissible inaction. Plaintiffs could characterize any minute delay as executive inaction, so if the judiciary were to review every potential case of inaction, the costs would be astronomical.<sup>168</sup> In order

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161. See U.S. CONST., art. III, § 2.

162. See Bhagwat, *supra* note 65, at 182 (“In addition, it is often difficult to identify when an agency has failed to act—at the least, delay and inaction can be difficult to distinguish—so that there is often no clear focus for judicial review of agency inaction.”).

163. Thomas O. McGarity, *Some Thoughts on “Deossifying” the Rulemaking Process*, 41 DUKE L.J. 1385, 1385 (1992).

164. See *supra* notes 80–82 and accompanying text.

165. That said, it is unlikely that the related issue of standing would keep the plaintiffs out of court. See Bressman, *supra* note 65, at 1670–75. Indeed, that the Supreme Court was willing to review the EPA’s decision in *Massachusetts v. EPA* suggests that other prudential concerns, not a lack of standing, serve as a barrier to challenges to inaction.

166. 5 U.S.C. § 706(1) (2012).

167. Although “delay” cases are reviewable despite the parallel with *Chaney*, see Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 770–73 (1990), in *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court held that these provisions apply only to discrete, legally required administrative actions, 542 U.S. 55, 63 & n.1 (2004).

168. Cf. Bressman, *supra* note 65, at 1693 (discussing the costs this would impose on agencies “both in terms of administrative flexibility and administrative efficiency”).

to avoid an unmanageable caseload, courts are likely to devise some prudential limits to confine their docket to cases with either a credible plaintiff or nonfrivolous claims on the merits.

## 2. Merits

Even if the courts were willing to reach the merits of a case, however, they would likely defer on a series of questions that require drawing difficult lines and ultimately refuse to force the executive to act. First, a court willing to address the merits of a case would have to determine the statutory baseline. In some cases, such as *Massachusetts v. EPA*, this question might be amenable to analysis using the traditional tools of statutory interpretation.<sup>169</sup> But this will not always be the case. Take, for example, the Securities Exchange Act of 1934,<sup>170</sup> which requires the Securities and Exchange Commission (“SEC”) to regulate in part to protect against national crises.<sup>171</sup> Is this mandate a judicially enforceable statutory minimum? If so, what obligations does it place on the SEC? If the Act were carried to its literal end, a court would likely balk at defining duties that are incommensurate with the SEC’s historical role and available budget.

Second, even if a court were willing to draw a baseline, how should it respond when the president claims his decision was motivated by resource concerns? Nonenforcement decisions “tend to involve a complex balancing of many factors, including the likelihood of success in litigation and whether agency resources are better spent elsewhere,” factors that courts are not well suited to review.<sup>172</sup> This is a real concern; as we have acknowledged, the reality is that some executive inaction is properly justified on resource grounds.<sup>173</sup> And while we are willing to label an invocation of resource constraints as pretextual based on the information available, it is unclear whether a court would do so. Not only would a court face significant informational constraints but—as is typical across the federal judiciary—it would also likely defer to the executive.<sup>174</sup> Indeed, in most cases, such deference might even be appropriate. But the effect here would be to deny some plaintiffs proper relief.

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169. See *supra* notes 79–86 and accompanying text; see also *Train v. City of New York*, 420 U.S. 35, 42–44 (1975) (determining the baseline spending rate required by the Federal Water Pollution Control Act).

170. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78pp (2012).

171. See 15 U.S.C. § 78b (“National emergencies, which . . . burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit.”).

172. Bhagwat, *supra* note 65, at 182.

173. See *supra* notes 100–103 and accompanying text.

174. Cf., e.g., *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2727–28 (2010) (deferring to the executive’s assertion that material support of the humanitarian wings of terrorist organizations would undermine federal antiterrorism efforts).

### 3. Remedy

The final issue is one of remedy. From one perspective, this issue might be framed as a question of the separation of powers—that is, whether it might be a violation of the Constitution for the judicial branch to dictate how the executive enforces the laws.<sup>175</sup> But in our view, this would mischaracterize the harm. The very premise for judicial review of executive inaction is that the executive has *failed* to meet the requirements of the Constitution, thereby making it entirely proper for the judiciary to intervene.<sup>176</sup> Nevertheless, it might still be worrisome for courts to dictate that the executive act in a particular way, especially given the complicated resource and enforcement decisions they might have to interfere with.<sup>177</sup> This represents yet another reason why the courts will be deferential to the president in evaluating inaction.

In sum, the courts will tend to under-enforce federal statutes in the face of presidential inaction. Not only does current doctrine provide very limited avenues for plaintiffs to challenge executive inaction, but courts are simply not well suited to police this sort of problem for a variety of prudential reasons. Thus, when the president threatens the separation of powers by unilaterally creating national policy through inaction, no meaningful check will come from the courts.<sup>178</sup>

#### B. *Weak Congressional Tools*

The previous discussion has emphasized the weaknesses of judicial checks on inaction, but legislative checks on inaction are similarly ineffective. The constitutional structure and institutional realities of the federal system provide Congress with numerous tools to check the kind of presidential aggrandizement Madison worried about. Many of these tools, however, are inapplicable when a president decides not to act, and others are merely less effective in the face of unchecked inaction.

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175. Cf. *Doyle v. Brock*, 821 F.2d 778, 788 (D.C. Cir. 1987) (Silberman, J., dissenting).

176. Cf. *Garland*, *supra* note 61, at 564–65 (“[W]hen a court merely orders an agency to act, leaving the choice of action to the agency’s discretion, no trespass [of the separation of powers] occurs.”).

177. Peter Lehner suggests some ways around this problem, Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 660–61 (1983), but the concern remains.

178. It is worth mentioning that two other avenues for judicial checks on executive inaction—implied statutory rights of action and § 1983 suits—have also been limited by the Supreme Court. See *Thompson v. Thompson*, 484 U.S. 174, 188–91 (1988) (Scalia, J., concurring in the judgment) (summarizing the Court’s skepticism of implied rights of action); see also *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002) (applying the implied rights of action test to beneficiary enforcement claims under § 1983). While these methods are beyond the scope of this Article, the doctrine supports our basic conclusion that the judiciary is largely without tools to police executive inaction.

### 1. The Power To Legislate

Congress's most potent check on the president is also its most basic: the president's authority to enforce laws extends only as far as Congress legislates. While modern presidents have invariably claimed the initiative for proposing legislation,<sup>179</sup> no president may take lawful administrative action in the domestic arena without official authorization by statute. Indeed, even proposed laws that have the president's support must pass through numerous vetogates before they become law.<sup>180</sup> One need only consider the trials and tribulations involved in the passage of the ACA to appreciate the time, effort, and luck necessary to pass modern legislation.<sup>181</sup> Not only must each house of Congress pass the statutory authorization but also the bill may die at any number of stages, including in committee, in conference, or by filibuster on the Senate floor. Moreover, once Congress has approved a law that would grant the president some authority, it must fund the initial delegation and (often) approve the president's nominee to head a new agency.<sup>182</sup> The new Consumer Financial Protection Bureau, for example, was unable to exercise its legal authority until Congress belatedly approved a director.<sup>183</sup>

In contrast, a president's decision not to enforce a law does not run up against Congress's power to legislate. That is, if the president decides not to enforce a law, this decision does not require the support of a committee chairman, a vote on the floor of either house of Congress, or reconciliation in committee.<sup>184</sup> When President Bush's EPA decided not to regulate certain auto emissions, it did not need to seek Congress's approval—it merely declined to regulate. Similarly, if President Obama were to decide that federal marijuana laws were not worth enforcing, he could direct the Department of Justice to focus its efforts elsewhere while leaving the CSA on the books. Put another way, the most powerful and robust checks on action—vetogates, bicameralism, and congressional review—are entirely absent in the inaction context.

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179. See CLINTON ROSSITER, *THE AMERICAN PRESIDENCY* 29 (2d ed. 1960); Richard E. Neustadt, *Presidency and Legislation: The Growth of Central Clearance*, 48 AM. POL. SCI. REV. 641 (1954).

180. See generally Eskridge, *Vetogates and American Public Law*, *supra* note 25; Eskridge, *Vetogates*, *Chevron*, *Preemption*, *supra* note 25, at 1444–48; McNollgast, *supra* note 25.

181. See LAWRENCE R. JACOBS & THEDA SKOCPOL, *HEALTH CARE REFORM AND AMERICAN POLITICS* (rev. & updated ed. 2012).

182. See generally LOUIS FISHER, *THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE* (4th ed. 1998) (discussing historical examples of congressional grants of power to the executive).

183. See Edward Wyatt, *Appointment Clears the Way for Consumer Agency to Act*, N.Y. TIMES, Jan. 5, 2012, at A16, available at <http://www.nytimes.com/2012/01/05/us/politics/consumer-financial-agency.html>.

184. Consider, for example, the cases of inaction described *supra* Part II.

## 2. Oversight

Congress's power to check presidential action does not stop after it has granted the president authority to act. Indeed, Congress exerts influence over the executive branch through formal oversight procedures, informal monitoring, and, in rare cases, sanctions. Yet while these mechanisms might prove useful for reining in overreaching presidential action, they remain ineffective as a means for Congress to police executive inaction.

Formal congressional oversight of executive actions takes a number of forms. For example, Congress has the power to order studies and reports of agency action and to hold oversight hearings to evaluate agency behavior.<sup>185</sup> Where the issues are salient to Congress and the public, such oversight hearings can be quite successful.<sup>186</sup> More informally, members of Congress can monitor executive action by communicating directly with agency staff to express their preferences,<sup>187</sup> a practice known as "jawboning." Further monitoring occurs through informal staff contacts and agency liaisons.<sup>188</sup>

If these formal and informal oversight processes reveal agency action that Congress is unhappy with, Congress can influence executive action through its power to sanction agencies—and thus to bring them in line with its preferences. Congress's sanction power "extends ultimately from [its] fundamental power of legislation . . . and its corollary power to spend, or refuse to spend, money."<sup>189</sup> Accordingly, Congress can use its power to legislate to curtail an agency's authority, either by "amending or, in the extreme, by repealing the agency's enabling act or other important pieces of legislation that give an agency its power."<sup>190</sup> Similarly, and perhaps more realistically, Congress can punish agencies that stray too far from its preferred

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185. Steven P. Croley, *Public Interested Regulation*, 28 FLA. ST. U. L. REV. 7, 12 (2000).

186. See Charles Tiefer, *Congressional Oversight of the Clinton Administration and Congressional Procedure*, 50 ADMIN. L. REV. 199, 203–05 (1998).

187. Jack M. Beer mann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 130 (2006).

188. Croley, *supra* note 185, at 12.

189. *Id.* at 11. For discussions of Congress's ability to use appropriations riders and earmarks, among other powers, to bring agencies in line, see Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443, 472–76 (1987), and Beer mann, *supra* note 187, at 84–91.

190. Croley, *supra* note 185, at 11; see also Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 YALE L.J. 451, 458 (1979) (discussing Congress's use of its legislative power to pass statutes requiring agencies to follow certain rulemaking procedures). As then-Professor Kagan notes, the first regulatory agencies were conceived of as mere "transmission belts" for congressional directives. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2255 (2001). Due to the increasing complexity of regulation, however, it may be impossible for Congress to achieve its regulatory goals by enacting detailed statutory prescriptions. See Jack M. Beer mann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727 (2009). Thus, even when Congress has sought to control regulatory policy by statute, it has done so by mandating results rather than by specifying mechanisms to achieve goals. Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 8 (1994).

policies, “curtail[ing] executive action by limiting agency funding [or] personnel.”<sup>191</sup> In theory, an agency that does not carry out Congress’s manifest desires may see its budget, and thus its power, diminish or disappear altogether. For example, in 1997, after the FDA promulgated new rules on tobacco, some members of Congress resisted appropriating money for the FDA to enforce the new regulations.<sup>192</sup> Similarly, officials in the Office of Management and Budget (“OMB”) were “sufficiently impressed by a recent threat to the appropriation for its Office of Information and Regulatory Affairs that it took steps to subject OMB-agency interactions to greater Congressional and public scrutiny.”<sup>193</sup> Congress’s power to punish the executive by limiting an agency’s authority and budget thus provides it with several positively Madisonian tools for preventing the president and his agencies from acting in ways that are inconsistent with Congress’s will.

Many of these tools for influencing presidential action would seem to apply just as well to inaction. Congressional committees, for example, could hold oversight hearings to ensure that the president and his agencies are not systematically under-enforcing the laws relative to the congressional baseline. Similarly, members of Congress could jawbone to prompt an administration to enforce a particular law. Sanctions could be an option for particularly egregious instances of inaction.

None of these checks on inaction, however, ultimately proves to be a practical or theoretical reality, for several reasons.<sup>194</sup> It is difficult, first, for Congress to monitor agency actions because it is not designed to collect and analyze information effectively. While none of the formal oversight powers is particularly difficult for Congress to draw upon as a procedural matter, in practice Congress cannot provide the kinds of meaningful oversight described above unless it knows what agencies are doing.<sup>195</sup> Indeed, “scholars [have] noted . . . the widespread lack of knowledge and interest among

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191. Greene, *supra* note 9, at 171; see also Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821, 834 (2003) (“[A]gencies are ever worried about their budgetary health as well as the scope of their regulatory jurisdiction, and for those reasons must be overly solicitous of the preferences of members of Congress, who after all control agency budgets and define the boundaries of agency authority.”).

192. Croley, *supra* note 185, at 72–74.

193. McGarity, *supra* note 189, at 475; cf. Croley, *supra* note 185, at 55–66 (providing a good case study of the give-and-take among the White House, Congress, and the EPA on rulemaking).

194. As a methodological matter, we cannot prove the weakness of congressional tools with respect to inaction through empirical examples because such examples are exceedingly rare. We can, however, infer as much. There is a cottage industry criticizing Congress’s tools when used to monitor runaway executive power. When one investigates the underlying rationale of these criticisms, though, it is apparent that they would apply with even greater force when it comes to executive inaction. Thus, to the extent that these tools are weak when applied to action, it is even less likely that they will effectively check inaction.

195. Croley, *supra* note 185, at 12.



members of Congress, evident in repeated surveys and actual cases, regarding obviously important administrative decisions.”<sup>196</sup>

The second—and perhaps the most fundamental—limitation on Congress’s power over the executive is the fact that it is a plural body. For example, implementing formal oversight proceedings, repealing an agency’s enabling act, or reducing an agency’s funding will “require the action of the full Congress” or at least of a committee—and this action is “costly and difficult to accomplish.”<sup>197</sup> Making matters more difficult is the reality that “a particular agency may be subject to oversight by several committees which have competing goals.”<sup>198</sup> For example, Congress’s ability to exercise its budgetary power to curtail runaway executive action requires the Authorizing and Appropriations Committees of both houses to discover and agree on an effective budgetary sanction—a tall task for a polarized, intensely political body.<sup>199</sup> Coordinating a full Congress to fight back against the executive may often be even further complicated by the need for support from more than a simple majority: to impose its most effective sanctions, Congress must gain the approval of two-thirds of both houses in order to overcome an almost-certain presidential veto.<sup>200</sup> As a case in point, during the Clinton presidency, the Republican Congress repeatedly attempted to decrease the budget of agencies carrying out President Clinton’s policy agenda. But Congress often found that the president was capable of forcing the return of funding to agencies by exercising his veto power.<sup>201</sup> More broadly, and perhaps more perniciously, Congress is often simply unable to generate a coherent policy agenda, let alone coherent action to reprimand the president.<sup>202</sup> As an institutional and practical matter, Congress is simply not good at oversight, whether by way of formal procedures, informal monitoring, or sanctions.<sup>203</sup>

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196. Kagan, *supra* note 190, at 2256. *But see* Croley, *supra* note 185, at 33 (discussing the McNollgast argument that administrative procedure facilitates legislative control by reducing the costs of congressional monitoring).

197. Kagan, *supra* note 190, at 2259.

198. Seidenfeld, *supra* note 190, at 11.

199. McGarity, *supra* note 189, at 475–76.

200. *See* Kagan, *supra* note 190, at 2259; *see also* MASHAW, *supra* note 11 (explaining how this mechanism contributes to the rise of the administrative state).

201. Kagan, *supra* note 190, at 2259 n.38; *see also* David Baumann, *The Art of the Deal*, 31 NAT’L J. 2700, 2701 (1999), *cited in* Kagan, *supra* note 190, at 2259 n.38 (“The conventional wisdom around town is that Clinton always wins these budgetary showdowns, and . . . has extraordinary leverage during such . . . negotiations . . .”); David E. Rosenbaum, *Bush Rules! It’s Good To Be the President.*, N.Y. TIMES, Jan. 28, 2001, at WK16, *available at* <http://www.nytimes.com/2001/01/28/weekinreview/the-nation-bush-rules-it-s-good-to-be-the-president.html>, *cited in* Kagan, *supra* note 190, at 2259 n.38 (“Clinton used a veto threat to block more than 70 riders attached to budget bills that would have relaxed . . . [regulatory requirements].”).

202. *See* Seidenfeld, *supra* note 190, at 10.

203. For an empirical argument that Congress rarely sanctions agencies, *see* Croley, *supra* note 185, at 106 (“Once the complexities of the relationship between legislators and agencies

What is worse, each of the problems highlighted above is exacerbated when the issue Congress must address is executive inaction. The reason for this is quite simple. Decisions that are manifested as inaction are, by definition, both less public and less salient than decisions that are implemented through action; most of the time, when a president decides not to enforce a law, there is no new regulation, no new request for funding, and no public statement. Significantly, Congress's oversight tools—both formal and informal—require that it identify a decision it does not like and take positive steps in response. Whatever trouble Congress has in identifying and reacting to executive action, these structural shortcomings will apply with extra force to inaction.<sup>204</sup>

To be sure, many of the cases of presidential inaction we have discussed thus far were particularly public, probably more so than most executive action, and so in these cases an information deficit probably did not affect Congress's response (although concerns about a lack of a trigger and misaligned incentives remain). Congress was aware of President Bush's decision to under-enforce the Clean Air Act, just as it was cognizant of President Obama's decision not to defend DOMA. This apparent publicity, however, is an artifact of the cases we have chosen: we made it a point to discuss the most obvious examples of presidential inaction. But most other decisions not to enforce the law will naturally be less salient, and so the information deficit described here will be relevant, if not dispositive.

Consider the case of oversight hearings. The problems associated with hearings as a tool to check executive inaction are largely prudential. Even if, for example, Congress structured an agency to require hearings on all agency decisions, including decisions not to act, two issues remain. First, just as it is difficult to identify a "case" of inaction for judicial review short of the president or his agency heads announcing a decision to halt enforcement of a particular provision,<sup>205</sup> it is not clear what event could trigger such hearings when the issue is inaction.<sup>206</sup> Second, just as court dockets are often overloaded, Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction; this is a basic question of bandwidth.<sup>207</sup>

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are taken into account . . . the picture changes. Legislative influence over agency-level regulatory decisions becomes more precarious." See also David B. Spence, *Administrative Law and Agency Policy-Making: Rethinking the Positive Theory of Political Control*, 14 *YALE J. ON REG.* 407, 423 (1997) (arguing that structural decisions about the scope of agency authority are infrequent).

204. Cf. *supra* notes 187–193 and accompanying text.

205. It is, of course, possible that this might happen, as in the case of Holder and DOMA. See discussion *supra* Section II.D.

206. The impoundment dispute could be a useful guide. See *infra* note 212 and accompanying text.

207. Congress's questioning of Anne Gorsuch could be an example of a successful oversight hearing to counteract executive inaction. Gorsuch, the head of the EPA during the Reagan administration, essentially engaged in wholesale environmental deregulation. She was then attacked in oversight hearings and held in contempt, and she ultimately resigned over the

Reduced or conditioned funding similarly fails as a check on executive inaction. As a theoretical matter,<sup>208</sup> we might understand this fact to follow from the risky position Congress assumes when it threatens to withhold funding on the basis of executive inaction. Budget fights are protracted zero-sum battles,<sup>209</sup> and every member of Congress must choose carefully how to allocate his or her political capital. It is certainly possible that executive inaction could justify a member taking up the cause. But, because inaction will always be less salient than action and thus less likely to provoke the interest of a member's constituents, it is unlikely that any member would choose to fight what would be a personal battle, especially when the battle would require compromising on other priorities. Finally, in the extreme case, conditioned funding would be no check at all, for if a president believed in a severely limited federal role and pursued inaction across the board, congressional threats to withhold funding would be largely ineffective.<sup>210</sup>

### C. Theory Versus Practice

All of this, once again, is not to say that Congress and the courts have *no* formal tools to police presidential inaction. Most significantly, where Congress is clear about its desired baseline level of enforcement, the president is presumptively unable to venture below this baseline.<sup>211</sup> If the baseline is unclear, the legislature can always pass new legislation requiring something more specific of the president. If the current Congress wanted to force President Obama to pursue harsher enforcement of immigration laws, for example, it could amend the relevant statutes to require a certain level of enforcement with respect to better-defined classes of immigrants.

The Nixon-era dispute over presidential impoundment of funds provides a stark example of Congress's using baselines to control the president. In response to President Nixon's decision not to spend some of the funds allocated for specific purposes, Congress passed the Congressional Budget and Impoundment Control Act of 1974, which expressly required the president to spend funds that Congress had allocated for specific purposes.<sup>212</sup> But the impoundment controversy is perhaps most useful as evidence that such congressional intervention is rare—Congress has only stepped in where the

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controversy. See Patrick Warren, *Servants and Reformers: The Roles of Appointees Under Separation of Powers 2* (Apr. 24, 2007), [http://www.stanford.edu/group/peg/3\\_may\\_2007\\_papers/servantsandreformers-PW.pdf](http://www.stanford.edu/group/peg/3_may_2007_papers/servantsandreformers-PW.pdf). We believe that this is another exception that proves the rule, however, as we were unable to find any other example of an oversight hearing successfully addressing executive inaction.

208. It is difficult to prove the negative, but we know of no examples of Congress threatening to withhold funding on the basis of executive inaction.

209. Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387, 387–88, 415 (1998) (describing the budget process's "zero-sum games").

210. See discussion *supra* Section III.B.

211. For several examples of such a clear baseline, see discussion *supra* Section II.A.

212. Pub. L. No. 93-344, tit. X, 88 Stat. 297, 332; cf. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863,

president's decision not to act was particularly public and thus where it was relatively easy for Congress to identify the issue and generate support for a legislative response.

Indeed, this debate played out in the *Windsor* decision—which struck down Section 3 of DOMA—in the pages of two separate and often conflicting dissenting opinions. Justice Alito, while dissenting on the merits of the decision, agreed that the requirements of Article III standing were met in the case—specifically because, in his view, Congress had standing to defend a law when the executive declined to do so.<sup>213</sup> Justice Scalia, who wrote the primary dissent and vehemently disagreed that there was standing in the case, accused Alito of ignoring all of the formal checks that Congress may use to counteract executive power: “If majorities in both Houses of Congress care enough about the matter, they have available innumerable ways to compel executive action without a lawsuit—from refusing to confirm Presidential appointees to the elimination of funding.”<sup>214</sup> Scalia is, of course, correct that Congress *could* play a role as the arbiter of inaction. But what he misses, and what Alito presumably recognizes, is that as a practical matter, Congress often does not do so, for reasons both legal and prudential.

Our suggestion—one that aligns nicely with Alito's approach—is to think about how the separation of powers works in practice. While virtually no affirmative executive policy can be implemented without some basic approval from Congress and while Congress may revisit executive action at any time, the legislature has fewer and weaker tools at its disposal to counteract inaction, given its particular institutional features. Likewise, notwithstanding the technical doctrinal availability of judicial review in some narrow instances, the courts in most cases will not serve as an institutional sentry.

In sum, neither the congressional nor the judicial tools that comprise the current system of separation of powers can prevent the president from making policy unilaterally by refusing to act. As a result, presidential inaction remains a largely unchecked facet of executive authority.

#### IV. THE IMPLICATIONS OF INACTION

In most cases, when the government takes allegedly unconstitutional action, the natural next step is litigation. As we have explained, however, that step will be mostly unhelpful when it comes to presidential inaction, given that judicial review will be largely unavailable. So, what next? In this Part, we ask what unreviewable, unchecked unilateral policymaking means for our system of constitutional governance. Understanding that the courts are not the answer, we then consider what tools do exist to counter unconstitutional

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863 & n.3 (1983) (noting that although the Court did not reach the issue of the constitutionality of impoundment in *Train v. City of New York*, 420 U.S. 35 (1975), many lower courts “have held that the President lacks inherent constitutional authority to impound funds”).

213. *United States v. Windsor*, 133 S. Ct. 2675, 2711–14 (2013) (Alito, J., dissenting).

214. *Id.* at 2701, 2704–05 (2013) (Scalia, J., dissenting).

inaction. This exploration will take us largely outside the judicial arena to Congress and the states.

Recognizing this gaping hole in the separation-of-powers scheme leads us to new insights on old problems. Most importantly, as we argue in Section IV.A, unchecked presidential inaction reveals a structural imbalance in the prevailing constitutional theory—a bias in favor of smaller government. The action-oriented scholarship in both the constitutional and administrative law fields would lead one to believe that we should be concerned not about a bias toward smaller government but about a growing executive<sup>215</sup> or the “[r]ise and [r]ise” of the administrative state.<sup>216</sup> By focusing almost exclusively on action and ignoring inaction, however, these scholars have missed a far more troubling power bestowed on the president: the power effectively to take federal laws off the books, at least for the duration of his term. This is not merely conjecture. As our examples have demonstrated, the rise of the administrative state has made this type of unilateral policymaking through executive inaction relatively common.

At the same time, the tools of the separation of powers—modified in light of modern governance—might be able to account for the problem of presidential inaction. In Section IV.B, we attempt to resuscitate Congress as a robust adversary of the executive. While the legislature’s current tools are clearly inadequate, congressional review could avoid the constitutional and prudential concerns that plague judicial oversight. Once one recognizes that presidential inaction presents the same separation-of-powers problems as affirmative executive overreach, moreover, the implications for other areas of public law become clear. Indeed, although our theory speaks most clearly to reforms within Congress that would empower it to check presidential inaction, a new focus on the functional similarities between action and inaction points in other promising directions as well, leading to new insights on old problems, from statutory interpretation to federalism.

#### A. *Structural Bias*

Because the current system of checks and balances is ineffective in addressing a president’s unilateral policymaking through inaction, over time we will end up with a government in which fewer laws are enforced than the Constitution requires. In other words, unchecked executive inaction creates a bias towards under-enforcement of laws, despite the fact that those laws were duly enacted pursuant to Article 1, Section 7 of the Constitution.

The mechanism of this asymmetry is not complicated. Recall the two presidents we met at the outset. The first needed to expand the role of the federal government in order to achieve his goals. He was therefore unable to pursue his preferred policies without gaining the support of the other branches. In contrast, the second president could achieve his policy goals much more easily; because he sought to implement policies that entailed

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215. See Ackerman, *supra* note 10.

216. Lawson, *supra* note 52, at 1231.

scaling back the level of government involvement, he could simply decide unilaterally to halt the enforcement of existing laws. This is where the bias begins: deciding not to enforce a law is easy. And once the decision not to enforce is made, Congress and the courts are unable to counterpunch.<sup>217</sup>

Most presidents, moreover, will engage in inaction. Liberal presidents generally desire a smaller federal role with respect to criminal law and social–moral issues.<sup>218</sup> Conservative presidents usually prefer that the federal government pursue less economic regulation. On the whole, then, every president will likely choose “smaller government” in some policy realms, resulting in a government that substantially under-enforces rights and privileges relative to what Congress has authorized through legislation. Of course, a future president can always decide to start enforcing a law again. But assuming that not *every* nonenforcement decision will be reversed by the next president with different ideological preferences, over time the net effect will be a growing bias toward less governmental action. Furthermore, even if every decision not to enforce the law were eventually reversed, the period during which a law is not enforced would amount to a unilateral four- or eight-year repeal that would contribute to the bias we have identified.

The asymmetry is further exacerbated by the intertemporal nature of the relationship between the branches and by the fact that government is often divided between the two major parties.<sup>219</sup> Most laws on the books today were enacted by a past Congress, which means that past Congresses established most of the statutory baselines. Of course, it is possible that the current Congress shares the values of the enacting Congress and that it will attempt to apply the (albeit weak) checks available to combat inaction. But it is just as likely that the current Congress will be indifferent to (or even support) the new president’s policies.<sup>220</sup> It is therefore unclear whether the current Congress will be inclined to ensure that its predecessors’ laws are enforced. Assuming that Congress’s ability to act is a scarce resource—or even simply that the legislature’s institutional preferences change over time—a system that forces the current Congress to intervene to protect the desires of a past Congress will prove a formidable barrier that further enables presidents to pursue inaction.<sup>221</sup> The point is essentially one of burden

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217. See discussion *supra* Part III (arguing that the courts and Congress lack the practical ability to check presidential inaction).

218. Cf. JONATHAN SIMON, *GOVERNING THROUGH CRIME* 44 (2007) (describing campaign promises to strengthen the war on crime by Presidents Nixon, Reagan, and Bush Sr.); Frances Fitzgerald, *A Disciplined, Charging Army*, *NEW YORKER*, May 18, 1981, at 53, available at [http://www.newyorker.com/archive/1981/05/18/1981\\_05\\_18\\_053\\_TNY\\_CARDS\\_000336703](http://www.newyorker.com/archive/1981/05/18/1981_05_18_053_TNY_CARDS_000336703) (describing the rise of the New Right and Ronald Reagan, who wanted federal laws that protected conservative social values).

219. Cf. Levinson & Pildes, *supra* note 27, at 2330, 2338 (discussing the functional effects on separation of powers when the three branches of government are unified under one party rather than divided).

220. Compare, for example, our discussion about budgetary priorities, *supra* Section III.B.2.

221. Consider the alternative, a hypothetical world in which the president had to seek Congress’s affirmative approval to rescind legislation. In this world, the costly behavior is

shifting, but the effect—as in other constitutional instances<sup>222</sup>—is significant: on balance, more and more laws that Congress has enacted will not be enforced.

This bias does not result from new political alliances or shifting public preferences alone. Instead, it is structural and deeply ingrained in the way the branches interact with each other. By failing to provide meaningful checks on inaction, the prevailing theory of the separation of powers places a thumb on the scale in favor of less government intervention than Congress intended.

### B. *Objections and Responses*

We can imagine three significant objections to our argument concerning structural bias. The first is that inaction will not occur all that often because it is only reactive, not proactive. The second is that because the Constitution is a libertarian document, it is actually *meant* to favor stasis.<sup>223</sup> The third, which we call the “Goldilocks” objection, is that the mechanism we have identified merely counteracts an otherwise overactive executive branch, which should result in just about the “correct amount” of government action in the end.

#### 1. Inaction Is Reactive

The first objection is the easiest to dispose of. As we have already mentioned, it is of course true that a president may only use inaction to thwart Congress’s affirmative plans, not to put his own plan into motion. In this sense, a president may only employ inaction responsively, not proactively, and this limits his ability to intrude on legislative power through inaction. By contrast, when the president overreaches by interpreting broadly Congress’s delegation or his own constitutional authority, he can pursue an unbounded set of policymaking options.

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repeal, and thus it is likely that only those situations where the current Congress truly does not care about the prior Congress’s preferences will result in a repeal. In all other instances, including where the current Congress is of mixed opinion about the past Congress’s preferences, the legislation will stand. Most crucially, these middle cases are where the current system enables further inaction.

222. For example, the First Amendment especially disfavors prior restraints, not because they are substantively more restrictive of speech but because they shift the burden of proof from the censor to the speaker. On the margin, by placing the burden on the censor, speech will be more protected. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS. 648, 648, 657 (1955).

223. See Lawson, *supra* note 52, at 1233. *But see* AKHIL REED AMAR, AMERICA’S CONSTITUTION (2005) (arguing that the Constitution is a deeply liberal document in many ways). This is not to say, of course, that a liberal document necessarily cannot be a libertarian one. Nevertheless, Professor Amar’s reading thoughtfully elucidates the idea that the Constitution was a practical document, one meant to enable the federal government to govern properly. Because such governance generally entails action, Amar’s reading is generally inconsistent with libertarian readings of the Constitution.

This may have been true in Madison's day, and it may even be true in the abstract today. But the argument does not hold water in the real world. Although opportunities for aggrandizement through excessive action may be *more* prevalent than opportunities for overreaching through inaction, this does not necessarily mean that inaction is not widespread. To the contrary, we have identified multiple high-profile instances of inaction just from the past ten years, in areas ranging from the environment to civil rights to criminal law. There is little doubt that inaction is becoming pervasive, even if it is reactive.

Indeed, the scope of modern administration gives the president unprecedented opportunities to make policy through inaction. Because so much of what the modern federal government does happens by delegation to the executive branch and because the government has its hand in virtually every aspect of modern life, the opportunities for a president to use inaction to thwart the will of Congress are numerous and growing. In other words, because Congress has a will—and has legislated—on everything under the sun, from criminal law to welfare to marriage, it is not particularly important that inaction is reactive. Of course, there are limits to what a president can accomplish through inaction; for example, he could not achieve the specific goal of universal government-run health care without some enabling legislation. Still, if the president is able to use inaction—even as a “reaction”—in every policy realm, then he can thwart Congress's will with respect to large swathes of federal policy.

This objection does have some merit: inaction *is* inherently reactive, and, as a theoretical matter, this characteristic could limit the problems raised by presidential inaction. As a practical matter, however, that limitation has lost virtually all of its effect.

## 2. The Constitution Is a Libertarian Document

Although the “libertarian” objection—that the Constitution was meant to put a thumb on the scale, to create a bias against government intervention—goes to the very heart of American constitutionalism,<sup>224</sup> it too comes up short. The Constitution's libertarian principles are fully accounted for in the formal requirements of bicameralism and presentment. The Constitution does not say much about the rules of Congress, but it does provide that both houses of Congress must pass a law, that the executive may veto the law, and that Congress may override this veto.<sup>225</sup> These rules (along with the modern vetogates) were designed to slow the pace of legislation and to allow each branch to have its say.<sup>226</sup> But once a bill makes it through the many structural barriers in Congress and is signed into law by the president (or Congress overrides the veto), Article I, Section 7 of the Constitution dictates

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224. And thus a satisfying response to this objection lies beyond the scope of this Article.

225. See U.S. CONST. art. I, § 7.

226. Cf. *supra* note 25 and accompanying text.



that it is the law of the land and merits full enforcement by the chief executive (subject, of course, to resource constraints). In light of these constitutional procedures, it would be incorrect to say that inaction serves the goals of the founding document.<sup>227</sup>

Others have argued that inaction might be thought of as a check on a Congress acting beyond its constitutional authority—for example, by passing legislation without the constitutional authority to do so. In other words, inaction can protect the separation of powers, prompting the other branches of government to assume their proper roles.<sup>228</sup> This may be a true statement of the way government works, but it is also unconstitutional. As a formal matter, nothing in the Constitution's text or structure permits the president to conjure a way to counteract Congress out of thin air. Nor can inaction be justified on functional grounds: even if it is true that inaction does allow the president to check Congress, this check is not itself subject to any counterweight. Because it is difficult for the coordinate branches to fight back against inaction, one cannot plausibly argue that inaction is the kind of check the Constitution calls for.<sup>229</sup>

In short, the Constitution does not condone unilateral inaction. If a president does not want to enforce a law, he has an acceptable avenue available: he can advocate for its repeal. But he may not disregard it.

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227. Moreover, there is a puzzling element to this objection even as a matter of constitutional originalism. Much of what makes presidential inaction constitutionally troubling—the unchecked power it vests in the executive—is a consequence of the modern administrative state. The objector must therefore be implying that we should take the Framers to have supported this outcome because it accords with their libertarian values, notwithstanding the fact that they could have never conceived of the administrative state. Not only is this implausible as a matter of specific intent, but the opposite is true: separation of powers—the foundational principle of the Constitution and the insight of its primary author—is about making sure that a single branch neither dictates national policy nor encroaches on the authority of the other branches, even if the policy accords with a general Burkean notion of deliberateness. Congress can, of course, set national policy in motion by passing laws and appropriating money for enforcement, but it does not unilaterally dictate national policy; each of these decisions is subject to checks, including the president's veto power and his power to direct the agencies to interpret and enforce the law, not to mention judicial review. This Article attempts to advance that foundational principle and to reconcile it with the modern administrative state.

228. Cf. LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2012) (arguing, generally, that a president may refuse to enforce certain laws as a constitutional tool to counteract a gridlocked Congress).

229. A third (and perhaps even less plausible) form of the argument might go as follows: Inaction is not only useful to check unconstitutional congressional actions. It might also simply be an effective tool for the president to rein in legislative initiatives he thinks are ill-advised. But while constitutional realists might welcome the asymmetry we have identified, they would almost certainly have to pick their cases carefully. A conservative might laud President Bush's decision not to enforce the Voting Rights Act rigorously, for example, but the tables can turn quickly: by 2009, it would have been social liberals who were promoting President Obama's inaction on immigration or marijuana. The point is this: one will not always support the inaction president, so this objection can be nothing more than an ad hoc contention that the ends justify the means in some cases (or even all cases while one's preferred party is in power). As such, the argument is not responsive to any enduring constitutional question.

### 3. The “Goldilocks” Argument: Inaction Produces Just the Right Amount of Government Intervention

Self-styled constitutional purists might welcome the asymmetry we have identified. Inaction, they might argue, simply brings us back to the golden days of the new Republic—or at least the *Lochner* Era<sup>230</sup>—by limiting the scope of federal intervention to a more “appropriate” level. The argument goes as follows: even if one accepts that inaction will produce a structural bias against future government intervention, the effect is not “too little” government. Rather, it is a rough counterbalance to government overreach that yields the “right-sized” government relative to what Congress actually intended.

This “Goldilocks” argument might look for support to Professor Mashaw, who describes how the structure of the separation of powers has allowed the executive to become bigger than Congress initially intended.<sup>231</sup> Mashaw explains the rise of the administrative state as following from the power of the president’s veto. Assume that Congress initially only meant to authorize an executive agency to monitor three categories of business, and for an initial period of time, the agency complies. At some point, though, the agency oversteps its authority and decides to monitor a new (and related) category of business. Congress could theoretically pass legislation clarifying that this action is not within the power of the agency. The president, however, would likely veto any such legislation, as it would constrain his branch’s overall power. Thus, Congress must accept the agency’s overreaching, unless it can muster enough votes to override the president’s veto. Because congressional override of a veto is comparatively rare, the net result is that agency overreaching goes unchecked, and the administrative state grows.<sup>232</sup>

Mashaw’s theory is an elegant one, and we do not consider it an objection to our fundamental claim. We do not, after all, intend to argue that the structural bias that we have identified justifies an inference about how much overall government intervention there should be. There are many factors at play in our constitutional scheme, some pushing in favor of smaller government and some pushing against.<sup>233</sup> We have tried to suggest that a president will face few obstacles in regulating less than Congress intended, a bias that is contrary to what the Constitution should permit. Mashaw has also outlined a bias that is contrary to what the Constitution should permit. Unless

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230. See generally Stephen A. Siegel, *Lochner Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) (discussing *Lochner v. New York*, 198 U.S. 45 (1905), and the controversial Supreme Court decisions invalidating federal and state regulatory statutes in the period following *Lochner*).

231. See MASHAW, *supra* note 11, at 193.

232. See *id.*

233. An example already discussed in this Article is the vetogates theory, which argues that the many constitutional and institutional constraints of the legislative process will always produce less legislation (and thus presumably smaller government) than would result in their absence. See *supra* note 25 and accompanying text.

the reader simply objects that two wrongs make a right<sup>234</sup>—that the two biases, pushing in opposite directions, will produce the amount of regulation Congress intended—this objection adds nothing. Indeed, the observation that a breakdown in the separation of powers has allowed the executive branch to become more active and to grow remains a sound one. We have simply argued that it is critical to consider the other side of the ledger: how a breakdown in separation of powers has allowed the executive branch to atrophy.

### C. *Creating Robust Checks on Inaction*

Institutional designers need not be resigned to this fate. Although the structural bias inherent in modern separation-of-powers law—and the reforms that might combat it—is likely to garner the most interest from constitutional lawyers and scholars, the functional similarities between presidential inaction and affirmative overreaching point in other directions as well. Particularly when it comes to the relationships among the executive branch, Congress, the courts, and the states, pushing beyond the antiquated focus on action yields useful insights into both doctrine and institutional design.

Although scholars might first focus on a doctrinal solution to the inaction problem, we have made the case that judicial review is unlikely to be successful for several fundamental reasons.<sup>235</sup> The best way to escape the bias built into our constitutional system, then, is to think about separation of powers not at the level of constitutional doctrine but at the level of institutional design. Rehabilitating Congress (and, in some very narrow situations, the courts) as a robust adversary to the president—drawing particularly, but not exclusively, on what Professor Chafetz calls Congress’s “soft power”<sup>236</sup>—may be the only solution.<sup>237</sup>

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234. We doubt the objector would take this position, as the assumption of equivalence is a subject of scholarly inquiry itself. Borrowing from another field, the existence of monopolies is generally thought to reduce output in a way that detracts from social welfare. If a good imposes negative externalities not properly accounted for in its price, however, there will be excess output relative to the socially optimal level. Now imagine a good that reflects both forces: oil provided by the OPEC monopoly. When considering whether the monopoly produces oil at a level that is socially optimal, it would be simplistic to assume that the two forces cancel each other out and thus make the answer yes. Rather, the proper scholarly inquiry would assess the extent of each force. (Credit for this example is due to Professor Markovits, who made the point in his Federal Income Taxation class at Yale Law School.)

235. See discussion *supra* Section III.A.

236. Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715 (2012) (discussing the myriad tools, other than legislation, that Congress has at its disposal in interbranch conflicts).

237. We thus exclude solutions internal to the executive branch. Although administrative law scholars have offered a number of useful policy proposals that would allow the president to police the agencies, see, e.g., Richard L. Revesz & Michael A. Livermore, *Scrutinizing Inaction*, HUFFINGTON POST (July 15, 2010, 12:21 PM), [http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/scrutinizing-inaction\\_b\\_647603.html](http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/scrutinizing-inaction_b_647603.html), because we focus on situations in which the president is the one acting out of line, those solutions are inapt.

Still, the reader must understand that these proposals are preliminary. The purpose of this Article has been to identify the separation-of-powers problems inherent in presidential inaction; future work will no doubt provide the solutions. Nonetheless, in this Section, we suggest a few possible avenues for reform and discuss the dilemmas that these solutions present.

### 1. Congress as Legislator

The least ambitious proposal might be to use the unique legislative capabilities of Congress to overcome the institutional barriers to judicial review of inaction. Most obviously, where the president's authority (and obligation) to enforce legislation is concerned, Congress could pass more specific legislative delegations that require the president to take action. Congress's delegation to the EPA, at issue in *Massachusetts v. EPA*, provides a good example of such specificity. In the Clean Air Act, Congress explicitly required the EPA to regulate "air pollutant[s] . . . which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,"<sup>238</sup> a mandate the Supreme Court found sufficiently specific to require executive action on carbon emissions.<sup>239</sup>

Or take the Impoundment Control Act. In response to President Nixon's refusal to spend certain funds Congress had allocated for executive programs, the legislature passed a new law requiring that allocated funds be spent; Congress essentially reset the baseline, and the Supreme Court concluded that the new baseline was binding on the president.<sup>240</sup> That is, the president could not refuse to spend the funds, for to do so would be to fall below the level of enforcement Congress explicitly required.

Under this regime, courts would still ultimately review the executive's decisions (as in *Massachusetts v. EPA*), but Congress would also help to identify the "case" and draw the hard lines that courts have been unwilling to address.

### 2. Remediating Information Asymmetries and Aligning Incentives

Many of the shortcomings in congressional oversight we explored earlier are, at root, problems of information asymmetry. Initiatives that bring greater transparency to executive decisionmaking could allow Congress to act as a meaningful check on inaction. For example, inspired by the REINS Act, which would limit executive action by requiring both houses of Congress to approve *newly promulgated regulations*,<sup>241</sup> Congress might require agencies to submit all decisions—including those involving inaction—for

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238. Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006).

239. See *Massachusetts v. EPA*, 549 U.S. 497 (2007); see also *supra* note 24.

240. See *Train v. City of New York*, 420 U.S. 35 (1975); see also *supra* notes 24, 212 and accompanying text.

241. See Felicia Sonmez, *REINS Bill to Expand Congressional Power over Executive Regulations Passed by House*, WASH. POST (Dec. 7, 2011, 5:38 PM), <http://www.washingtonpost.com/blogs/2chambers/post/reins-bill-to-expand-congressional-power-over-executive-regulations->

ratification. If Congress failed to ratify, it would provide the courts with a justiciable vehicle to adjudicate the underlying issues.<sup>242</sup>

Of course, any such solution would suffer from many of the same problems it is intended to combat. For example, even if Congress required an agency to submit decisions not to act for legislative review, it is unlikely that Congress would have the motivation or the capacity to review every such decision. It is perhaps even more unlikely that an agency would submit willingly to such requests, and the same problem of the missing trigger arises—to wit, how would the agency (or Congress) decide which decisions merit reporting? It seems unlikely that anyone—Congress, agency head, or citizen—would make a federal case out of every decision not to issue a regulation. (What would it mean, for example, to claim that the SEC did not do enough to go after insider traders on a particular day?<sup>243</sup>)

Fortunately, the problem is not entirely informational. Indeed, Congress was aware of the decisions not to enforce the Clean Air Act or certain parts of the Immigration and Nationality Act, and Barbara Walters made the impending showdown on marijuana enforcement a major part of the first news interview with President Obama after the 2012 election. In fact, in those high-profile cases, it could be argued that the president's primary motivation in pursuing a policy of inaction was to *make* the issue politically salient. In these circumstances, where information is not the problem, institutional designers need to find a way to motivate Congress to step in.

One approach would be to attempt to align the powers of Congress with results the executive would find detrimental. Conditioned funding may exacerbate the problem of inaction by rewarding presidents who prefer less government regulation as a general matter, but every chief executive—liberal or conservative—is invested in maintaining his unitary power over the entire branch.<sup>244</sup> With this insight in mind, Congress could fracture that unitary authority by contracting outside the administrative state to provide the set of services that the president is unwilling to provide. The litigation surrounding President Obama's decision not to defend DOMA is an excellent example. The administration made it clear that it would not carry out the duty assigned to it by the Constitution, so Congress responded by hiring someone not employed by the president—in this case, a private lawyer—to do the job.<sup>245</sup> Congress could also enlist private and public institutions to enforce agency nonperformance through *qui tam* actions or other private rights of action.

Not only does this approach guarantee that duly enacted laws are enforced in the end, but it creates a powerful disincentive for the president to

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passed-by-house/2011/12/07/gIQAs6VMdO\_blog.html (discussing the 2011 version of the REINS bill).

242. *But see* Staszewski, *supra* note 160. Such postregulation oversight may implicate *Chadha's* prohibition against the legislative veto. *See INS v. Chadha*, 462 U.S. 919 (1983).

243. We thank David Wishnick for pushing us with this evocative example.

244. *See* Strauss, *supra* note 34, at 597.

245. *See supra* notes 134–135 and accompanying text.

pursue a policy of inaction in the first place. If Congress is waiting in the wings, ready to act, inaction will be both fruitless with respect to the policy question at issue (Congress will simply hire someone to do what the president is unwilling to do) and counterproductive with respect to the rest of the president's power (it will take his unitary authority away).<sup>246</sup>

### 3. Cooperative Federalism, but Cooperating with Whom?

Similarly, Congress could profitably look to the states for help enforcing laws the president chooses to ignore. The potential role of the states as bulwarks against presidential inaction is a logical outgrowth of Professor Bulman-Pozen's suggestion that the states act to "safeguard" the separation of powers.<sup>247</sup> Bulman-Pozen notes that if Congress is not satisfied with the executive's performance, it can enlist the states and local governments to carry out its programs.<sup>248</sup> But the states are all the more vital when the president chooses to pursue a policy of inaction contrary to the national legislature's will. For while Congress can bring to bear all of its institutional power to prevent the president from *acting* out of line with its preferences (thus often making recourse to the states unnecessary), we have argued that Congress cannot do so when the president chooses *not to act*. Thus, where the president chooses inaction, the states could take on an even greater role in helping to implement Congress's preferred policies.<sup>249</sup>

More broadly, inaction complicates the traditional debate between advocates of "cooperative" and "uncooperative" federalism. Cooperative-federalism scholars see the states as allies of the federal government.<sup>250</sup> But if the president chooses to under-enforce a particular congressional enactment, the simple account of cooperative federalism cannot hold. It can no longer be the case, after all, that the states and local governments are allies of the *entire* federal government; when the president fails to enforce the law, he is

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246. This might raise some constitutional concerns but is likely acceptable so long as *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding congressional power to limit the president's control over certain administrative agencies), remains good law. Of course, other concerns may prompt the president to choose not to act even where Congress threatens to make an end run around his executive authority—there is some evidence that President Obama knew the Republican Congress would hire an outside lawyer if he failed to defend DOMA, but he pursued this course nonetheless.

247. Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 477–98 (2012).

248. *Id.* at 471–72.

249. The states-as-safeguards solution will necessarily be limited by the doctrine of (field) preemption. In the *Arizona* case, for example, the Court struck down the state's own immigration provisions in part on the grounds that they were preempted by existing federal law, despite the fact that the president had under-enforced that law. *Arizona v. United States*, 132 S. Ct. 2492 (2012). Moreover, all of the usual concerns about commandeering apply. *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (holding that the federal government may not commandeer state officers to enforce federal statutes).

250. *See, e.g., Roderick M. Hills, Jr., The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998).

by definition at odds with Congress. If the states are to cooperate with the federal government in a world of inaction, then, they must often choose sides.

In another sense, inaction also complicates the account of those partial to uncooperative federalism—most notably Professors Gerken and Bulman-Pozen—who argue that the states can influence federal activity by asserting their own authority (the “power of the servant”) to check the federal government.<sup>251</sup> While Gerken and Bulman-Pozen see the states and local governments as challengers to federal policy, a jurisdiction may use its position as servant to pull the federal government more in line with its own preferences. But where the president chooses not to enforce a federal law, the role of the states and localities will be at once broader (in the sense that they may voice their preference by cooperating with Congress and forsaking the president) and narrower (if the state wants to signal its approval of the president’s agenda, there will be fewer opportunities to do so where the president implements his preferred policies by not acting and, further, not asking the states to act).

The recent controversy surrounding Arizona’s strict immigration law, known as S.B. 1070, usefully illustrates the role of inaction in federalism. In response to the federal government’s suit seeking to prevent the state from enforcing its own law aimed at strengthening immigration enforcement, Arizona argued that it was simply “supplement[ing]” federal immigration enforcement in order to effectuate the will of Congress.<sup>252</sup> The Justice Department, on behalf of the president, argued that, to the contrary, Arizona’s law frustrated Congress’s purpose, which was to grant the president discretion to enforce the immigration laws as he sees fit.<sup>253</sup> The key, though, is precisely that: Congress’s intent. If it was Congress’s intent that the president enforce federal immigration law to the fullest extent possible, advocates of the states-as-safeguards solution might suggest that Arizona be allowed to enforce its own law because where the president refuses to carry out Congress’s policies, the body’s power to get what it wants is at its lowest ebb. If the legislature instead intended to grant the president broad discretion, the state’s role would have to be more limited. Perhaps a better approach, then, would be to require that Congress *affirmatively ask* the states to take on a more constructive role if that is what it wants. For example, it could ask the states not to pass their own immigration laws but to agree to enforce the federal laws currently on the books. Such a solution would serve both as an information-forcing mechanism (by forcing Congress to state its intent in actionable terms) and a tool for Congress to keep the president in line (by

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251. Jessica Bulman-Pozen & Heather K. Gerken, Essay, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009); Heather K. Gerken, *Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 35 (2010).

252. Brief for Petitioners at 14–18, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2012 WL 416748, at \*14–18.

253. Brief for the United States at 13–15, *Arizona v. United States*, 132 S. Ct. 2492 (2012) (No. 11-182), 2011 WL 5548708, at \*13–15.

facilitating interaction between Congress and an alternative prosecutor: the states).

#### 4. The “Presidential Inaction” Canon

Courts have long considered it appropriate to use their interpretive prerogative to enforce under-enforced constitutional norms.<sup>254</sup> This focus on promoting structural and individual rights through statutory interpretation has led the courts to impose clear statement rules to enforce several foundational principles, including federalism,<sup>255</sup> democracy,<sup>256</sup> and due process.<sup>257</sup> Most relevant here, though, the Supreme Court has sought to enforce the separation of powers through a presumption against congressional disruption of the traditional balance of power.<sup>258</sup> If the Court has in the past interpreted statutes with the goal of protecting the separation of powers, it should be but a small step to integrate our theory of inaction into this jurisprudence. In hard cases—those in which the president uses his interpretive authority to pursue a policy that falls short of a congressional baseline or in which it is not clear what that baseline is—judges could enforce the separation-of-powers norm by placing a thumb on the scale in favor of enforcement. In this way, courts could allow Congress to avoid many of the problems outlined above while still permitting the elected branches to pursue a joint policy of under-enforcement if that is their collective goal.<sup>259</sup>

*Massachusetts v. EPA* once again may be the best example of such a case. By requiring the EPA to promulgate environmental regulations, the Court put the question of inaction back in the hands of the legislature. Had the Court instead required that Congress police the president’s decision not to

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254. See, e.g., WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 285–89 (1994); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 *VAND. L. REV.* 593 (1992).

255. See, e.g., *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 65 (1989) (“If Congress intends to alter the ‘usual constitutional balance between the States and the Federal Government,’ it must make its intention to do so ‘unmistakably clear in the language of the statute.’” (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985), *superseded by statute*, Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845)).

256. See, e.g., Richard L. Hasen, *The Democracy Canon*, 62 *STAN. L. REV.* 69 (2009) (collecting state cases in which judges have placed a thumb on the scale in favor of access to the ballot, among other democratic values).

257. See, e.g., Eskridge & Frickey, *supra* note 254, at 600–03 (arguing that the Supreme Court has enforced due process norms through its reliance on the rule of lenity and the rule favoring liberal interpretation of statutes meant to protect discrete and insular minorities).

258. *Id.* at 604–07 (discussing the Court’s presumptions against “derogation of the President’s traditional powers” and “excessive congressional delegation of its own lawmaking powers”).

259. It seems odd, at first, to hold out the courts as the last hope. After all, we have argued at some length that the courts are institutionally ill suited to combat inaction. This does not mean that judges can never step in, however, and a rule of interpretation that makes judicial involvement more likely would be at worst a wash and at best a useful tool in the anti-inaction arsenal.



regulate by passing new, more specific enabling legislation or cutting funding for one of the president's favored projects, it would have been left essentially impotent to combat the president's decision.<sup>260</sup> But rather than relying on Congress to police President Bush's decision not to act, the Court allowed room for the president to pursue his policy *if Congress acquiesced* through a clearer statement that such inaction was statutorily acceptable. A presumption in favor of enforcement would go a long way toward ameliorating the structural bias at the heart of the constitutional case against inaction.

#### CONCLUSION

We live in an era of "presidential lawmaking."<sup>261</sup> This insight is not new. Theorists, however, have failed to realize that presidential lawmaking can take a particularly insidious form: the decision *not to enforce* laws that Congress has duly passed. Once one recognizes this shortcoming, it becomes possible to identify new rules, institutions, and doctrine that would more effectively serve the goals of the separation of powers.

Recognizing and beginning to combat unchecked presidential inaction are even more important as the modern government has become one of "presidential administration."<sup>262</sup> Strong presidents who are willing, and now able, to make policy through their agencies will only exacerbate the pathology of presidential inaction, rendering antiquated our notion of the president and Congress in dialogue.

It is only a small step, then, to realize the challenge unchecked presidential inaction poses for Madison's ideal of separated powers. If the modern government is to be one of true checks and balances, then scholars, judges, and legislators alike will have to recognize that inaction is a real and growing problem in need of a solution.

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260. See *supra* Section III.B.

261. Greene, *supra* note 9, at 123–24.

262. Kagan, *supra* note 190, at 2246.