

The Extra-legislative Veto

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Presidents check statutory mandates outside the legislative process in a variety of ways. They may hold up implementation of a law, decide not to enforce a law, or decline to defend a law, to name just a few. This Article argues that these “extra-legislative vetoes” serve functions similar to the President’s Article I veto, only with respect to enacted law. The extra-legislative veto (1) requires that legal mandates maintain a threshold level of political support, (2) allows the President to protect the people from laws that the President views as bad, and (3) encourages deliberation regarding controversial policies. But the extra-legislative veto also poses dangers to our Madisonian system by virtue of the distinct institutional constraints on its exercise. A unilateral check on congressional acts threatens to transform the President into a “Legislator in Chief” and undermine the stability and transparency of government policy.

Based on this reconceptualization of the extra-legislative veto, this Article reviews some of its most prominent forms. The Article concludes that decisions not to defend a statute provide some of the benefits of an extra-legislative veto without raising significant concerns with transparency, executive lawmaking, or policy destabilization. Enforcement policies provide greater deliberation-forcing benefits, political responsiveness, and protection from “bad law” but also increase executive lawmaking. Although judicial review sets boundaries on policy instability, it does little to ensure the transparency of enforcement discretion. Conversely, judicial review of rulemaking does a better job promoting the transparency of statutory implementation but limits the extra-legislative veto’s political responsiveness. Finally, the presidential nonenforcement theory advanced by some scholars would dramatically increase the President’s power to protect the people from unconstitutional laws but would risk greater executive lawmaking and oscillations in policy, without the same deliberative benefits or political responsiveness of other extra-legislative vetoes. Accordingly, this Article proposes institutional mechanisms to preserve Congress’s voice in inter-branch policy deliberation while leveraging the extra-legislative veto’s power to protect the people from “laws gone bad.”

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TABLE OF CONTENTS

INTRODUCTION	353
I. EXTRA-LEGISLATIVE VETOES	359
A. DECLINING TO DEFEND A LAW: THE CASE OF DOMA	362
B. EXERCISING ENFORCEMENT DISCRETION: THE DACA PROGRAM ...	368
C. CHECKING STATUTORY IMPLEMENTATION: OIRA REVIEW	370
II. THE FUNCTIONS AND RISKS OF THE EXTRA-LEGISLATIVE VETO	372
A. THE CONSTITUTIONAL VETO POWER, PAST AND PRESENT	373
B. THE BENEFITS OF AN EXTRA-LEGISLATIVE VETO	376
1. Requiring the Executive's Support of Government Policies	376
2. Protecting the People from Laws Gone Bad	381
<i>a. Adapting to Fundamental Social, Economic, and Political Change</i>	381
<i>b. Curing the Poor Fit of General Laws to Specific Cases</i>	382
<i>c. Prioritizing Among Competing Goals</i>	385
3. Forcing Congressional Deliberation	386
4. Protecting the President from Past Enacting Coalitions ..	386
C. THE RISKS PRESENTED BY THE EXTRA-LEGISLATIVE VETO	387
1. The Threat of Executive Lawmaking	387
<i>a. Altering Rights, Duties, and Relations</i>	387
<i>b. Upsetting Legislative Bargains</i>	389
2. Undermining the Transparency of Changes in Policy ...	390
<i>a. Stealth Repeals to Please Special Interests</i>	391
<i>b. Increasing Congressional Monitoring Costs</i>	391
3. Destabilizing Government Policy	392
III. JUDICIAL REVIEW OF EXTRA-LEGISLATIVE VETOES	393
A. DECISIONS NOT TO DEFEND A STATUTE	394
B. DECISIONS NOT TO ENFORCE A STATUTE	394

C. DECISIONS NOT TO IMPLEMENT A STATUTE THROUGH RULE-
MAKING 397

IV. ENHANCING THE BENEFITS AND MITIGATING THE RISKS OF THE
EXTRA-LEGISLATIVE VETO 401

A. ENSURING THE TRANSPARENCY OF ENFORCEMENT POLICIES 401

 1. Reserving the Presumption Against Reviewability for
 Transparent Enforcement Policies 401

 2. Precommitting the Executive Branch to “Best Prac-
 tices” 402

 3. Enhancing Transparency Through Framework
 Statutes 404

B. GRANTING THE EXECUTIVE JURISDICTIONAL DISCRETION 404

V. THE STRONG PRESIDENTIAL NONENFORCEMENT THEORY 407

CONCLUSION 411

[W]e’ve got three branches of government. Congress passes the law. The executive branch’s job is to enforce and implement those laws. And then the judiciary has to interpret the laws. . . . [F]or me to simply . . . ignore those congressional mandates would not conform with my appropriate role as President.¹

INTRODUCTION

Each president brings his² own perspective to the statutory mandates he inherits from the political coalitions of the past. Inevitably he will disagree with some of their choices. Indeed, presidential candidates often campaign on repealing unpopular laws. Candidate Barack Obama campaigned in 2008 on repealing “Don’t Ask, Don’t Tell” and the Defense of Marriage Act (DOMA);³ candidate Mitt Romney campaigned in 2012 on repealing “Obamacare.”⁴ But once in office, presidents face a stark reality: they have far more power to prevent the

1. President Barack Obama, Remarks by the President at the Univision Town Hall (Mar. 28, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/03/28/remarks-president-univision-town-hall>.

2. This Article uses the male pronoun to refer to the President because to date, they have all been men.

3. Open Letter from Barack Obama to the LGBT Cmty. (Feb. 28, 2008), available at <http://www.towleroad.com/2008/02/barack-obama-wr.html>.

4. Ian Gray & Amanda Terkel *Mitt Romney’s Day One Promises: Immigration Reform, Keystone XL Pipeline, Repeal Obamacare*, HUFFINGTON POST (Oct. 16, 2012), http://www.huffingtonpost.com/2012/10/16/mitt-romney-day-one-promises_n_1968893.html (same); ‘I Will,’ He Said: Romney’s Campaign Promises, N.Y. TIMES (Sept. 6, 2012), <http://www.nytimes.com/interactive/2012/08/30/us/politics/romney->

enactment of proposed legislation than to repeal existing law. Though the Constitution grants the President a limited veto power as part of the legislative process,⁵ it commands the President to “take Care that [enacted] Laws be faithfully executed”;⁶ the Founders did not furnish the President with the power to annul existing laws without seeking new legislation from Congress.⁷

But it can be slow and difficult to repeal laws through the legislative process.⁸ The constitutional requirements of bicameralism and presentment⁹ as well as numerous congressionally created “veto gates”¹⁰ stand in the way of most significant legislation. Procedural innovations such as the filibuster¹¹ allow a minority in one house to block repeals favored by a majority of both houses and the President.¹² Thus, enacted law can persist long after it has lost the support of the people and the political branches.¹³ Consequently, modern presidents turn to what this Article calls the “extra-legislative veto.”¹⁴

The extra-legislative veto comprises a variety of practices used by presidents to check or weaken statutory mandates outside the legislative process. It includes decisions not to enforce the law, decisions not to implement the law, and decisions not to defend the law. It may be motivated by the President’s constitutional views, his policy agenda, or simple electoral politics.

Consider the following high-profile examples from President Obama’s first

i-will.html (promising to issue executive waivers from Obamacare to all fifty states on the first day of his administration).

5. U.S. CONST. art. I, § 7.

6. U.S. CONST. art. II, § 3.

7. By means of the pardon power, however, the Founders did expressly provide the President with a check on the application of criminal laws in individual cases. See U.S. CONST. art. II, § 2 (giving the President the power “to grant Reprieves and Pardons for Offences against the United States”).

8. See ABNER J. MIKVA & ERIC LANE, LEGISLATIVE PROCESS 677–85 (2d ed. 2002). *INS v. Chadha*, 462 U.S. 919, 959 (1983) (“The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . .”). It took twenty years and four presidential administrations, for example, to repeal the Tenure of Office Act, which President Andrew Jackson was impeached for ignoring. See Christopher N. May, *Presidential Defiance of “Unconstitutional” Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 969 (1994).

9. U.S. CONST. art. I, § 7.

10. William N. Eskridge Jr., *Vetogates and American Public Law*, J.L. ECON. & ORG. 1, 2–6 (Apr. 19, 2012), <http://0-jleo.oxfordjournals.org.gull.georgetown.edu/content/early/2012/04/19/jleo.ews009.full.pdf+html>. McNollgast, *Legislative Intent: The Use of Positive Political Theory in Statutory Interpretation*, 57 LAW & CONTEMP. PROBS. 3, 16–18 (1994) [hereinafter McNollgast, *Legislative Intent*]; McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 720–21 (1992) [hereinafter McNollgast, *Positive Canons*].

11. Ezra Klein, *The History of the Filibuster, in One Graph*, WASH. POST (May 15, 2012), http://www.washingtonpost.com/blogs/wonkblog/post/the-history-of-the-filibuster-in-one-graph/2012/05/15/gIQAVHfORU_blog.html.

12. The repeal of Don’t Ask, Don’t Tell was repeatedly blocked by a minority in the Senate despite the support for repeal by both the President and the House. See, e.g., Steve Benen, *Senate GOP Blocks DADT Repeal, Military Spending*, WASH. MONTHLY (Sept. 21, 2010), http://www.washingtonmonthly.com/archives/individual/2010_09/025773.php.

13. See *infra* Part II.

14. I analogized prolonged agency foot-dragging to an extra-legislative veto in Michael D. Sant’Ambrogio, *Agency Delays*, 79 GEO. WASH. L. REV. 1381, 1396–97 (2011).

term:

- In February 2011, President Obama instructed the Department of Justice (DOJ) to abandon its defense of DOMA against legal challenges because the President believed the Act was unconstitutional.¹⁵
- In September 2011, President Obama blocked a National Ambient Air Quality Standard for ground ozone that the Environmental Protection Agency (EPA) concluded was required by the Clean Air Act, citing the need to reduce regulatory burdens during a weak economic recovery.¹⁶
- In June 2012, President Obama announced the Deferred Action for Childhood Arrivals (DACA) program, directing the Department of Homeland Security (DHS) to suspend deportations under the Immigration and Nationality Act of a then-estimated 800,000 undocumented immigrants who came to the United States as children.¹⁷

The extra-legislative veto is by no means confined to the Obama Administration or to Democratic presidents. Republican presidents also make avid use of it.¹⁸ President George W. Bush, for example, blocked the EPA's regulation of greenhouse-gas emissions from new motor vehicles under the Clean Air Act,¹⁹ and the Bush DOJ did not file a single lawsuit alleging a pattern or practice of discrimination against African Americans during his first term.²⁰

The extra-legislative veto raises difficult questions for our Madisonian system of separation of powers and the rule of law. Once legislation has run the gauntlet of bicameralism and presentment, it is the law of the land.²¹ As Justice Robert H. Jackson famously explained in *Youngstown Sheet & Tube Co. v. Sawyer*, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."²² Indeed, before reversing course, President Obama defended DHS's deportations under the Immigration and Nationality Act by citing his constitutional duty to enforce the laws that Congress passed.²³

Scholars have debated the constitutionality and wisdom of various forms of

15. See *infra* note 80 and accompanying text.

16. See *infra* notes 137–38 and accompanying text.

17. See *infra* note 122 and accompanying text.

18. Professor May's exhaustive survey of presidential administrations found that between 1900 and 1992, five Republican presidents and four Democratic presidents had refused to comply with a law they alleged was unconstitutional, the strongest form of an extra-legislative veto. May, *supra* note 8, at 998–99.

19. See *infra* notes 141–46 and accompanying text.

20. CITIZENS' COMM'N ON CIVIL RIGHTS & CTR. FOR AM. PROGRESS, *THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION* 29 (William L. Taylor et al. eds., 2007), available at http://www.americanprogress.org/issues/2007/03/pdf/civil_rights_report.pdf.

21. U.S. CONST. art. II, § 3.

22. 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

23. See Obama, *supra* note 1.

the extra-legislative veto.²⁴ Yet they have not considered more generally the functions that an executive check on existing law might serve in our Madisonian system. This Article seeks to fill this gap by developing an analytical framework for assessing the normative desirability of an executive check on enacted law. It asks: What functions might an executive check on enacted law serve? What risks does it pose? How might we design institutional structures to harness the extra-legislative veto's potential benefits while minimizing its risks?

This Article argues that the extra-legislative veto is best understood as serving many of the same functions as the veto power the Framers gave the President in Article I of the Constitution,²⁵ only with respect to existing law. These functional similarities illuminate the potential normative benefits of an extra-legislative veto. The Founders gave the President a limited veto power as part of the legislative process (1) to provide the Executive with a shield against encroachments by the Legislature, (2) to protect the people from laws the President views as bad, and (3) to encourage greater deliberation on important government policies.²⁶ The constitutional veto accomplishes these goals by requiring the President's approval or—if the President objects—two rounds of

24. Most of this debate has focused on the President's enforcement obligations under the Constitution. See, e.g., Daniel J. Crooks III, *In Defense of the Obama Administration's Non-Defense of DOMA*, 4 LEGIS. & POL'Y BRIEF 33, 61 (2012) (arguing that the Obama Administration's decision not to defend DOMA was proper); 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, 784–85 (2013) (arguing that Obama's DACA program is unconstitutional); Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 509 (2012) (arguing that the President has no duty to defend or enforce laws he deems unconstitutional); Brianne J. Gorod, *Defending Executive Nondefense and the Principal-Agent Problem*, 106 NW. U. L. REV. 1201, 1238–44 (2012) (“[T]here are arguments that the Executive can—and even should—decline to enforce laws that it deems unconstitutional.”); Aziz Z. Huq, *Enforcing (But Not Defending) ‘Unconstitutional’ Laws*, 98 VA. L. REV. 1001, 1088 (2012) (“[T]here is a case for thinking that enforcement-litigation gaps should be presumptively favored when there is an Article II issue in play, and presumptively disfavored for other sorts of constitutional questions.”); Dawn E. Johnsen, *Presidential Non-enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7, 10 (2000) (proposing a context-dependent approach to presidential nonenforcement decisions); Dawn E. Johnsen, *The Obama Administration's Decision to Defend Constitutional Equality Rather than the Defense of Marriage Act*, 81 FORDHAM L. REV. 599, 605 (2012) (“Routine unilateral presidential nonenforcement would undermine Congress's core power and constitutionally preferred mechanisms for Presidents to promote their constitutional views.”); Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1303–04 (1996) (arguing that the President should refuse to enforce statutes he believes are unconstitutional); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373, 379 (1994) (“I think it is deeply paradoxical to argue that the President is under a duty to enforce what he or she believes to be an unconstitutional statute.”); May, *supra* note 8, at 986–88 (arguing that presidential noncompliance with allegedly unconstitutional laws is generally improper); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1202–05 (2012) (arguing that the Executive should generally defend congressional statutes); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (“The President's power to interpret the law is, within the sphere of his powers, precisely coordinate and coequal in authority to the Supreme Court's”).

25. U.S. CONST. art. I, § 7.

26. See *infra* section II.A.

congressional deliberation and a supermajority of each house to enact new law.²⁷

But once the constitutional defenses against the enactment of bad law are breached, these same defenses, along with subsequent congressional procedural innovations, make it exceedingly difficult to repeal bad laws, even when they have lost popular support and could not be reenacted. The extra-legislative veto is the Executive's response to this structural dilemma, allowing the President to check statutory policies that have lost public and political support. In this way, the extra-legislative veto (1) protects the sitting President from the choices of prior enacting coalitions, (2) rescues the people from "laws gone bad" (that is, laws that have unintended consequences or have come to be seen as odious), and (3) encourages deliberation concerning contested government policies.

At the same time, the distinct institutional constraints on the extra-legislative veto reveal both its limits and its risks. An executive check on statutory mandates threatens to displace Congress with a "Legislator in Chief," who unilaterally alters "legal rights, duties, and relations"²⁸ and upsets legislative bargains. In addition, unilateral executive action outside the constitutionally prescribed lawmaking process may undermine the transparency of changes in government policy, creating opportunities for "stealth repeals" to please special interests, rather than exploiting the President's unique national perspective. Moreover, the extra-legislative veto may destabilize the continuity of policies and programs dependent upon the grace of each new presidential administration. In a highly partisan political environment, it also inevitably raises questions about the legitimacy and legality of the President's actions.

Accordingly, the normative desirability of extra-legislative vetoes and their institutional constraints is a function of their ability to facilitate the benefits of an executive veto while enhancing the transparency of changes in policy, preserving Congress's supremacy in lawmaking, and avoiding excessive policy destabilization.

Reconceptualizing the extra-legislative veto in this way has important implications for several current debates in administrative and constitutional law. First, it suggests we should fear neither executive decisions not to defend a statute nor the exercise of enforcement discretion. Decisions not to defend a statute allow the President to respond to political and social change, weaken what he views as bad laws, and invite deliberation of controversial policies, without the danger of executive lawmaking or destabilization of government policy. Enforcement discretion, so long as it is transparent, provides even more potential benefits. Though it also entails greater executive lawmaking and policy fluctuations, judicial review keeps these in check and provides Congress with a means of responding to the Executive's veto. Thus, rather than reducing the Executive's enforcement discretion, we should focus on improving its transparency.

27. U.S. CONST. art. I, § 7.

28. *INS v. Chadha*, 462 U.S. 919, 952 (1983) (defining legislative power).

The institution in the best position to improve the use of enforcement discretion is of course the Executive itself. Therefore, this Article advocates executive precommitment to certain “best practices” designed to ensure the transparency and deliberation-forcing benefits of the extra-legislative veto. For example, agencies should submit proposed enforcement policies to the White House and Congress in advance of their implementation to avoid stealth repeals, lower congressional monitoring costs, and give Congress the opportunity to deliberate changes in government policy *ex ante*. In addition, formal nonenforcement policies should be time limited, periodically reviewed, and open to public comment. Consequently, enforcement discretion would not only empower the Executive but also would enhance the quality of congressional and public deliberation over further legislative action. In this way, the Article contributes to the literature advocating “internal checks and balances” within the Executive Branch in light of the shift in locus of lawmaking away from Congress.²⁹

Second, the framework developed herein provides additional support for the Supreme Court’s recent decision to grant agencies *Chevron* deference for interpretations of their statutory jurisdiction, or jurisdictional discretion.³⁰ Allowing the Executive to expand and contract jurisdiction where congressional intent is vague permits some of the functional benefits of the extra-legislative veto and will generally be transparent. Moreover, judicial review limits the scope of executive lawmaking and policy oscillation.

Third, analogizing to the Article I veto suggests that the provocative presidential nonenforcement theory recently advanced by Professors Robert Delahunty, Neal Devins, Saikrishna Prakash, John Yoo, and others³¹ is both too strong and too weak. These scholars contend that the President should not enforce any law he deems unconstitutional and should only abide by judicial conclusions to the contrary in individual cases.³² Such an extra-legislative veto is too strong because it allows the President to use his constitutional vision to rewrite laws he finds objectionable without any direct congressional check. But it is also too weak because an extra-legislative veto, like the Article I veto power, is useful

29. See, e.g., Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 246 (2007); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2232 (2006); Anne Joseph O’Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CALIF. L. REV. 1655, 1721 (2006).

30. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013) (holding that a court should apply *Chevron* to review an agency’s determination of its own jurisdiction).

31. See Delahunty & Yoo, *supra* note 24, at 785; Devins & Prakash, *supra* note 24, at 509. Although these scholars have reinvigorated and developed the argument that presidents should not enforce laws they believe are unconstitutional, the basic idea has been around for some time. See, e.g., Lawson & Moore, *supra* note 24, at 1303–04; Levinson, *supra* note 24, at 378–79; Paulsen, *supra* note 24, at 221. Indeed, President Andrew Johnson was impeached in 1868 for ignoring the Tenure of Office Act, which he believed unconstitutionally interfered with his removal power. See generally MICHAEL LES BENEDICT, *THE IMPEACHMENT AND TRIAL OF ANDREW JOHNSON* (1973).

32. See Delahunty & Yoo, *supra* note 24, at 836 n.363; Devins & Prakash, *supra* note 24, at 574.

outside the constitutional sphere. Thus, nonenforcement would not reach all bad laws nor facilitate interbranch deliberation over controversial policies—a core function of the extra-legislative veto. Rather, presidential nonenforcement creates a dialogue between the Executive and the Judiciary in which Congress is a mere bystander.

This Article proceeds in five parts. Part I examines the most common ways in which presidents exercise extra-legislative vetoes, focusing on several high-profile examples from the George W. Bush and Obama Administrations. Part II analyzes the normative desirability of an extra-legislative-veto power, including its risks and benefits. Part III then reframes the Supreme Court’s review of extra-legislative vetoes in light of these insights. Next, Part IV uses the framework developed in Part II to propose mechanisms to increase the benefits of discrete forms of the extra-legislative veto while mitigating their risks. Finally, Part V explores the implications of this Article’s reconceptualization of the extra-legislative veto for the presidential nonenforcement theory.

I. EXTRA-LEGISLATIVE VETOES

The President plays a significant role in the enactment of new legislation. The Constitution charges him with recommending to Congress “such Measures as he shall judge necessary and expedient”³³ and requires that all bills passed by Congress be presented to the President before becoming law.³⁴ The President may within ten days (Sundays excepted) return the bill along with his objections to the house of Congress in which it originated.³⁵ This is the “regular” veto, and it is subject to a congressional override if two-thirds of each house votes to approve the bill after reconsideration.³⁶ Alternatively, if Congress adjourns during the ten day period, the President may exercise a “pocket” veto by doing nothing.³⁷ The pocket veto is not subject to a congressional override and the bill must be reintroduced in Congress.³⁸ The veto provides the President with a formal, albeit limited, check on legislation. In addition, the mere threat of a veto may encourage Congress to modify legislation before it reaches the President’s desk.³⁹

33. U.S. CONST. art. II, § 3.

34. U.S. CONST. art. I, § 7, cl. 2.

35. *Id.*

36. *Id.*

37. *Id.* If the President does not return the bill to Congress within ten days and Congress does not adjourn, the bill becomes law as if the President had signed it. *Id.*

38. Robert J. Spitzer, *The “Protective Return” Pocket Veto: Presidential Aggrandizement of Constitutional Power*, 31 *PRESIDENTIAL STUD. Q.* 720, 721 (2001).

39. CHARLES M. CAMERON, *VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER* 188 (Cambridge Univ. Press 2000) (finding that veto threats produced congressional concessions 90% of the time based on a random sampling of initially passed, nonminor bills presented to the President between 1945 and 1992); ROBERT J. SPITZER, *THE PRESIDENTIAL VETO: TOUCHSTONE OF THE AMERICAN PRESIDENCY* 101–03 (1988) (reviewing the effects of veto threats). Spitzer found that of fifty-six bills subject to public veto threats between 1961 and 1986, thirteen died in Congress and sixteen were modified before

The veto is a powerful yet blunt weapon. The President must reject or approve the legislation presented to him in whole.⁴⁰ This creates difficult choices because Congress has a habit of combining unrelated legislation in a single bill, and the President may like some parts of the bill but not others.⁴¹ One way presidents have tried to mitigate this difficulty is by issuing signing statements claiming the authority or intent to disregard objectionable provisions contained in legislation that the President otherwise feels compelled to sign.⁴² But signing statements are controversial and do not provide any independent authority for the President to disregard the laws he signs.⁴³

In contrast to the President's power to shape and block new legislation, the President has no formal constitutional power to annul existing legislation.⁴⁴ To the contrary, the Constitution commands the President to "take Care that the Laws be faithfully executed."⁴⁵ Yet presidents may strongly oppose certain statutory mandates, and presidential candidates frequently campaign against objectionable laws. In 2008, candidate Barack Obama promised to repeal DOMA and DADT.⁴⁶ In 2012, candidate Mitt Romney promised to dismantle the Affordable Care Act, commonly known as "Obamacare."⁴⁷ Indeed, as the rise in signing statements suggests,⁴⁸ presidents may even oppose aspects of legislation they sign into law.

The President can of course attempt to repeal or amend objectionable laws through new legislative efforts. But this will often prove difficult. Bicameralism

passage to accommodate the President. SPITZER, *supra*, at 103 tbl.3-4. In three cases, the President backed down and the bill was enacted unchanged. *Id.* In only five cases was the bill passed without change and Congress was able to override the President's veto. *Id.*

40. *Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998) (holding that the Line Item Veto Act violated the Presentment Clause in Article I, Section 7, Clause 2 of the U.S. Constitution).

41. *See, e.g.*, Tim Weiner, *Unrelated Spending Divides Conferees on Emergency Bills*, N.Y. TIMES (May 12, 1999), <http://www.nytimes.com/1999/05/12/us/unrelated-spending-divides-conferees-on-emergency-bills.html>.

42. *See, e.g.*, Memorandum from Office of Legal Counsel, Dep't of Justice, to Bernard N. Nussbaum, Counsel to the President, *The Legal Significance of Presidential Signing Statements* (Nov. 3, 1993), available at <http://www.justice.gov/olc/signing.htm>. A list of presidential signing statements and their texts is maintained by Joyce Green, *List of Laws Subjected to Signing Statements*, PRESIDENTIAL SIGNING STATEMENTS, <http://www.coherentbabble.com/listLAWSall.htm> (last visited Sept. 15, 2013). Of course, the difficulty of vetoing legislation is another reason presidents turn to the extra-legislative veto.

43. The dramatic increase in signing statements by President George W. Bush, *see* Charlie Savage, *Obama Looks to Limit Impact of Tactic Bush Used to Sidestep New Laws*, N.Y. TIMES, Mar. 10, 2009, at A12, ultimately led the American Bar Association to denounce their use to disregard parts of a law the President signs, *see* ABA TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE, REPORT AND RECOMMENDATION (2006), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2006/annual/dailyjournal/20060823144113.authcheckdam.pdf>. Signing statements have yet to receive the Court's blessing, and President Obama has issued far fewer of them than his predecessor. *See* Green, *supra* note 42.

44. However, the President has the power "to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment." U.S. CONST. art. II, § 2.

45. U.S. CONST. art. II, § 3.

46. *See supra* note 3 and accompanying text.

47. *See supra* note 4.

48. *See supra* note 42 and accompanying text.

and presentment, along with numerous congressional veto gates, make repeal far from certain, even for laws that have lost popular support and could never be reenacted.⁴⁹ Moreover, presidents have a finite amount of time to devote to a seemingly infinite number of matters under their supervision and must focus their attention on their most important priorities.⁵⁰ There is little doubt that a President Romney would have attempted to repeal Obamacare; it is less certain whether he would have aggressively sought to repeal the Davis–Bacon Act, another campaign commitment.⁵¹ Moreover, as the President spends political capital pushing his most important priorities through Congress, there may be little left to spend on other campaign promises.⁵² Consequently, presidents block statutory mandates contrary to their agenda using the extra-legislative veto.

The extra-legislative veto is an action taken outside the legislative process with the goal of checking, weakening, or curbing a statutory mandate. The extra-legislative veto comes in a variety of forms and strengths. The President can exercise an extra-legislative veto by not defending a law when its constitutionality is challenged in court;⁵³ by not enforcing a law,⁵⁴ either in whole or in part;⁵⁵ by not engaging in rulemaking necessary to implement a law;⁵⁶ by withholding funds for a statutory goal;⁵⁷ by waiving a regulatory requirement;⁵⁸ by interpreting a law narrowly to limit its jurisdiction;⁵⁹ or by plain, old foot-dragging.⁶⁰ The President's veto may be motivated by constitutional principles,⁶¹ policy preferences,⁶² or simple electoral politics.⁶³

This Part illustrates a few of the most important means by which presidents

49. See *infra* section II.B.1.

50. Matthew Eshbaugh-Soha, *The Politics of Presidential Agendas*, 58 POL. RES. Q. 257, 266 (2005).

51. See *Mitt Romney's Day One Promises*, *supra* note 4. The Davis–Bacon Act requires that contractors and subcontractors on federal construction projects pay qualified employees the prevailing wage rate for their job classification as determined by the Secretary of Labor. 40 U.S.C. § 3142(b) (2006).

52. For discussion of DADT and DOMA, see *infra* section I.A.

53. See *infra* section I.A.

54. See *infra* section I.C.

55. See *infra* sections I.A–B.

56. See *infra* section I.C.

57. For example, after campaigning in 2008 to shut down Yucca Mountain as a site for storing nuclear waste, President Obama's first budget proposed that Department of Energy spending on Yucca Mountain "be scaled back to those costs necessary to answer inquiries from the Nuclear Regulatory Commission, while the Administration devises a new strategy toward nuclear waste disposal." OFFICE OF MGMT. & BUDGET, A NEW ERA OF RESPONSIBILITY 63, 65 (2009), available at http://www.whitehouse.gov/sites/default/files/omb/assets/fy2010_new_era/A_New_Era_of_Responsibility2.pdf; see Keith Rogers, *Yucca Critic Wants Clarity*, LAS VEGAS REV.-J. (Nov. 11, 2009), <http://www.lvrj.com/news/yucca-critic-wants-clarity>. For an insightful analysis of the conflict between the Nuclear Regulatory Commission and the Department of Energy in the Yucca Mountain saga, see Emily Hammond Meazell, *Presidential Control, Expertise, and the Deference Dilemma*, 61 DUKE L.J. 1763, 1782–90 (2012).

58. See, e.g., Rebecca Berg, *Shift in Welfare Policy Draws G.O.P. Protests*, N.Y. TIMES, July 18, 2012, at A17.

59. See *infra* section I.C.

60. See Sant' Ambrogio, *supra* note 14, at 1396–97.

61. For discussion of DOMA, see *infra* section I.A.

62. For discussion of the DACA program, see *infra* section I.B.

exercise an extra-legislative veto using examples from recent presidential administrations. Rather than seeking to present an exhaustive survey, the objective is to provide a foundation to assess the potential benefits and risks of a presidential veto of enacted law.

A. DECLINING TO DEFEND A LAW: THE CASE OF DOMA

President Obama campaigned in 2008 on repealing the Defense of Marriage Act (DOMA).⁶⁴ Enacted in 1996, DOMA (1) declared that no state is required to recognize any public acts concerning same-sex marriages recognized by another state and (2) defined “marriage” for purposes of federal law as “a legal union between one man and one woman as husband and wife.”⁶⁵ The national debate over same-sex marriage began in 1993, when the Hawaii Supreme Court held that the Equal Protection Clause of Hawaii’s Constitution required the state to demonstrate that its ban on same-sex marriage was narrowly tailored to achieve a compelling state interest.⁶⁶ After the court remanded the case to the trial court, some asserted that the U.S. Constitution’s Full Faith and Credit Clause would require all states to recognize same-sex marriages if they became legal in Hawaii.⁶⁷ The issue became highly politicized as the 1996 presidential election approached.⁶⁸ The legislation was introduced in Congress in May 1996, passed by overwhelming majorities of both parties in September, and promptly signed into law by President Bill Clinton.⁶⁹

Public opinion shifted dramatically in the years following the passage of DOMA, however. In 1996, according to a Gallup poll, only 27% of Americans supported same-sex marriage.⁷⁰ By 2010, according to the same Gallup poll, the percentage had risen to 44%.⁷¹ Moreover, a CNN poll conducted in 2010 found for the first time that a narrow majority of Americans supported same-sex

63. For discussion of the National Ambient Air Quality Standard for ground ozone, see *infra* section I.C.

64. See Open Letter from Barack Obama to the LGBT Community, *supra* note 3.

65. Defense of Marriage Act, Pub. L. No. 104-199, §§ 2–3, 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. § 7 (2006) and 28 U.S.C. § 1738C (2006)), *invalidated by* United States v. Windsor, 133 S. Ct. 2675 (2013).

66. Baehr v. Lewin, 852 P.2d 44, 67, 74 (Haw. 1993); see also David L. Chambers, *Couples: Marriage, Civil Union, and Domestic Partnership*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 281, 291–92 (John D’Emilio et al. eds., 2000).

67. Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CALIF. L. REV. 1153, 1203 (2009).

68. *Id.* at 1186.

69. For a historical account of DOMA and subsequent developments concerning marriage equality in Hawaii and the nation, see Michael D. Sant’Ambrogio & Sylvia A. Law, *Baehr v. Lewin and the Long Road to Marriage Equality*, 33 U. HAW. L. REV. 705, 721–22 (2011). The House approved the bill 342 to 67; the Senate approved it 85 to 14. *Id.* at 722 n.145.

70. Jeffrey M. Jones, *Americans’ Opposition to Gay Marriage Eases Slightly*, GALLUP (May 24, 2010), <http://www.gallup.com/poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx>.

71. *Id.*

marriage.⁷² When President Obama was elected in 2008, a majority in just three states supported marriage equality; by 2011, a majority in eleven states did.⁷³

Nevertheless, President Obama's commitment to repealing DOMA took a back seat during his first year in office to higher legislative priorities, including the American Recovery and Reinvestment Act of 2009 (the stimulus)⁷⁴ and the Patient Protection and Affordable Care Act (commonly known as Obama-care).⁷⁵ Then a strategic decision was made to first seek repeal of the military's Don't Ask, Don't Tell (DADT) policy,⁷⁶ another campaign commitment,⁷⁷ because DADT was perceived to have less support than DOMA.⁷⁸ DADT was ultimately repealed on December 21, 2010, during the lame-duck session of the 111th Congress.⁷⁹ But soon thereafter, the House passed to Republican control, making repeal of DOMA through the legislative process a nonstarter.

Two months later, on February 23, 2011, Attorney General Eric Holder announced that he and President Obama had concluded that DOMA was unconstitutional and therefore the DOJ would no longer defend the law against constitutional challenges.⁸⁰ The Obama DOJ had initially defended the law, despite strong opposition from many of President Obama's constituents.⁸¹ But by 2011, this position had become untenable.⁸² The Obama DOJ's defense of DOMA was driving a wedge between the President and an important Democratic constituency that favored marriage equality.⁸³

72. *Americans Split Evenly on Gay Marriage*, CNN (Aug. 11, 2010), <http://politicalticker.blogs.cnn.com/2010/08/11/americans-split-evenly-on-gay-marriage/>.

73. *Id.*

74. Pub. L. No. 111-5, 123 Stat. 115.

75. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 19 U.S.C., 20 U.S.C., 26 U.S.C. & 42 U.S.C.). *But see* Proclamation No. 8529, 75 Fed. Reg. 32,079 (June 7, 2010) (proclaiming June 2010 as Lesbian, Gay, Bisexual, and Transgender Pride Month).

76. DADT was enacted as part of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1670 (1993) (codified at 10 U.S.C. § 654 (2006)), *repealed by* Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

77. *See supra* note 64 and accompanying text.

78. Angie Drobnic Holan, *Repeal of DOMA Appears Unlikely with Republican Majority in the House*, TAMPA BAY TIMES (Nov. 4, 2010), <http://www.politifact.com/truth-o-meter/promises/obameter/promise/294/support-repeal-of-the-defense-of-marriage-act>.

79. 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?_r=1&.

80. Charlie Savage & Sheryl Gay Stolberg, *In Shift, U.S. Says Marriage Act Blocks Gay Rights*, N.Y. TIMES, Feb. 24, 2011, at A1; Letter from the Attorney Gen. to Cong. on Litig. Involving the Defense of Marriage Act (Feb. 23, 2011) [hereinafter Letter from the Attorney General], *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>.

81. There is a long tradition of the DOJ defending congressional statutes unless they intrude upon the President's constitutional powers. *See Meltzer, supra* note 24, at 1202-05 (calling it "extraordinarily unusual for the [DOJ], outside of the separation-of-powers area, not to present colorable arguments in defense of a federal statute"). Indeed, presidential nominees to positions in the DOJ are often asked if they will defend acts of Congress during their Senate confirmation hearings. *Id.* at 1218-19 & nn.156-57.

82. Charlie Savage, *Suits on Same-Sex Marriage May Force Administration to Take a Stand*, N.Y. TIMES, Jan. 29, 2011, at A14.

83. *See id.*

Of course, Attorney General Holder did not cite the changing mood of the country or the President's constituency in explaining the decision to no longer defend the law. Rather, he cited a change in the legal landscape. Specifically, the Attorney General explained that new lawsuits challenging DOMA had been filed in the Second Circuit, where the standard of review for classifications based on sexual orientation remained a question of first impression.⁸⁴ The Attorney General concluded that the Second Circuit would likely hold that gays and lesbians constitute a suspect class, triggering the application of heightened scrutiny.⁸⁵ Consequently, the DOJ could no longer defend DOMA using hypothetical rationales that might satisfy rational basis review but had to defend Congress's actual motivations for the law as "substantially related to an important government objective."⁸⁶ This, Attorney General Holder concluded, the DOJ could not do because of the numerous expressions in the congressional record of moral disapproval of gays and lesbians and their intimate relationships.⁸⁷ He explained that this was "precisely the kind of stereotype-based thinking and animus [that] the Equal Protection Clause [was] designed to guard against."⁸⁸

Although the Obama Administration declined to defend DOMA based on its view that the law was unconstitutional, the Administration vowed to continue to enforce the law until repealed or enjoined by court order.⁸⁹ Meanwhile, the House of Representatives quickly stepped in to defend DOMA.⁹⁰ Ultimately, the Supreme Court held that Section 3 of DOMA, which precluded federal recognition of same-sex marriages recognized by the states, was unconstitutional.⁹¹

President Obama's decision not to defend DOMA reinvigorated a debate about whether it is appropriate for the DOJ to abandon the defense of a duly enacted federal statute.⁹² But scholars seem to agree that, appropriate or not,

84. Letter from the Attorney General, *supra* note 80. On October 18, 2012, in an opinion written by Chief Judge Dennis Jacobs, a George H.W. Bush appointee, the Second Circuit held that intermediate scrutiny applied to classifications based on sexual orientation. *Windsor v. United States*, 699 F.3d 169, 185 (2d Cir. 2012). Thus, in retrospect, the criticism that Attorney General Holder's constitutional analysis was mere window dressing, *see infra* notes 93–95 and accompanying text, seems misplaced.

85. Letter from the Attorney General, *supra* note 80.

86. *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)).

87. *Id.*

88. *Id.*

89. *Id.* However, in September 2012, the Department of Homeland Security announced that undocumented immigrants without criminal records who are same-sex partners of American citizens are eligible to have their deportations halted based on "family relationships." Julia Preston, *Same-Sex Couples Granted Protection in Deportations*, N.Y. TIMES, Sept. 29, 2012, at A15.

90. Jennifer Steinhauer, *House Republicans Move to Uphold Marriage Act*, N.Y. TIMES, Mar. 5, 2011, at A16.

91. *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013).

92. Compare Devins & Prakash, *supra* note 24, at 509 (arguing that the President has no duty to defend or enforce laws he deems unconstitutional), and Crooks, *supra* note 24, at 61 (arguing that the Obama Administration's nondefense of DOMA is proper), with Orin Kerr, *The Executive Power Grab in the Decision Not to Defend DOMA*, VOLOKH CONSPIRACY (Feb. 23, 2011), <http://volokh.com/2011/02/>

statutes are weakened when the DOJ abandons their defense. Professor Orin Kerr suggests that the adoption of a contested constitutional theory by the Executive Branch constitutes a “power grab” at the expense of Congress⁹³: “[T]he Executive Branch essentially has the power to decide what legislation it will defend based on whatever views of the Constitution are popular or associated with that Administration.”⁹⁴ Consequently, presidential administrations will simply decline to defend whatever laws they do not like, and undefended laws will be less likely to survive judicial review.⁹⁵ Similarly, Professor Daniel Meltzer argues that from an institutional perspective, the Executive Branch generally should defend duly enacted laws of Congress.⁹⁶ Professor Meltzer suggests that Congress may not be well equipped to defend its laws, at least outside the context of Supreme Court review.⁹⁷ Whether Congress even steps in depends upon the politics of each house.⁹⁸ Moreover, without the defense of a statute at the trial level, the defenders may not be able to develop the record necessary for strong appellate review.⁹⁹ The concern of Kerr and Meltzer is that undefended statutes are more likely to be struck down as unconstitutional by the courts.

Professors Robert Delahunty, Neal Devins, Saikrishna Prakash, and John Yoo, on the other hand, argue that there is no constitutionally based duty for the President to defend statutes he believes are unconstitutional.¹⁰⁰ Quite the opposite: they contend that the President’s oath to uphold the Constitution compels him to neither defend nor enforce laws that he believes are unconstitutional, although they admit that the President must execute judicial judgments concerning the constitutionality of a statute in the particular case under review.¹⁰¹ The duty to defend, Devins and Prakash argue, is nothing more than a tool used by the DOJ to enhance its independence and status vis-à-vis Congress and the courts.¹⁰² Unlike Kerr and Meltzer, Devins and Prakash believe that presidents are unlikely to abandon many statutes because they have a “limited constitutional agenda.”¹⁰³ They calculate that from December 1975 to May 2011, the

23/the-executive-power-grab-in-the-decision-not-to-defend-DOMA (questioning the nondefense of enacted law), and Meltzer, *supra* note 24, at 1202–05 (arguing that the Executive generally should defend congressional statutes).

93. Kerr, *supra* note 92.

94. *Id.*

95. *Id.*

96. Meltzer, *supra* note 24, at 1208–27.

97. *Id.* at 1209–11.

98. *Id.* at 1211–12.

99. *Id.* at 1209–11.

100. Delahunty & Yoo, *supra* note 24, at 801; Devins & Prakash, *supra* note 24, at 532.

101. Delahunty & Yoo, *supra* note 24, at 801; Devins & Prakash, *supra* note 24, at 532; see Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1627–28 (2008).

102. Devins & Prakash, *supra* note 24, at 540–41.

103. *Id.* at 573.

DOJ decided not to defend seventy-seven statutory provisions.¹⁰⁴ Moreover, there are so many exceptions to the duty to defend that the President can already choose not to defend a statute when it suits him.¹⁰⁵ The current state of affairs merely obscures the President's constitutional vision.¹⁰⁶

Though the debate raises unresolved empirical questions about how often the President would choose not to defend congressional statutes if unconstrained by tradition, fear of congressional reprisal, and questions about its constitutionality, there is no question that such decisions do undermine the statutes abandoned by the President. First, most would-be defenders lack the resources and expertise of the DOJ.¹⁰⁷ Of course, in the case of DOMA, the House was able to hire Paul Clement, the Solicitor General during George W. Bush's second term in office.¹⁰⁸ Mr. Clement has some of the same institutional advantages—familiarity and experience with the Court—that distinguishes the DOJ from most private attorneys. But this comes at a price. Mr. Clement's defense of DOMA reportedly cost the government \$2.3 million.¹⁰⁹ Perhaps funds can be raised for a few high-profile defenses. But what if Congress had to defend scores of federal statutes? It would be politically and financially untenable for Congress to hire many Paul Clements, particularly to defend statutes such as DOMA that are vulnerable to a multiplicity of challenges because of their impact on thousands of citizens. The prestige of the DOJ and the opportunity to work on interesting high-profile cases enables the DOJ to hire the best and the brightest on the cheap. It would be expensive and wasteful for Congress to hire private attorneys on a regular basis to defend federal statutes. Alternatively, Congress itself might "lawyer up," developing its capacity to appear in court.¹¹⁰ But this would likely dilute the prestige of the legal counsel for the political branches as each office became the arm of a partisan branch of government.

Second, the line between defending and enforcing a statute may be difficult to maintain for long. Any law that the government seeks to use coercively against an individual is ripe for constitutional challenge, and this in turn will force the

104. *Id.* at 561.

105. *Id.* at 576–77.

106. *Id.* at 576.

107. Neither the Office of the Senate Legal Counsel nor the Office of General Counsel of the House of Representatives currently has the resources to participate in more than a handful of challenges to federal statutes. See Amanda Frost, *Congress in Court*, 59 UCLA L. REV. 914, 945 (2012).

108. See Felicia Sonmez, *House Raises Salary Cap for DOMA Lawyer to \$1.5 Million*, WASH. POST (Oct. 4, 2011), http://www.washingtonpost.com/blogs/2chambers/post/house-raises-salary-cap-for-doma-lawyer-to-15-million/2011/10/04/gIQUAL8biLL_blog.html.

109. See Ian Millhiser, *House Republicans Charged the American Taxpayer \$2.3 Million to Lose DOMA Case*, THINK PROGRESS (June 26, 2013), <http://thinkprogress.org/justice/2013/06/26/2219971/house-republicans-charged-the-american-taxpayer-23-million-to-lose-doma-case/?mobile=nc>. The amount authorized for the case rose from \$500,000 to \$3 million as costs "spiraled out of control . . . as the case wound its way to the Supreme Court." Walter Hickey, *John Boehner Committed Six Times as Much Government Money as He Originally Said He Would Defending DOMA*, BUS. INSIDER (Mar. 27, 2013), <http://www.businessinsider.com/house-blag-money-doma-paul-clement-2013-3>.

110. See, e.g., Frost, *supra* note 107, at 968 (arguing that Congress should become a more active participant in federal litigation).

Government to defend the law or risk its demise. Consider the Clinton Administration's decision not to defend a statutory provision that, had it not been ultimately repealed, would have required the discharge of HIV-positive members of the armed services.¹¹¹ If the Clinton Administration had decided to enforce the law by instituting discharge proceedings, some of those targeted surely would have challenged the provision's constitutionality. Unless a party steps into the shoes of the Executive and mounts a serious defense of the law, as the House did with DOMA,¹¹² a court may be reluctant to uphold such an undefended law. Moreover, judicial resolution of the matter will not suffer the usual delays of adversarial litigation. Thus, the Executive will likely not be able to enforce such a law for long, even if it formally appeals adverse judgments by lower courts and ultimately petitions for Supreme Court review, as the Obama Administration did with DOMA.

Third, the President's constitutional view may itself impact the law's success in litigation. The same day Attorney General Holder announced the President's view of DOMA, the plaintiffs in the lawsuit challenging California's referendum prohibiting same-sex marriage filed a motion to vacate the stay pending appeal of the district court's order holding Proposition 8 unconstitutional.¹¹³ The plaintiffs argued that the stay should be lifted because the Attorney General's position meant the proponents of Proposition 8 were not likely to succeed on the merits of their appeal.¹¹⁴ Thus, the President's constitutional views, though far from binding precedent, provided additional legal authority for advocates of same-sex marriage. Moreover, the Executive Branch has an enviable rate of success before the Supreme Court. The Supreme Court follows the certiorari recommendations of the Office of the Solicitor General almost 80% of the time,¹¹⁵ grants the Solicitor General's petitions for certiorari 70% of the time,¹¹⁶ and rules in favor of the government in 60% to 70% of the cases in which the government is a party.¹¹⁷ And of course the Supreme Court ultimately agreed with the Obama Administration that Section 3 of DOMA was unconsti-

111. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, repealed by Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321, 1321-30 (codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)). President Clinton announced in a signing statement that he would enforce but not defend the law while he sought its repeal. Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 PUB. PAPERS 226, 227 (Feb. 10, 1996).

112. See *supra* note 90 and accompanying text.

113. Motion to Vacate Stay Pending Appeal of Plaintiffs–Appellees Kristin M. Perry et al. at 4, *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696).

114. *Id.* at 7.

115. See David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the View of the Solicitor General*, 16 GEO. MASON L. REV. 237, 245, 276–77 (2009).

116. See Margaret Meriwether Cordray & Richard Cordray, *The Solicitor General's Changing Role in Supreme Court Litigation*, 51 B.C. L. REV. 1323, 1333 (2010).

117. See *id.* at 1334–35.

tutional. Although correlation does not equal causation,¹¹⁸ it makes sense that the Supreme Court would give greater respect to the constitutional views of a coordinate branch of government headed by the only two political officers elected by the whole nation than to the constitutional views of most parties that come before it. Indeed, the Supreme Court *sua sponte* solicits the views of the Solicitor General during the certiorari process in about a dozen cases each Term.¹¹⁹

In sum, though the decision not to defend a federal law is a weak form of the extra-legislative veto (it does not automatically implicate the enforcement or implementation of a law), like the other extra-legislative vetoes discussed herein, it comprises an action taken by the President to undermine or check a law that he opposes. Furthermore, it threatens a statute's survival without seeking legislative repeal.

B. EXERCISING ENFORCEMENT DISCRETION: THE DACA PROGRAM

The Development, Relief, and Education for Alien Minors (DREAM) Act is a legislative proposal to create a path to lawful permanent residency, and ultimately citizenship, for a category of illegal immigrants known as "the DREAM-ers," who came to this country as children and meet certain other criteria. Some version of the DREAM Act has been introduced in every congressional session since 2001,¹²⁰ and President Obama campaigned in 2008 in support of the DREAM Act.¹²¹ But after the DREAM Act died in the 112th Congress, President Obama turned to his enforcement discretion to accomplish the goals of the legislation.

On June 15, 2012, President Obama announced the Deferred Action for Childhood Arrivals (DACA) program, in which the administration would suspend deportations under the Immigration and Nationality Act (INA) of a then-estimated 800,000 undocumented immigrants who came to the United States as children.¹²² The persons eligible for "prosecutorial discretion," according to a memo issued by Secretary of Homeland Security Janet Napolitano,

118. The Executive may just be better at picking winners.

119. See Thompson & Wachtell, *supra* note 115, at 245.

120. See H.R. 1842, 112th Cong. (2011); S. 952, 112th Cong. (2011); H.R. 1751, 111th Cong. (2009); S. 729, 111th Cong. (2009); S. 2205, 110th Cong. (2007); S. 774, 110th Cong. (2007); H.R. 1275, 110th Cong. (2007); H.R. 5131, 109th Cong. (2006); S. 2075, 109th Cong. (2005); S. 1545, 108th Cong. (2003); H.R. 1684, 108th Cong. (2003); S. 1291, 107th Cong. (2002); H.R. 1918, 107th Cong. (2001).

121. Shan Carter et al., *On the Issues: Immigration*, N.Y. TIMES, available at <http://elections.nytimes.com/2008/president/issues/immigration.html> (last visited Oct. 11, 2013).

122. Julia Preston & John H. Cushman Jr., *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 16, 2012, at A1; Memorandum from Janet Napolitano, Sec'y of Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>. The number of eligible immigrants was initially estimated at 800,000 but has since been reported to be as high as 1.7 million. Julia Preston, *Young Illegal Immigrants Jump at a First Chance*, N.Y. TIMES, Aug. 16, 2012, at A1. Any immigrant who

came to the United States before the age of sixteen; had been residing in the country for at least five years preceding the announcement; were currently in school or had graduated from high school, obtained a general education development certificate, or been honorably discharged from the Coast Guard or the Armed Forces of the United States; were below the age of thirty; had not been convicted of a felony offense, a significant misdemeanor offense, or multiple misdemeanor offenses; and did not pose a threat to national security or public safety.¹²³ The criteria for deferred action are remarkably similar to the criteria used in various forms of the DREAM Act to describe the DREAMers.¹²⁴

Critics declared these actions a manifestation of the “Obama imperial presidency” and charged the President with ignoring his duty to faithfully execute the law.¹²⁵ Professor John Yoo, a lawyer in the Office of Legal Counsel (OLC) during the George W. Bush Administration, accused President Obama of “executive overreach,” writing in *National Review* that “what we have here is a president who is refusing to carry out federal law simply because he disagrees with Congress’s policy choices.”¹²⁶

Yoo is right that the DACA program is a policy choice and that President Obama is using the program to accomplish much of what he sought to achieve through the DREAM Act. No one would suggest that President Obama could unilaterally pass the DREAM Act. Can he accomplish essentially the same objectives with an enforcement policy?¹²⁷ Just fifteen months earlier in a town hall meeting, President Obama said he could not:

With respect to the notion that I can just suspend deportations[,] . . . that’s just not the case . . . There are enough laws on the books by Congress that are

entered or is present in the United States in violation of the INA is deportable. 8 U.S.C. § 1227 (2006 & Supp. V 2012).

123. Memorandum from Janet Napolitano, *supra* note 122, at 1.

124. *Cf.* H.R. 1751 (authorizing the Secretary of Homeland Security to cancel the removal of aliens who: (1) entered the United States before their sixteenth birthday and have been present in the United States for at least five years preceding enactment; (2) are of good moral character; (3) are not inadmissible or deportable under specified grounds of the INA; and (4) at the time of application, have been admitted to an institution of higher education or have earned a high school or equivalent diploma).

125. Kimberley A. Strassel, *Obama’s Imperial Presidency*, WALL ST. J. (July 5, 2012), <http://online.wsj.com/article/SB10001424052702304141204577506881495497626.html>; *see* John Yoo, *Executive Overreach*, NAT’L REV. ONLINE (June 15, 2012), <http://www.nationalreview.com/corner/303038/executive-overreach-john-yoo#>.

126. Yoo, *supra* note 125; *see* Delahunty & Yoo, *supra* note 24, at 785. While at the DOJ’s Office of Legal Counsel, Yoo defended the President’s power to authorize water boarding and other enhanced interrogation techniques often regarded as torture, *see* Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 20, 2010, at A1, and argued that President Bush was not bound by the War Crimes Act, *see* Michael Isikoff, *Memos Reveal War Crimes Warnings*, NEWSWEEK (May 16, 2004), <http://www.thedailybeast.com/newsweek/2004/05/16/memos-reveal-war-crimes-warnings.html>. But Yoo distinguishes between presidential decisions not to enforce the law based on constitutional objections and those based on policy preferences, approving of the former and disapproving of the latter. Yoo, *supra* note 125.

127. As explained below in sections III.B and IV.A, the DACA program is almost certainly legal under existing law and does not raise serious normative concerns.

very clear in terms of how we have to enforce our immigration system that for me to simply through executive order ignore those congressional mandates would not conform with my appropriate role as President.¹²⁸

The law President Obama referred to is of course the INA, which provides that aliens in certain categories, including those who entered or are present in the United States in violation of the law “shall, upon the order of the Attorney General, be removed” from the United States.¹²⁹ Nevertheless, DHS has begun issuing work authorizations to immigrants deportable under the INA.¹³⁰

Thus, enforcement discretion has the potential to be a powerful extra-legislative veto. Although the Obama Administration does not seek wholesale repeal of the INA, it has shielded a group of people from the application of the law, effectively rewriting the INA (at least temporarily) in the process.

C. CHECKING STATUTORY IMPLEMENTATION: OIRA REVIEW

Presidents have significantly increased their control over the implementation of statutes over the last three decades by centralizing review of regulatory initiatives in the Office of Information and Regulatory Affairs (OIRA) located in the White House’s Office of Management and Budget (OMB).¹³¹ All Executive Branch agencies are now required to submit proposed rules along with a

128. Obama, *supra* note 1.

129. 8 U.S.C. § 1227(a) (2006 & Supp. V 2012). Aliens are “removable” if they were (1) not admitted to the United States and were inadmissible under 8 U.S.C. § 1182 or (2) admitted to the United States but deportable under section 8 U.S.C. § 1227. 8 U.S.C. § 1229a(e)(2). Those present in the United States in violation of the immigration laws are deportable under 8 U.S.C. § 1227(a)(1)(B).

130. See Marshall Fitz et al., *The Early Success of the Deferred Action for Childhood Arrivals Policy*, *CTR. FOR AM. PROGRESS* (Oct. 26, 2012), <http://www.americanprogress.org/issues/immigration/news/2012/10/26/43051/the-early-success-of-the-deferred-action-for-childhood-arrivals-policy>.

131. For a discussion of the use of executive orders to assert executive control over the administrative state, see Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 *COLUM. L. REV.* 1260, 1263–64 (2006); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. CHI. L. REV.* 1, 3 (1995). President Ronald Reagan established the fundamental framework for White House review through Exec. Order No. 12,291, 3 *C.F.R.* 127 (1982), *reprinted in* 5 *U.S.C.* § 601 (1988), and Exec. Order No. 12,498, 3 *C.F.R.* 323 (1985), *reprinted in* 5 *U.S.C.* § 601 (1988). President Clinton formally repealed both orders in 1993 but maintained OIRA’s centralized oversight of regulatory action and many of the substantive principles of review. Exec. Order No. 12,866, 3 *C.F.R.* 638, 646–48 (1993), *reprinted in* 5 *U.S.C.* § 601 (2006). Similarly, Presidents Bush and Obama maintained strong White House oversight of agency action, although each modified some of its features. *Compare* Exec. Order No. 13,422, 72 *Fed. Reg.* 2763 (Jan. 18, 2007) (requiring inter alia that agencies identify specific market failures when considering new regulations, submit guidance documents to OIRA for review, and obtain the approval of the agency head or a politically appointed Regulatory Policy Officer before proposing new regulations), *and* Exec. Order No. 13,258, 67 *Fed. Reg.* 9385 (Feb. 26, 2002) (reducing the formal role of the Vice President in OIRA review), *with* Exec. Order 13,563, 76 *Fed. Reg.* 3821 (Jan. 18, 2011) (directing that each agency submit a plan for retrospective review to OIRA), *and* Exec. Order No. 13,497, 74 *Fed. Reg.* 6113 (Jan. 30, 2009) (President Obama’s revocation of Executive Order Numbers 13,258 and 13,422). See generally Memorandum on Preemption, 2009 *DAILY COMP. PRES. DOC.* 384 (May 20, 2009) (initiating a review of state-law-preemption statements included in regulatory preambles over the past decade and restricting their future use).

regulatory impact analysis for all significant regulations to OIRA before issuing a notice of proposed rulemaking to the public.¹³² White House review of rulemaking offers presidents a ready means of delaying, modifying, or blocking proposed regulations.¹³³ Presidents committed to deregulation have made particularly deft use of it. The George H.W. Bush Administration used the process to “weaken, and in some cases eliminate, regulations relating to commercial aircraft noise, the protection of wetlands, mandatory recycling, and air pollution.”¹³⁴ Similarly, during the first six years of the George W. Bush Administration, the Occupational Safety and Health Administration (OSHA) issued 86% fewer economically significant rules and regulations than it did during the Clinton Administration.¹³⁵ Officials at OSHA reported that political appointees ordered the withdrawal or reconsideration of workplace safety and health regulations in response to industry pressure.¹³⁶

But Democratic presidents also use OIRA to block regulations. On September 2, 2011, for example, President Obama rejected a new National Ambient Air Quality Standard for ground ozone proposed by the EPA under the Clean Air Act, citing the need to reduce regulatory burdens on businesses and the states during a weak economic recovery.¹³⁷ The EPA had stated that the new standard was required by the Clean Air Act’s mandate that the EPA issue ambient air quality standards “requisite to protect the public health.”¹³⁸ Many assumed that President Obama acted to shield himself from charges of overregulation in the upcoming 2012 election, rather than because he disapproved of a stricter standard for ground ozone to protect public health.¹³⁹

132. Exec. Order No. 12,866, 3 C.F.R. 638, 646–48 (1993), *reprinted in* 5 U.S.C. § 601 (2006).

133. For an analysis of the number of proposed rules that were modified or withdrawn altogether during the Bush and Obama administrations, see Nina A. Mendelson, *Disclosing “Political” Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1151 (2010) (“[O]ver 90 percent of economically significant rules underwent some change or withdrawal during the OIRA review process.”). Nicholas Bagley and Dean Richard Revesz argue that many of the features of OIRA review create an institutional bias against regulation due to the Reagan-era concerns with overregulation. Bagley & Revesz, *supra* note 131, at 1280–82. The review is almost wholly reactive to proposed regulations and systematically fails to examine agency failures to regulate. *Id.* at 1274–78. And with just twenty-two employees reviewing six hundred economically significant regulations per year, OIRA has more on its plate than it can possibly handle. *Id.* at 1277–78.

134. Caroline DeWitt, Comment, *The President’s Council on Competitiveness: Undermining the Administrative Procedure Act with Regulatory Review*, 6 ADMIN. L. REV. AM. U. 759, 762–63 (1993) (internal quotation marks omitted).

135. R. Jeffrey Smith, *Under Bush, OSHA Mired in Inaction*, WASH. POST (Dec. 29, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122802124.html>.

136. *Id.*

137. John M. Broder, *Obama Administration Abandons Stricter Air-Quality Rules*, N.Y. TIMES (Sept. 2, 2011), <http://www.nytimes.com/2011/09/03/science/earth/03air.html?pagewanted=all>; Press Release, White House, Statement by the President on the Ozone National Ambient Air Quality Standards (Sept. 2, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/09/02/statement-president-ozone-national-ambient-air-quality-standards>.

138. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938, 2944 (proposed Jan. 19, 2010).

139. See Amy Harder, *Sizing Up Obama’s Ozone Standard Delay*, NAT’L J. ENERGY EXPERTS BLOG (Sept. 6, 2011), <http://energy.nationaljournal.com/2011/09/sizing-up-obamas-ozone-standar.php>.

Of course, presidents need not wait for OIRA review to block the implementation of statutory mandates. Presidents have other ways to make their views known to the agency heads they appoint.¹⁴⁰ In 2003, the Bush EPA reversed the Agency's prior position and concluded in a denial of a petition for rulemaking that it did not have jurisdiction to regulate greenhouse gases because they were not "air pollutants" as defined by the Clean Air Act.¹⁴¹ In addition, the EPA stated that even if it had jurisdiction to regulate greenhouse-gas emissions, it would decline to do so based on the President's global climate change priorities.¹⁴² These included "calls for near-term voluntary actions and incentives along with programs aimed at reducing scientific uncertainties and encouraging technological development."¹⁴³ As discussed more fully below in section III.C, the Bush Administration overplayed its hand. The Court ultimately held that the Clean Air Act mandated that the EPA make a determination about whether greenhouse gases endangered human health and welfare.¹⁴⁴ Nevertheless, even after the Supreme Court's decision, the White House blocked the EPA's efforts to comply with the Court's order. When the EPA e-mailed its endangerment report to OIRA, the White House refused to open the e-mail and asked the EPA Administrator to retract it.¹⁴⁵ Ultimately, the EPA was able to publish an Advanced Notice of Proposed Rulemaking stripped of the endangerment finding, merely asking for public comments on whether greenhouse-gas emissions pose a threat.¹⁴⁶ Thus, the Bush Administration managed to kick the matter to the next president.

II. THE FUNCTIONS AND RISKS OF THE EXTRA-LEGISLATIVE VETO

What functions might an executive check on enacted law serve as a matter of constitutional design? Section II.A below begins to answer this question by

140. For this reason, new presidents often issue moratoriums on rulemaking when they take office, directing the agencies to suspend all regulatory initiatives until a political appointee is in place and can supervise the agency's agenda. See Kathryn A. Watts, *Regulatory Moratoria*, 61 DUKE L.J. 1883, 1941 (2012).

141. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003); Memorandum from Robert E. Fabricant, Gen. Counsel, Envtl. Prot. Agency, to Marianne L. Horinko, Acting Adm'r, Envtl. Prot. Agency, EPA's Authority to Impose Mandatory Controls to Address Global Climate Change Under the Clean Air Act (Aug. 28, 2003), available at [http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/BC82F18BAC5D89FF852574170066B7BD/\\$File/UARG%20Atchmnt%20G...43.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Attachments%20By%20ParentFilingId/BC82F18BAC5D89FF852574170066B7BD/$File/UARG%20Atchmnt%20G...43.pdf). For a summary of political interference with agency expertise during the George W. Bush Administration, see Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 54–64 (2007).

142. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925.

143. *Id.* at 52,930; see also *Massachusetts v. EPA*, 549 U.S. 497, 511 (2007).

144. *Massachusetts*, 549 U.S. at 534.

145. Felicity Barringer, *White House Refused to Open E-mail on Pollutants*, N.Y. TIMES, June 25, 2008, at A15.

146. *Regulating Greenhouse Gas Emissions Under the Clean Air Act*, 73 Fed. Reg. 44,354 (proposed July 30, 2008). The White House also clarified that the EPA Staff Draft was issued in response to the Supreme Court's command and did not represent Administration policy. Policy Memorandum, White House, Environmental Protection Agency Advance Notice of Proposed Rulemaking Regarding Greenhouse Gas Emissions and the Clean Air Act 1–2 (July 11, 2008), available at http://heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/23533.pdf.

exploring the functions of the veto power that the Framers gave the President in Article I of the Constitution. Section II.B then argues that the extra-legislative veto can serve similar functions with respect to existing legislation. Nevertheless, because the extra-legislative veto exists outside the constitutionally prescribed lawmaking process, it poses distinct threats to our Madisonian system. Section II.C identifies these threats, including displacing Congress's supremacy in lawmaking, undermining the transparency of changes in government policy, and destabilizing the law.

A. THE CONSTITUTIONAL VETO POWER, PAST AND PRESENT

The Founders granted the President a limited veto for several reasons. First, the Founders conceived the veto as a shield for the Presidency to defend itself against congressional deprivations.¹⁴⁷ Alexander Hamilton, writing as Publius in *The Federalist* No. 73, noted the legislature's propensity to "intrude upon the rights, and to absorb the powers, of the other departments."¹⁴⁸ The men who gathered in Philadelphia had seen how the state legislatures in the post-Revolutionary period had dominated their executives.¹⁴⁹ For this reason, the Constitution provided the Executive with the means for its own defense, lest it "gradually be stripped of [its] authorities by successive resolutions, or annihilated by a single vote."¹⁵⁰ As Madison put it, "[a]mbition must be made to counteract ambition."¹⁵¹ Accordingly, the President was given the veto power so that he could check the legislature's encroachment upon the Executive's constitutional sphere.

Second, the Founders believed the veto would help protect the nation from bad laws: "It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good, which may happen to influence a majority of [Congress]."¹⁵² With many onerous parliamentary acts fresh in their minds, the Founders were consumed with designing the Constitution to discourage bad laws. The veto was conceived to discourage bad laws in three ways. First, the Founders believed the President would bring a different perspective to legislation by virtue of his unique position as chief magistrate for the whole

147. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 74–75 (Max Farrand ed., 1966) (Elbridge Gerry arguing that the veto would "secure the Executive department [against] legislative encroachment"); *id.* at 74 (James Madison arguing that the veto power "would be useful to the Executive, by inspiring additional confidence [and] firmness in exerting the revisionary power"); SPITZER, *supra* note 39, at 15; Kory A. Atkinson, *In Defense of Federalism: The Need for a Federal Institutional Defender of State Interests*, 24 N. ILL. U. L. REV. 93, 112–13 (2003).

148. THE FEDERALIST NO. 73, at 371 (Alexander Hamilton) (Ian Shapiro ed., Yale Univ. Press 2009).

149. SPITZER, *supra* note 39, at 16.

150. THE FEDERALIST NO. 73, *supra* note 148, at 371. For this reason, Hamilton vigorously advocated giving the Executive an absolute veto. SPITZER, *supra* note 39, at 12.

151. THE FEDERALIST NO. 51, *supra* note 148, at 264 (James Madison).

152. THE FEDERALIST NO. 73, *supra* note 148, at 371.

nation.¹⁵³ Accordingly, the President might be able to identify errors overlooked by the legislature. Second, by returning the bill or resolution to Congress for its reconsideration, the President's veto would prompt further deliberation on the issue.¹⁵⁴ This is a function of the limited nature of the veto power. With an absolute veto, there would be no reason for Congress to reconsider the bill in the form presented, although it would still have an incentive to consider revisions to respond to the President's specific objections. But with a limited veto, Congress can debate a fuller range of policy options: it might abandon its effort in the face of presidential resistance, modify the legislation to address the President's concerns, or attempt to override the veto. Thus, the constitutional veto serves as a deliberation-forcing mechanism.¹⁵⁵

Finally, although the President's veto was not absolute, it nevertheless required a certain level of consensus among the nation's political representatives to enact law. Because of their fear of bad laws, the Founders erected a system of checks and balances that, among other things, makes it difficult to pass most significant legislation.¹⁵⁶ All three representative institutions—the House, the Senate, and the Presidency—or a two-thirds majority of each house of Congress, must agree to the enactment of new law.¹⁵⁷ Because each democratic institution represents a different set of constituents, each brings distinct perspectives to bear on proposed acts. The members of the House represent (in most cases) the smallest and most concentrated constituencies, whereas each Senator represents a state, and the President represents the nation as a whole. By providing a voice in the process to political representatives with different constituencies, the Constitution sought to improve the deliberative process and reduce the likelihood that Congress would pass bad laws “through haste, inadvertence, or design.”¹⁵⁸

There is some debate about whether the Founders envisioned the President vetoing legislation based on policy disagreements or primarily to check unconstitutional laws.¹⁵⁹ The text of the Presentment Clause, however, does not restrict

153. *Id.* at 372 (“The oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it . . .”); see SPITZER, *supra* note 39, at 17; Atkinson, *supra* note 147, at 113 (“The founders bestowed the president with the veto . . . not because they expected the president to possess more wisdom and virtue than Congress, but because they expected Congress to make mistakes.”).

154. SPITZER, *supra* note 39, at 9.

155. *Id.*

156. See, e.g., THE FEDERALIST NO. 73, *supra* note 148, at 371 (describing bicameralism and presentment as means of preventing “improper laws”).

157. U.S. CONST. art. I, § 7.

158. THE FEDERALIST NO. 73, *supra* note 148, at 372.

159. Compare J. Richard Broughton, *Rethinking the Presidential Veto*, 42 HARV. J. ON LEGIS. 91, 95 (2005) (arguing that presidents should exercise greater restraint when vetoing legislation on policy grounds), and Cass R. Sunstein, *An Eighteenth Century Presidency in a Twenty-First Century World*, 48 ARK. L. REV. 1, 9 (1995) (“[T]he Framers’ principal goal was to allow the President to veto laws on constitutional, rather than policy, grounds.”), with SPITZER, *supra* note 39, at 18 (“[T]he founders’ conception of the circumstances under which the veto could be applied, and the quality of the power

the President's discretion in any way.¹⁶⁰ Moreover, the reasons the Founders armed the Executive with a veto seem to contemplate disagreements about more than constitutional principles. Laws passed "through haste, inadvertence, or design"¹⁶¹ might be constitutional yet bad law from a policy perspective. Still, in the early history of the Republic, the veto power was used sparingly and mostly justified by the President's constitutional views. It was not until after the Civil War that presidents began to use the veto more aggressively as a tool for advancing their legislative agendas.¹⁶²

Today, although the President is constitutionally required to give some reason for his veto,¹⁶³ it is generally believed that he can give any reason at all; the only constraint on the exercise of the veto is political.¹⁶⁴ This evolution of the veto is part and parcel of the growth of the President's role in the legislative process, which in turn reflects the democratization and politicization of the office since the founding.¹⁶⁵ Modern presidents are expected to take the lead in pushing important legislation through Congress on behalf of their party and the electorate that put them in office.¹⁶⁶ The veto and the President's willingness to use it for political and policy reasons gives the Executive the tools it needs to shape legislation as it works its way through Congress.¹⁶⁷

Yet the basic function of the veto remains unchanged. It continues to allow presidents to defend themselves from legislative encroachments and to protect the people from law that is bad in the President's view. Moreover, it remains a vehicle for expressing the President's unique political perspective, forcing additional congressional deliberation, and ensuring a high level of support among our political representatives to enact policy.

itself, were substantially broader than is typically realized or acknowledged."), and Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205, 214 (1999) ("For the Framers, the presidential veto could be used for constitutional or policy reasons when appropriate.").

160. U.S. CONST. art. I, § 7.

161. THE FEDERALIST NO. 73, *supra* note 148, at 372.

162. See Broughton, *supra* note 159, at 124.

163. U.S. CONST. art. I, § 7 (requiring the President to return vetoed bills to Congress "with his Objections").

164. J. Richard Broughton, *What Is It Good for? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 718 (2001). *But see* Broughton, *supra* note 159, at 95 (arguing that presidents should veto legislation that they deem constitutional but exercise greater restraint when vetoing legislation on policy grounds).

165. For histories of democratization in America, see generally CANDICE J. NELSON, *GRANT PARK: THE DEMOCRATIZATION OF PRESIDENTIAL ELECTIONS, 1968–2008* (2011) (describing the democratization of the presidential election as a result of changes in technology, election law, party organization, and demographics); SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN* (2005) (chronicling the rise of democracy in America). For an account of the change in the relationship between the President and Congress as a result of the rise of partisan party politics, see generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

166. For example, Democrats criticized President Obama for initially failing to take the lead in drafting healthcare legislation and putting forward his own healthcare plan. Theda Skocpol et al., *Obama's Health Care Mistake?*, N.Y. TIMES (Aug. 19, 2009), <http://roomfordebate.blogs.nytimes.com/2009/08/19/obamas-health-care-mistake/>.

167. See, e.g., CAMERON, *supra* note 39, at 20.

B. THE BENEFITS OF AN EXTRA-LEGISLATIVE VETO

The extra-legislative veto can serve many of the same positive functions as the constitutional veto, bringing the President's unique national perspective¹⁶⁸ to bear on important policy questions, requiring a high level of political support to sustain enacted laws, rescuing the people from laws the President finds objectionable, encouraging further deliberation regarding contested government policies, and shielding the President from the dead hand of past enacting coalitions.

1. Requiring the Executive's Support of Government Policies

Although the Founders were preoccupied with preventing the enactment of bad laws, they gave less thought to eliminating laws gone bad. That is, laws that lose public support because either their original objectives or their unforeseen consequences come to be viewed as objectionable. To be sure, Thomas Jefferson famously suggested that each generation should enact its own laws:

[N]o society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. . . . Every constitution then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right.¹⁶⁹

Thus, in Jefferson's view, laws must enjoy ongoing popular support to maintain their democratic legitimacy; it is not enough that laws are passed through democratic processes. Nevertheless, although Jefferson and Hamilton recognized the importance of contemporary support for law's legitimacy, outside the context of military appropriations, which the Constitution limits to two years,¹⁷⁰

168. The Vice President is a second nationally elected political officer, but his policy perspective is subservient to that of the President, and we do not expect him to represent us in the same way as the President.

169. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), available at <http://press-pubs.uchicago.edu/founders/documents/v1ch2s23.html>.

170. Professor Jacob E. Gersen has noted that the one feature of the Constitution that recognizes how laws may become odious over time is the limit on Congress's ability to appropriate funds for a standing army. Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 251 (2007). The Constitution grants Congress the power "[t]o raise and support Armies" but stipulates that "no Appropriation of Money to that Use shall be for a longer Term than two Years." U.S. CONST. art. I, § 8, cl. 12. This should not be surprising given the Founders' fear of standing armies based on their pre-Revolutionary War experience. See THE FEDERALIST NO. 26, *supra* note 148, at 130 (Alexander Hamilton). As Professor Gersen has explained, "the appropriations sunset . . . force[s] legislators to reconsider the need for a standing military, and incorporate information about changing circumstances into legislative deliberations." Gersen, *supra*, at 251. It also helps avoid the tendency for legislative outcomes to be shaped by the status quo. *Id.*; see also Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 250–51 (1987) [hereinafter McNollgast, *Administrative Procedures*] (discussing the impact of the status quo on legislative outcomes); Matthew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435–40 (1989) [hereinafter McNollgast, *Structure and Process*] (same). Yet outside the

the Founders effectively relied on new legislation, with all the requirements of bicameralism and presentment, to repeal laws gone bad.

Unfortunately, there are difficulties with relying on legislative repeal to eliminate bad laws. As with all legislation, any one of the three political institutions can block repeal. Either the House or Senate alone can kill the bill, and the President can force Congress to muster a larger political coalition to override his objections. In addition to these constitutional hurdles, bills must also negotiate a plethora of congressionally created veto gates in each house.¹⁷¹ Bills introduced into either house are generally referred to a committee from whence the bill might never emerge without the support of the committee chair and a majority of the committee members.¹⁷² This is where most legislation dies.¹⁷³ Bills that do make it out of committee need the support of the leadership, most importantly the Speaker of the House and the Majority Leader in the Senate, to get to the floor of the chamber.¹⁷⁴ Indeed, the agenda control exercised by the leadership of each house allows a small number of senators or representatives to block repeal.¹⁷⁵ But even a bill with the support of the leadership might not receive a vote due to the increasingly ubiquitous filibuster in the Senate or the Hastert Rule in the House.¹⁷⁶ Moreover, due to increased gerrymandering, the majority in control of the House may not have garnered the majority of the votes cast in House races nationally. Therefore, a minority party in control of the House through gerrymandering may prevent legislative action.¹⁷⁷

context of military appropriations, the Founders did not build any design features into the Constitution to account for the way in which permitting the status quo to shape legislative outcomes allows for the persistence of laws gone bad.

171. See generally STEVEN S. SMITH ET AL., *THE AMERICAN CONGRESS* ch. 4 (4th ed. 2006); Eskridge, *supra* note 10; McNollgast, *Legislative Intent*, *supra* note 10; McNollgast, *Positive Canons*, *supra* note 10.

172. SMITH, *supra* note 171, at 99–100.

173. See *id.*

174. *Id.* at 102–07.

175. *Id.* at 102–11.

176. The “Hastert Rule” is an informal rule named after Dennis Hastert, the Republican Speaker of the House from 1999 to 2007. The rule requires a majority of the majority party to bring a bill to the House floor. George Crawford, *The ‘Majority of the Majority’ Doctrine*, HILL (Sept. 19, 2007), <http://thehill.com/business-a-lobbying/k-street-insiders/k-street-insiders/20145-the-majority-of-the-majority-doctrine>; Lynn Sweet, *Boehner, the Fiscal Cliff and the Majority of the Majority: The Hastert Rule*, CHI. SUN-TIMES (Dec. 27, 2012), http://blogs.suntimes.com/sweet/2012/12/boehner_the_fiscal_cliff_and_t.html.

177. According to the *Washington Post*, Democratic House candidates won approximately 49% of the popular vote cast in House races, compared to 48% for Republicans, but Republicans have their second-biggest House majority in sixty years and their third biggest since the Great Depression. Aaron Blake, *In 1996, House Democrats Also Won the Popular Vote but Remained in the Minority (Kind of)*, WASH. POST (Nov. 12, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/12/in-1996-house-democrats-also-won-the-popular-vote-but-remained-in-the-minority/>. Given the Founders’ lack of foresight with regard to the role that political parties would play in the Republic, see, e.g., Levinson & Pildes, *supra* note 165, at 2313, they would likely be surprised by how difficult legislative action has become.

Consequently, even the loss of support by a majority of both houses of Congress and the President does not ensure that a law will be repealed. Put differently, laws that could never be enacted by the present Congress can endure because of legislative roadblocks designed by the Founders and subsequent procedural innovations in the rules of each house.¹⁷⁸

The traditional defense of the legitimacy of old laws is that the sitting legislature is presumed to approve them if it does not repeal them.¹⁷⁹ But this is a strange fiction considering that congressional inaction is generally considered a weak indication of legislative intent.¹⁸⁰ Given the difficulties of the legislative process, the failure to repeal a law in no way indicates, without more, that the sitting legislature approves it. Whatever we think of the merits of making it difficult to change the legal regime,¹⁸¹ the democratic legitimacy of legislative acts can erode over time if that legitimacy is based solely on their enactment.

Moreover, focusing on legislative changes to the legal regime ignores how the meaning and impact of laws evolve with changes outside the pages of the U.S. Code. It is impossible to separate law from the environment in which it operates. For example, when DOMA was enacted in 1996, it did not have any legal effect because same-sex marriage did not exist in any state.¹⁸² Although the statute certainly had expressive power, it had no concrete legal effect for another seven years, when Massachusetts became the first state to recognize same-sex marriages.¹⁸³ And before it was declared unconstitutional in 2013, DOMA blocked federal recognition of same-sex marriages recognized in thirteen states and the District of Columbia.¹⁸⁴ In 1996, the majority of Americans opposed same-sex marriage; today, a majority of Americans support it.¹⁸⁵ It strains credulity to claim the law has democratic legitimacy today based on a vote taken in 1996 when both the world and the law's impact have changed so dramatically. DOMA is hardly *sui generis*. The legal effect of many laws will change as the world changes around them.¹⁸⁶

178. Of course, "[w]hen a motivated majority wishes to act, committees can be bypassed, rules can be waived, agendas can be modified, and quick votes can be taken." John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1817 (2003).

179. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 109 (1982).

180. See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (1994) (noting that "[c]ongressional inaction lacks persuasive significance" (quoting Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990))).

181. For discussion of the merits of making it difficult for government to change the background legal regime, see *infra* section II.C.3.

182. See Sant' Ambrogio & Law, *supra* note 69, at 722.

183. *Id.* at 727.

184. United States v. Windsor, 133 S. Ct. 2675, 2689 (2013).

185. See *supra* notes 70–73 and accompanying text.

186. Perhaps the most notorious example is the Alternative Minimum Tax, enacted in the 1960s to ensure that the wealthiest Americans would not avoid paying taxes using deductions and tax credits. John D. McKinnon, *Millions More Could Face AMT Hit*, WALL. ST. J., Dec. 21, 2012, at A4. Because Congress neglected to index the Alternative Minimum Tax to inflation, each year it threatens an ever-growing percentage of Americans with a tax hike, including individuals earning as little as

In addition, the breadth of legislative delegations to regulatory agencies and the impotence of the nondelegation doctrine raise questions about the democratic legitimacy of government policies surely unanticipated by the Founders.¹⁸⁷ Today, it is often difficult to ground the political support for government policies in the enacting coalitions that gave birth to them. Consider the regulation of greenhouse-gas emissions under the Clean Air Act. The Congress that passed the Clean Air Act was unaware of global warming or its relationship to greenhouse-gas emissions.¹⁸⁸ Moreover, the immediate problem that Congress sought to address was local, ground-level pollution rather than a global atmospheric problem.¹⁸⁹ For these reasons (among others), the Bush Administration disclaimed jurisdiction to regulate greenhouse-gas emissions under the Clean Air Act, contending that the statute was meant to reach only local pollution.¹⁹⁰ The Obama Administration, on the other hand, embraced regulating greenhouse-gas emissions using the Clean Air Act, arguing that it was consistent with the enacting coalition's more general goal of regulating air pollutants.¹⁹¹ Each administration chose a different level of generality to define the Act's statutory mandate, and each argument is plausible based on the text and legislative history of the Act. But the lack of a clear meaning undermines the notion that the regulation of greenhouse gases can be legitimized democratically solely based on the coalitions that passed the Clean Air Act.¹⁹²

Indeed, the Court regularly interprets statutes broadly to apply to problems unforeseen by enacting coalitions.¹⁹³ The policies implemented pursuant to

\$33,750 per year. *Id.* Recognizing the lack of democratic legitimacy for such an impact and the uproar that would ensue, Congress has passed an annual exemption in recent years to protect middle-class families from the law. *Id.*

187. There is a substantial amount of literature on the accountability of regulatory agencies acting pursuant to broad delegations of authority. *See, e.g.*, DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 99–102 (1993) (arguing that giving broad delegations of rulemaking authority to agencies undermines democratic accountability); Pildes & Sunstein, *supra* note 131, at 8 (advocating for more accountability of regulatory agencies); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 *CARDOZO L. REV.* 775, 781 (1999) (suggesting ways in which agencies are democratically accountable).

188. *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (“[T]he Congresses that drafted [the Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming.”).

189. Richard A. Epstein, *Carbon Dioxide: Our Newest Pollutant*, 43 *SUFFOLK U. L. REV.* 797, 815–16 (2010).

190. *Id.*

191. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 *Fed. Reg.* 66,496, 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

192. A Congressional Connection Poll conducted in June 2012 by United Technologies and *National Journal*, however, found that 55% of Americans believe the EPA should be able to regulate greenhouse-gas emissions that contribute to climate change. Amy Harder, *Poll Finds Public Backs EPA, Not GOP, on Mercury*, *NAT'L J. DAILY* (June 19, 2012), <http://www.nationaljournal.com/daily/poll-finds-public-backs-epa-not-gop-on-mercury-20120619>.

193. *See, e.g.*, *Massachusetts*, 549 U.S. at 532 (recognizing that greenhouse gases were unknown to Congress when it passed the Clean Air Act); *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (holding that same-sex sexual harassment is actionable under Title VII of the Civil Rights Act

regulatory statutes such as the Clean Air Act, the Clean Water Act, the Occupational Safety and Health Act, the National Traffic and Motor Vehicle Safety Act, and many others continue to evolve over time. Indeed, Congress often delegates broad policymaking authority to agencies so that the legislation will stand the test of time and need not be continually amended as circumstances change. There are many reasons to applaud the development of the regulatory state,¹⁹⁴ but the shift in locus of policymaking from Congress to regulatory agencies erodes the democratic legitimacy such policies can claim from long-gone enacting coalitions.¹⁹⁵

To be sure, the President alone cannot supply the same democratic legitimacy as bicameralism and presentment. The President's actions do not constitute an unmediated expression of the people's will, and he may stray from his electoral mandate. Whereas first-term presidents face electoral accountability, second-term presidents are not directly accountable to the people, although impeachment is always a (remote) possibility. Nevertheless, the extra-legislative veto ensures a high level of political support for current government policies in the same way the constitutional veto ensures a high level of political support for new government policies.¹⁹⁶ If the sitting President undermines a policy he opposes, absent a judicial check,¹⁹⁷ the sitting Congress must muster the political will to override the President's extra-legislative veto through new legislative action—for example, setting enforcement guidelines to eliminate the President's enforcement discretion¹⁹⁸ or clarifying a statute to eliminate the Executive's "Chevron space"¹⁹⁹—just as Congress needs a high level of political support to override an Article I veto. The point is not that the President's

of 1964 even though it was not the evil Congress sought to address with Title VII); *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1338 (11th Cir. 1999) ("[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." (quoting *Oncale*, 523 U.S. at 79)).

194. See generally STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2008).

195. This fact explains the turn by many scholars and jurists to the President as a means of providing the regulatory agencies with democratic legitimacy. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–39 (2001) (arguing that the President should shape the discretion delegated to agencies because of his democratic accountability); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 42–45 (2009) (arguing that crediting agencies' political reasons for policy choices would improve political accountability).

196. Of course, the extra-legislative veto has the most democratic legitimacy when used against laws that the President has campaigned against. By contrast, if the President has acquiesced or succumbed to the passage of the legislation during his own term, then the extra-legislative veto merely provides a second bite at the apple in the face of strong support for the law and is not democracy enhancing.

197. For discussion of judicial review, see *infra* section II.C & Part III.

198. For discussion of constraints on enforcement discretion, see *infra* section III.B.

199. Peter L. Strauss, "Deference" Is Too Confusing—Let's Call Them "Chevron Space" and "Skidmore Weight," 112 COLUM. L. REV. 1143, 1145 (2012) ("'Chevron space' denotes the area within which an administrative agency has been statutorily empowered to act in a manner that creates legal obligations or constraints—that is, its delegated or allocated authority."). For discussion of constraints on statutory implementation, see *infra* section III.C.

actions are always democratically legitimate; rather, it is that laws without the robust, contemporary political support necessary to override an extra-legislative veto are democratically suspect.

2. Protecting the People from Laws Gone Bad

The extra-legislative veto, like the constitutional veto, is a powerful tool for protecting the people from what the President views as bad laws, or more specifically laws gone bad.²⁰⁰ These include laws that come to be viewed as obsolete or oppressive due to fundamental social, economic, and political change; general laws that do not fit well with the specific facts of individual cases or new circumstances; and laws that cannot achieve all their goals with the resources available.

a. Adapting to Fundamental Social, Economic, and Political Change. The extra-legislative veto can protect individual liberties in a rapidly evolving society. Because rights and liberties are dynamic and expansive concepts, the oppressive nature of a law may not be apparent or widely appreciated until long after enactment. Both DADT and DOMA are good examples of such laws. Passed with strong public support in 1993 and 1996 respectively, a majority of Americans, the Executive Branch, and the Senate came to view the laws as oppressive to gay and lesbian citizens. The shift in public opinion was dramatic. In 1993, an ABC/Washington Post poll found that only 44% of Americans supported allowing gays and lesbians serving openly in the military.²⁰¹ By 2008, another ABC/Washington Post poll found that 75% of Americans believed they should be able to serve openly.²⁰² The shift in public opinion regarding DOMA and same-sex marriage was similarly dramatic.²⁰³ President Obama's efforts to repeal DADT and DOMA, as well as his decision to abandon the legal defense of DOMA when repealing it failed, reflected this change in public attitudes concerning individual rights.²⁰⁴

The extra-legislative veto can also help negotiate conflicts between state and federal law where there are differences in social, cultural, and political views among the states. In 2012, voter initiatives in Colorado and Washington legalized the possession of small amounts of marijuana, yet the same conduct

200. Naturally, whether we believe the extra-legislative veto is desirable in specific contexts will depend on our opinion of the law in question. But this is no different than the constitutional veto.

201. Emily B. Guskin, *Attitudes Towards 'Don't Ask, Don't Tell' Policy Radically Change*, ABC News (July 19, 2008), <http://abcnews.go.com/PollingUnit/Politics/story?id=5387980&page=1#.UH7XeVGqSZQ>.

202. *Id.*

203. See *supra* notes 70–73 and accompanying text.

204. See *supra* section I.A. A decision not to enforce DOMA—that is, directing the federal government to recognize same-sex marriages under state law—would of course be a much more powerful extra-legislative veto.

remains illegal under federal law.²⁰⁵ The voter initiatives may be part of a growing acceptance of marijuana: a 2012 Gallup poll found that 50% of Americans support legalization.²⁰⁶ Following the state initiatives, President Obama stated it was not a “top priority” to go after “recreational users in states that have determined that it’s legal.”²⁰⁷ Deputy Attorney General James Cole subsequently announced that the DOJ would exercise a degree of prosecutorial discretion in states that implement “strong and effective regulatory and enforcement systems to control the cultivation, distribution, sale, and possession of marijuana,”²⁰⁸ although it is too early to say precisely how this policy will operate in practice. In recognition of federalism values and certain states’ desire to decriminalize the use of marijuana, the Executive might generally refrain from enforcement efforts in states that have legalized the use of marijuana under certain conditions.

In the words of Justice Scalia, there is nothing wrong if “important legislative purposes, [once] heralded in the halls of Congress,” are “lost or misdirected in the vast hallways of the federal bureaucracy. . . . Yesterday’s herald is today’s bore”²⁰⁹ Citing the example of the Sunday blue laws, which were “unenforced long before they were widely repealed,” Justice Scalia argues that such abandonment can be “one of the prime engines of social change.”²¹⁰ The extra-legislative veto both responds to and accelerates social, economic, or political change.

b. Curing the Poor Fit of General Laws to Specific Cases. Some form of extra-legislative veto is indispensable in a system of separation of powers.²¹¹

205. Charlie Savage, *Administration Weighs Legal Action Against States that Legalized Marijuana Use*, N.Y. TIMES, Dec. 7, 2012, at A20.

206. Sarah Kliff, *Can Colorado Create a Legal Market for Marijuana?*, WASH. POST WONKBLOG (Nov. 1, 2012), <http://www.washingtonpost.com/blogs/wonkblog/wp/2012/11/01/can-colorado-create-a-legal-market-for-marijuana>.

207. Rachel Weiner, *Obama: I’ve Got “Bigger Fish to Fry” than Pot Smokers*, WASH. POST WONKBLOG (Dec. 14, 2012), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/12/14/obama-got-bigger-fish-to-fry-than-pot-smokers>.

208. Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; see Ryan J. Reilly & Ryan Grim, *Eric Holder Says DOJ Will Let Washington, Colorado Marijuana Laws Go Into Effect*, HUFFINGTON POST (Aug. 29, 2013), http://www.huffingtonpost.com/2013/08/29/eric-holder-marijuana-washington-colorado-doj_n_3837034.html.

209. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983) (quoting Calvert Cliff’s Coordinating Comm’n v. Atomic Energy Comm’n, 449 F.2d 1109 (D.C. Cir. 1971)).

210. *Id.*

211. Separation of powers is, as one scholar has put it, “an area of political thought in which there has been an extraordinary confusion in the definition and use of terms.” M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 2 (2d ed. 1998). There is no constitutional provision expressly mandating separation of powers. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944–45 (2011). Madison proposed an amendment to the Constitution that would have made it explicit, but it was not adopted. *Id.* at 2015 & n.382 (citing 12 THE PAPERS OF JAMES

The traditional goal of separation of powers is to protect individual liberty from tyrannical government. *The Federalist* No. 47 warns that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.”²¹² As Montesquieu explained in *The Spirit of the Laws*, “[w]hen legislative power is united with executive power in a single person or in a single body, . . . there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.”²¹³ Put differently, when legislative, executive, and judicial powers are combined, each law becomes a bill of attainder declaring a person or group of persons guilty of a crime without trial. If the Legislature is deprived of the opportunity to enforce and interpret the law, it will focus on drafting generally applicable laws for the public good.

The benefit of generally applicable rules is that they are not shaped by individual cases; the drawback of generally applicable rules is that they do not always fit well with individual cases. In particular, when Congress legislates against a background of uncertainty, it will be unable to anticipate all of the ways in which a law might be applied or its collateral consequences. Moreover, because Congress is often driven by individual events even as it seeks to enact generally applicable laws, we often get the worst of both worlds—laws responsive to specific events that are drafted in the garb of generally applicable rules.²¹⁴

Consequently, the Executive must often fit general laws to specific problems, as a tailor alters a suit off the rack—taking in a little here, letting out a little there. For example, the poor fit between the Clean Air Act’s local pollution controls and greenhouse-gas emissions from automobiles, which are distributed relatively evenly across the planet after entering the atmosphere,²¹⁵ caused the Bush Administration to claim that the EPA did not have jurisdiction to regulate greenhouse-gas emissions under the Clean Air Act.²¹⁶ The Supreme Court and the Obama Administration of course disagreed with this position.²¹⁷ Nevertheless, when the Obama EPA proceeded to regulate greenhouse-gas emissions, it confronted a statutory requirement that any source of 100 tons per year of a

MADISON 202 (Charles F. Hobson & Robert A. Rutland eds., 1979)). But the Court has inferred the principle from the structure of the government established by the Constitution and the vesting clauses for each branch. *See generally, e.g.,* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

212. *THE FEDERALIST* No. 47, *supra* note 148, at 245 (James Madison).

213. MONTESQUIEU, *THE SPIRIT OF THE LAWS* 157 (Anne M. Cohler et al. eds. trans., Cambridge Univ. Press 1989).

214. *See, e.g.,* *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub. L. No. 107-56, 115 Stat. 272.

215. Epstein, *supra* note 189, at 817–18.

216. *See* *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,928 (Sept. 8, 2003).

217. *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007); *Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act*, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1).

pollutant obtain a permit.²¹⁸ Because greenhouse gases are emitted at such levels by far more sources than other pollutants regulated under the Act, the EPA faced the prospect of subjecting thousands of residential homes, apartment buildings, and small businesses to the permitting provisions of the Clean Air Act.²¹⁹ This would have overwhelmed the EPA and significantly burdened entities never before regulated under the Clean Air Act.²²⁰ Accordingly, the EPA issued timing and tailoring rules that shielded many greenhouse-gas-emissions sources from permitting that otherwise would have been required by the plain language of the Act.²²¹

Similarly, the DACA program responded to the poor fit between the INA (with its general command that those in violation of the Act “shall, upon the order of the Attorney General, be removed” from the United States)²²² and the circumstances of young immigrants who were brought to this country by their parents as children, grew up and attended school here, and consider themselves Americans. There is no evidence that the enacting coalitions that constructed our immigration laws thought about individuals in this category.²²³ Thus, ripping these young people from their families and communities may have negative consequences unintended by Congress. As the Supreme Court has explained:

The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. . . . Returning an alien to his own country may be deemed inappropriate even where he has committed a removable offense or fails to meet the criteria for admission. The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return.²²⁴

218. See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 115 (D.C. Cir. 2012); *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514, 31,517 (June 3, 2010) (“[S]tate and local permitting authorities would be burdened by the extraordinary number of these permit applications, which are orders of magnitude greater than the current inventory of permits and would vastly exceed the current administrative resources of the permitting authorities.”).

219. See *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. at 31,517.

220. *Id.*

221. *Id.*

222. 8 U.S.C. § 1227 (2006 & Supp. V 2012). Aliens are “removable” if they were (1) not admitted to the United States and were inadmissible under 8 U.S.C. § 1182 or (2) admitted to the United States but deportable under section 8 U.S.C. § 1227. 8 U.S.C. § 1229a(e)(2). Those present in the United States in violation of the immigration laws are deportable under 8 U.S.C. § 1227(a)(1)(B).

223. Even when the legislative record suggests that some members of Congress raised the prospect of such consequences, the final legislation may not definitively resolve Congress’s position on the matter. Those that voted for the legislation might have intended such consequences or they might have ignored the concerns, accepted them as part of a compromise, or discounted the possibility of such consequences.

224. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

Although we generally think of prosecutorial discretion being exercised on a case-by-case basis, in a large, advanced society many cases will share common characteristics. It is more efficient for the Executive to define categories of cases that represent poor fits with the law than to repeatedly adjudicate common issues in each individual case.²²⁵

c. Prioritizing Among Competing Goals. The extra-legislative veto can also channel limited resources toward achieving what the President views as a law's highest priorities. Most laws seek to achieve more than one objective. The Clean Air Act seeks to reduce air pollution and to allow for reasonable economic growth.²²⁶ Intellectual property law seeks both to encourage innovation and to provide for the dissemination of inventions for the public good.²²⁷ The criminal justice system seeks to deter criminal behavior, punish those convicted of crimes, and rehabilitate offenders who have served their sentences.²²⁸ Immigration law similarly serves multiple goals. It seeks to control our national borders by denying entry to criminals and security risks,²²⁹ to track foreign nationals within our borders, to preserve employment opportunities for citizens and residents by "combating the employment of illegal aliens,"²³⁰ and to regulate our relations with foreign nations.²³¹ The relative importance of these goals changes over time. After September 11, 2001, for example, the law enforcement aspects of immigration law became more pressing.²³² The extra-legislative veto allows the Executive to juggle these competing statutory goals and adapt enforcement priorities to the changing environment.

The DACA program provides a rational way to prioritize the INA's many objectives in the face of limited resources and millions of immigrants subject to removal.²³³ It signals the Executive's focus on removing dangerous undocumented immigrants and deferring action against those who did not consciously violate the INA and who have a good track record in this country. Beyond husbanding scarce resources, such prioritization allows the Executive to avoid

225. Cf. Michael D. Sant'Ambrogio & Adam S. Zimmerman, *The Agency Class Action*, 112 COLUM. L. REV. 1992, 2041–63 (2012) (proposing ways in which administrative agencies can more efficiently, consistently, and accessibly adjudicate cases with common questions of law or fact).

226. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 851–52 (1984).

227. See U.S. CONST., art. I, § 8, cl. 8 (stating that Congress has power to "promote the Progress of Science and useful Arts").

228. SANFORD H. KADISH ET AL., *CRIMINAL LAW AND ITS PROCESSES* ch. 2 (9th ed. 2012).

229. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012) ("Federal law makes a single sovereign responsible for maintaining a comprehensive and unified system to keep track of aliens within the Nation's borders.")

230. *Id.* at 2504 (citing *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002)).

231. *Id.* at 2498.

232. Cf. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 54–56 (1983) (approving the consideration of public reaction when implementing the law).

233. "The Obama administration spent nearly \$18 billion on immigration enforcement [in 2012], significantly more than its spending on all the other major federal law enforcement agencies combined . . ." Julia Preston, *Huge Amounts Spent on Immigration, Study Finds*, N.Y. TIMES, Jan. 7, 2013, at A11.

cases that might undermine the law's legitimacy. Deporting young immigrants in good standing who were brought to this country as children may erode public support for immigration policy, while doing little to discourage illegal immigration or secure our borders.²³⁴ Thus, the extra-legislative veto may help further the core purposes of the law by checking its application in certain cases.

3. Forcing Congressional Deliberation

Like the constitutional veto, the extra-legislative veto can prompt congressional deliberation. If it is transparent,²³⁵ the Executive's action invites public debate and a congressional response. In addition, the extra-legislative veto can provide concrete data to fuel deliberation concerning further legislative action. When the 113th Congress considers the DREAM Act, it will have a sense of what implementation might look like based on the DACA program. How many immigrants have applied for the program? Where do they live? What are they doing? In this way, the extra-legislative veto can play both a deliberation-forcing and deliberation-enhancing role.

To be sure, even if transparent, the extra-legislative veto will not always result in congressional deliberation. The congressional reaction is a function of the political landscape and whether Congress is willing and able to override the President's extra-legislative veto. But this is no different than the constitutional veto. Congress is not obligated to reconsider a vetoed bill and frequently does not.²³⁶

4. Protecting the President from Past Enacting Coalitions

The extra-legislative veto is less vital as a tool for protecting the institution of the Presidency from the Legislature. In general, we can rely on each president to look out for the interests of the Office of the President in addition to his own policy agenda.²³⁷ There are of course exceptions. Presidents will sometimes sign laws they feel intrude upon executive power because it is necessary to obtain another objective.²³⁸ They may register their objections in signing statements rather than vetoing the legislation.²³⁹ But we generally expect

234. Cf. *Wait Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969) (“[A] rule is more likely to be undercut if it does not in some way take into account considerations of hardship, equity, or more effective implementation of overall policy, considerations that an agency cannot realistically ignore, at least on a continuing basis. The limited safety valve permits a more rigorous adherence to an effective regulation.”)

235. See *infra* section II.C.2.

236. See SPITZER, *supra* note 39, at 103 tbl.3-4.

237. It is now something of a truism that presidential candidates who run against abuses of executive power are quick to utilize those same powers once elected. See, e.g., Charlie Savage, *Shift on Executive Power Lets Obama Bypass Rivals*, N.Y. TIMES, Apr. 23, 2012, at A1.

238. For example, presidents long objected to the legislative veto that Congress wrote into hundreds of laws but agreed to it in exchange for broad delegations of authority. See *INS v. Chadha*, 462 U.S. 919, 968-74 (1983) (reviewing the history of the legislative veto).

239. See *supra* notes 42-43 and accompanying text.

presidents to protect the prerogatives of the office when presented with congressional legislation, if only because they do not want to tie their own hands in the future.

Nevertheless, the extra-legislative veto does protect the President from conflicts of interest with his political constituencies created by the choices of the past. Soon after taking office, the Obama Administration found itself in the uncomfortable position of defending DOMA despite the strong opposition of many of Obama's political supporters.²⁴⁰ Moreover, the Administration was forced to make legal arguments about marriage and same-sex relationships that many of his constituents found offensive.²⁴¹ Similarly, many Latino groups—another important constituency—criticized the Obama Administration for deporting an unprecedented number of immigrants pursuant to the INA.²⁴² In both cases, the extra-legislative veto protected the President from conflicts with his constituency based on legislative bargains struck by enacting coalitions that had left the political stage.

C. THE RISKS PRESENTED BY THE EXTRA-LEGISLATIVE VETO

Although the extra-legislative veto shares many similarities with the Article I veto power, an executive check on existing law also poses distinct dangers to our Madisonian system because it operates outside the constitutionally prescribed lawmaking process. These dangers include displacing Congress's primary role in lawmaking, undermining the transparency of government policy, and creating excessive policy instability.

1. The Threat of Executive Lawmaking

Extra-legislative vetoes risk executive lawmaking. They allow the Executive unilaterally to alter the rights, duties, and relations of parties and upset legislative bargains. Nevertheless, in most cases such executive lawmaking does not raise substantial concerns because it operates within statutory constraints. Thus, only in the most extreme cases does the extra-legislative veto risk creating a Legislator in Chief.

a. Altering Rights, Duties, and Relations. The Supreme Court has defined lawmaking as “altering the legal rights, duties and relations of persons.”²⁴³ Not all extra-legislative vetoes alter rights, duties, or relations. For example, the decision not to defend a statute while continuing to enforce it does not impact rights, duties, or relations of persons (other than the duty of DOJ lawyers to defend the law) unless and until a court holds the law unconstitutional. Thus, it

240. See Savage, *supra* note 82.

241. *Id.*

242. Corey Dade, *Obama Administration Deported Record 1.5 Million People*, NPR (Dec. 24, 2012), <http://www.npr.org/blogs/itsallpolitics/2012/12/24/167970002/obama-administration-deported-record-1-5-million-people>.

243. *Chadha*, 462 U.S. at 952.

does not constitute executive lawmaking. But many extra-legislative vetoes do. The DACA program, for example, provides a two-year stay from deportation and work authorization during the period.²⁴⁴ Some states are now providing other benefits such as driver's licenses to the beneficiaries of the program.²⁴⁵ Thus, the DACA program has a profound (albeit not necessarily permanent) impact on the rights of its beneficiaries. Similarly, the decision not to regulate greenhouse-gas emissions or not to tighten the pollution standard for ground ozone impacts the duties of entities subject to the requirements of the Clean Air Act.

Nevertheless, the Supreme Court has approved executive lawmaking pursuant to statutory delegations of authority.²⁴⁶ For many of the reasons discussed above in section II.B, Congress sometimes expressly delegates extra-legislative vetoes to the Executive Branch. In *INS v. Chadha*, for example, the Court approved the Attorney General's suspension of Chadha's deportation based on "extreme hardship" because it was authorized by the INA.²⁴⁷ Such vetoes do not raise concerns with executive lawmaking, except to the extent that they raise nondelegation problems, because they are expressly authorized by statute.

Other extra-legislative vetoes are not expressly authorized by statute but take advantage of ambiguities in the statutory text. For example, when the Bush Administration checked the regulation of greenhouse-gas emissions, it first interpreted the Clean Air Act as not applying to greenhouse-gas emissions. Though this is distinguishable from the deportation suspension in *Chadha*, which was expressly authorized by the INA, it still purports to operate within the constraints of the statutory text. Ultimately, the Court disagreed with the EPA's interpretation, concluding that greenhouse-gas emissions constitute "air pollutant[s]" under the Act and that the EPA Administrator was required to form a judgment concerning whether they "endanger public health or welfare."²⁴⁸ Thus, extra-legislative vetoes exercised by means of statutory interpretation will face a judicial check when they directly conflict with clear statutory mandates. But the Supreme Court recognized in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* that some statutory interpretation by the Executive fills gaps left by Congress either because it did not consider the question or "was unable to forge a coalition on either side of the question."²⁴⁹ Such executive lawmaking is constrained by statute in the sense that there are limits

244. See Fitz et al., *supra* note 130.

245. See, e.g., Press Release, Mich. Dep't of State, State to Issue Driver's Licenses to Qualified Deferred Action Program Participants After Federal Government Reversal (Feb. 1, 2013), available at <http://www.michigan.gov/sos/0,4670,7-127--294244--rss,00.html>.

246. *Chadha*, 462 U.S. at 953 n.16 (noting that "the Executive's . . . activity cannot reach beyond the limits of the statute that created it—a statute duly enacted pursuant to Art. I"). The President may also be able to alter rights, duties, and relations pursuant to certain self-executing constitutional powers, such as the pardon power.

247. *Id.* at 924.

248. *Massachusetts v. EPA*, 549 U.S. 497, 532–34 (2007) (citing 42 U.S.C. § 7521(a)(1) (2006)).

249. 467 U.S. 837, 865–66 (1984).

to the extent of executive lawmaking that the text of the statute will bear, but it is a form of executive lawmaking nonetheless.

Still other extra-legislative vetoes eschew any reliance on statutory delegations of authority. The exercise of enforcement discretion, for example, does not purport to exercise authority delegated by statute. Rather, it is a decision not to apply the statute in certain cases. At best, the President can claim that Congress legislates against a background presumption that the Executive will exercise some enforcement discretion when taking care that the laws are faithfully executed. But it will be difficult to draw the line between enforcement discretion that is anticipated by Congress and that which is not, or between permissible enforcement discretion and that which risks abdicating the Executive's responsibilities under the statute.²⁵⁰

Finally, the decision not to enforce a law or a specific legal provision at all eschews any reliance on statutory authority, instead generally looking to the the Constitution for legal authority. Indeed, it is a decision to ignore a law's clear statutory mandate. Thus, it is a particularly strong form of unilateral executive lawmaking and threatens to turn the President into a Legislator in Chief.

b. Upsetting Legislative Bargains. By altering rights, duties, and relations between persons, the extra-legislative veto risks upsetting legislative bargains. The decision not to enforce a law obviously disrupts the deal that produced it. But extra-legislative vetoes implemented through enforcement discretion and statutory interpretation may disrupt bargains as well. If we understand the legislative process as involving horse trading and negotiated compromises, the extra-legislative veto may privilege certain members of the enacting coalition. A statute might be drafted at a level of generality to bring three types of behavior within its jurisdiction and secure the support of three distinct congressional caucuses. To the extent the extra-legislative veto ignores one or more of these concerns, it will upset the bargain made by the enacting coalition, even if the Executive does not abdicate its responsibilities under the statute.

In addition, it will often be difficult for Congress to enforce these types of legislative deals. If the Executive undermines the objective of only one of three members of the enacting coalition, the other two will likely have no incentive to enforce the original bargain with greater specificity.²⁵¹ Indeed, they might even prefer the new legal status quo.

In sum, the extra-legislative veto usually involves some degree of executive lawmaking. In most but not all cases, the scope of executive lawmaking is limited by statutory constraints. But even extra-legislative vetoes that operate within statutory constraints have the potential to upset legislative bargains.

250. See *infra* section III.B.

251. See, e.g., McNollgast, *Administrative Procedure*, *supra* note 170, at 250–51; McNollgast, *Structure and Process*, *supra* note 170, at 435–40.

2. Undermining the Transparency of Changes in Policy

Because the extra-legislative veto exists outside the legislative process, there are fewer formal mechanisms to ensure its transparency. The most transparent forms of the extra-legislative veto are decisions not to defend a statute because they are disclosed in court. In addition, the Executive must by law notify Congress when it decides not to defend or enforce an act of Congress.²⁵² There is no requirement, however, that the Executive disclose enforcement discretion policies.²⁵³ Theoretically, White House review of rulemaking should be more consistently transparent than enforcement policies. Executive Order 12,866 requires OIRA to maintain information related to written communications with the agency and oral communications with individuals outside the Executive Branch.²⁵⁴ But gaps remain—for example, oral communications between OIRA and the agency need not be disclosed²⁵⁵—and none of the disclosure requirements are judicially enforceable.²⁵⁶ Consequently, OIRA sometimes fails to comply with its disclosure requirements.²⁵⁷ In addition, because courts (a) generally avoid examining the actual reasons behind agency action, taking at face value the reasons proffered by the agency,²⁵⁸ and (b) recognize various executive privileges,²⁵⁹ White House control of agency action can be opaque.

Consequently, the transparency of enforcement discretion and White House control of rulemaking often depends on the incentives for disclosure. This is a function of politics (how Congress and the public are likely to respond) and policy imperatives. President Obama certainly had a strong incentive to disclose the DACA program to buttress support from a key constituency. Moreover, it

252. See 28 U.S.C. § 530D (2006).

253. See *infra* Part III.

254. Exec. Order No. 12,866 § 6(b)(4)(C), 3 C.F.R. 638 (1993), *reprinted in* 5 U.S.C. § 601 (2006) (requiring a public log of all written communications forwarded to the agency as part of the review process and the dates, subject matter, and persons involved in all substantive oral communications between OIRA and individuals outside the Executive Branch).

255. *Id.*

256. *Id.* § 10 (“[T]his Executive order . . . does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.”).

257. See RENA STEINZOR ET AL., *CTR. FOR PROGRESSIVE REFORM, BEHIND CLOSED DOORS AT THE WHITE HOUSE* 7 (2011) (finding that OIRA routinely violated the executive order’s disclosure requirements); Bagley & Revesz, *supra* note 131, at 1309–10 (describing OIRA’s history of secrecy); Nina A. Mendelson, *Foreword: Rulemaking, Democracy, and Torrents of E-mail*, 79 *GEO. WASH. L. REV.* 1343, 1354 (2011) (noting OIRA’s lack of transparency).

258. “[A]n agency’s action must be upheld, if at all, on the basis articulated by the agency itself.” *Bowen v. Am. Hosp. Ass’n*, 476 U.S. 610, 643 (1986) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)). *But see* *Sierra Club v. Costle*, 657 F.2d 298, 407 (D.C. Cir. 1981) (suggesting that the President’s role may need to be disclosed when the agency relies upon information or data obtained from the President in formulating a rule). A scholarly debate has arisen recently about whether courts should grant greater deference to agency decision making when the President is actively involved. See, e.g., Mendelson, *supra* note 133, at 1151; Watts, *supra* note 195, at 8.

259. See, e.g., *N.Y. Times Co. v. U.S. Dep’t of Justice*, 915 F. Supp. 2d 508, 550 (S.D.N.Y. 2013) (upholding deliberative process and attorney–client privilege claims of the Executive Branch).

would be impossible to implement a program on the scale of DACA without substantial public communications. Indeed, there are often incentives to disclose enforcement priorities to shape behavior, encourage voluntary compliance, and reduce enforcement costs.²⁶⁰ And agencies must give reasons for denying petitions for rulemaking. But when the extra-legislative veto may upset a powerful or vocal constituency or deliver benefits to a narrow interest at public expense, there will be no incentive for the White House to act transparently. The Bush DOJ, for example, had little incentive to publicly declare its suspension of pattern and practice race-discrimination suits under Title VII.²⁶¹ Nor did it have an incentive to disclose its efforts to prevent the EPA from making an endangerment finding concerning greenhouse-gas emissions.²⁶²

a. Stealth Repeals to Please Special Interests. Nontransparent extra-legislative vetoes give special interests with White House access another opportunity to stifle policies they oppose. Although the President's constitutional veto was intended to kill bad laws, without transparency the extra-legislative veto provides another opportunity for special interests to kill good laws. The President's stature means he is more accessible to well-established interests (whether energy companies or unions) than to the less powerful or well connected. Consequently, nontransparent extra-legislative vetoes allow for stealth repeals of statutory mandates to please special interests.

b. Increasing Congressional Monitoring Costs. Nontransparent extra-legislative vetoes also increase congressional monitoring costs. Unlike the constitutional veto, the extra-legislative veto can be exercised at any time. The President need not wait for congressional action. He alone determines when, where, and how to exercise the extra-legislative veto. Consequently, Congress must always be on the lookout for stealth repeals.

In addition, when presented with an extra-legislative veto, Congress must deliberate over its course of action. Will it step into the shoes of the DOJ to defend a statute? Will it attempt to pass new legislation to constrain the Executive's enforcement discretion? Will it take a more active role in setting regulatory standards? The choices Congress makes may have opportunity costs, limiting the amount of time that can be devoted to new legislative projects. Congress must find additional time, develop relevant expertise, and resolve internal conflicts to respond to the Executive's actions. In addition, Congress will face the prospect of the President's Article I veto.

Nevertheless, the extra-legislative veto obviates the need for Congress to anticipate every circumstance in which the law might be applied poorly, allowing the Executive to check these poor applications. This saves the drafting

260. Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 172 & n.85 (1996).

261. CITIZENS' COMM'N ON CIVIL RIGHTS & CTR. FOR AM. PROGRESS, *supra* note 20, at 29.

262. *See supra* notes 141–46 and accompanying text.

Congress time. Consequently, savings in drafting costs on the front end may offset the additional monitoring costs on the back end.

3. Destabilizing Government Policy

The Constitution improves the predictability, stability, and continuity of government policy through various mechanisms to check the passions of passing majorities and ensure a consensus among a majority coalition before turning the ship of state. As with constitutional commitments and *stare decisis*, the difficulty of changing the legal background regime allows parties to order their affairs with greater certainty about the future. This in turn makes them more willing to invest in the future, increasing the productive activity of society. The extra-legislative veto threatens to upset this stability by making it easier for the President to change policy unilaterally and by subjecting government programs to the whims of each new administration.²⁶³

But the value of predictability for ordering our affairs must be balanced against the value of creating good law. Bad law may engender less-than-optimal ordering of affairs, whereas eliminating bad law may facilitate more socially useful activities. Put simply, there is less value in the predictability and continuity of government policy when it is bad policy. In some cases, the bad policy may not produce any positive ordering of affairs. For example, it is difficult to imagine any positive ordering of affairs premised on DOMA. Quite the opposite: the productive ordering possible with DOMA's repeal is demonstrated wherever same-sex marriages have been legalized. Thus, there was little value to the predictability and continuity of this policy other than the expressive value to those who opposed same-sex marriage for ideological reasons. In other cases, bad policies will engender reliance interests that produce some positive ordering of affairs, even if the policy is not optimal from a social-welfare standpoint. For example, certain government subsidies may be economically wasteful yet may encourage investments with collateral benefits based on the recipient's belief that the subsidies will continue. Nevertheless, if a policy produces little or no positive ordering of affairs compared to an alternative policy, then stability and continuity are less important.

Perhaps for this reason, the Framers' central design objective was to prevent the enactment of bad law, not to make changes to the legal status quo difficult *per se*. They created three lawmaking institutions designed to be responsive to

263. It is questionable whether the entrenchment of ordinary legislation can meet the demand for predictability. Despite the difficulty of repeal, when Mitt Romney ran in 2012 on a platform of repealing the Affordable Care Act, numerous states delayed developing health insurance exchanges under the Act, awaiting the outcome of the presidential election, Abby Goodnough & Michael Cooper, *Health Law Has States Feeling Tense Over Deadline*, N.Y. TIMES, Nov. 15, 2012, at A20, even though commentators pointed out that repeal was unlikely with the Democrats in control of the Senate, *see, e.g.*, Ryan Lizza, *Why Romney Won't Repeal Obamacare*, NEW YORKER (June 28, 2012), <http://www.newyorker.com/online/blogs/newsdesk/2012/06/why-romney-wont-repeal-obamacare.html>. Thus, highly salient and closely contested laws will likely be viewed as vulnerable to shifting political majorities and administrations, regardless of the difficulties of the legislative repeal process.

distinct yet overlapping constituencies at different times, thereby insulating the lawmaking process from the danger of fleeting passions among a segment of the electorate. Nevertheless, the Framers generally favored simple-majority control of most ordinary legislation, in contrast to the supermajority requirements of the Articles of Confederation, and disapproved the ability of a small number of legislators to thwart the majority's will.²⁶⁴ Indeed, the Founders would likely be dismayed to learn that barriers to the passage of bad laws, once breached, prevent the same bad laws from being repealed.

Thus, although policy stability is valuable when it engenders productive ordering of affairs in reliance upon those policies, it must be balanced against the value of eliminating bad law. In addition, the scale and duration of instability matters. Dramatic shifts in policy with each new administration are more troubling than incremental shifts, and repeated swings are more troubling than conclusive ends to policies against which the public has turned. As discussed more fully below in Part III, we must rely on Congress to set limits on the scale of policy changes that may be implemented by the extra-legislative veto and on the Judiciary to enforce those limits. Within these boundaries, the frequency and duration of policy oscillation will ultimately depend on the strength and stability of the electorate's own preferences.

* * *

Having identified the functions and dangers of the extra-legislative veto, the next Part turns to how the Supreme Court reviews this exercise of power.

III. JUDICIAL REVIEW OF EXTRA-LEGISLATIVE VETOES

Notwithstanding Justice Jackson's declaration that the President's power is at its lowest ebb when he takes "measures incompatible with the expressed or implied will of Congress,"²⁶⁵ the Supreme Court uses a variety of administrative law doctrines to grant significant leeway in the timing and manner by which the President must meet his "take care" responsibilities. Though the Court enforces legislative bargains that are clear, specific, and drafted in the language of command, the Executive generally has the power to check statutory mandates outside the legislative process. Thus, the Court protects the most transparent congressional bargains and leaves enforcement of unarticulated or ambiguous legislative deals to the discretion of future administrations and the will of the sitting Congress. In this way, the Supreme Court facilitates some of the benefits

264. During the constitutional debates, Alexander Hamilton remarked:

Congress, from the nonattendance of a few States, have been frequently in the situation of a Polish diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode Island, has several times been able to oppose an entire bar to its operations

THE FEDERALIST NO. 22, *supra* note 148, at 110 (Alexander Hamilton).

265. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952).

of the extra-legislative veto, while controlling the risk of presidential law-making and excessive policy destabilization.

A. DECISIONS NOT TO DEFEND A STATUTE

In *United States v. Windsor*, the Court expressed some misgivings about the Obama Administration's decision not to defend DOMA, but it did not hold that the Executive had violated any constitutional or statutory duty.²⁶⁶ Thus, although there is ultimately a judicial check on this type of extra-legislative veto, because a court will decide whether the law is constitutional,²⁶⁷ the decision not to defend appears to be an unreviewable political question to which the Court defers to the President.

B. DECISIONS NOT TO ENFORCE A STATUTE

Agency decisions not to institute enforcement proceedings are presumptively unreviewable under the Administrative Procedure Act (APA).²⁶⁸ In *Heckler v. Chaney*, prison inmates convicted of capital offenses and sentenced to death by lethal injection of drugs petitioned the Food and Drug Administration (FDA) to take various enforcement actions against the use of the drugs because they were not approved for use in human executions under the Food, Drug, and Cosmetic Act (FDCA).²⁶⁹ The FDA disputed its jurisdiction under the Act but argued that even if it did have jurisdiction, it had inherent discretion not to pursue enforcement proceedings based on the Commissioner's conclusion that there was no "serious danger to the public health or a blatant scheme to defraud."²⁷⁰ The Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion" under Section 701(a)(2) of the APA.²⁷¹

266. 133 S. Ct. 2675, 2689 (2013) ("When the Executive makes a principled determination that a statute is unconstitutional, it faces a difficult choice. Still, there is no suggestion here that it is appropriate for the Executive as a matter of course to challenge statutes in the judicial forum rather than making the case to Congress for their amendment or repeal. The integrity of the political process would be at risk if difficult constitutional issues were simply referred to the Court as a routine exercise.")

267. The Court will appoint outside counsel to defend statutes when necessary, and of course, it usually receives a substantial number of amicus briefs on weighty issues of the day.

268. *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985).

269. *Id.* at 823–24; *see* Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–99 (2006 & Supp. 2012).

270. *Chaney*, 470 U.S. at 824–25 (internal quotation marks omitted).

271. *Id.* at 831. The Court presented four rationales for its decision. First, the decision involves a complex balancing of factors peculiarly within an agency's expertise, including whether a violation has occurred, whether agency resources are best spent on this violation, whether the enforcement proceeding is likely to succeed, whether the action fits the agency's overall policies, and whether the agency has enough resources to undertake the action at all. *Id.* Second, by refusing to act, an agency "generally does not exercise its *coercive* power over an individual's liberty or property rights, and thus does not infringe upon areas that courts often are called upon to protect." *Id.* at 832. Third, agency inaction does not provide the same focus for judicial review as agency action. *Id.* And fourth, an agency's decision not to act "shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws

The presumption against review is not absolute, however. Two exceptions are relevant here. First, Congress can limit an agency's enforcement discretion "either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue."²⁷² The *Chaney* Court contrasted the FDCA with the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),²⁷³ which was considered in *Dunlop v. Bachowski*.²⁷⁴ The LMRDA provided that upon the filing of a complaint by a union member, "[t]he Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation . . . has occurred[,], he shall . . . bring a civil action."²⁷⁵ Thus, if the statute clearly requires the agency to bring an enforcement action under certain specified conditions, the courts will enforce the congressional command.²⁷⁶

Second, the Executive cannot use its enforcement discretion to wholly abdicate its responsibilities under the statute. As the Court explained in *Chaney*, the presumption against reviewability does not apply when the agency has "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."²⁷⁷ In a concurring opinion, Justice Brennan described this as "an agency engag[ing] in a pattern of non-enforcement of clear statutory language."²⁷⁸ In *Adams v. Richardson* (the example cited by the Court in *Chaney*), African-American students, citizens, and taxpayers alleged that the Secretary of Health, Education, and Welfare (HEW) and the Director of HEW's Office of Civil Rights "consciously and expressly adopted a general policy which is in effect an abdication of [HEW's] statutory duty" under Title VI of the Civil Rights Act of 1964.²⁷⁹ The statute prohibits racial discrimination in programs or activities receiving federal financial assistance²⁸⁰ and directs federal agencies to take appropriate action to effectuate the statutory prohibition,²⁸¹ including by "cutting off the flow of federal funds . . . or by any other means authorized by law."²⁸² In 1969–1970, HEW determined that ten Southern states were operating racially segregated systems of higher education in violation of Title VI and requested that the states submit desegregation plans.²⁸³ Five states totally ignored HEW's requests, and the other five sub-

be faithfully executed.'" *Id.* at 831–32. The third and fourth rationales seem more relevant to ad hoc enforcement decisions than agency enforcement policies.

272. *Id.* at 833.

273. *Id.* at 833–35; see 29 U.S.C. §§ 401–531 (2006).

274. 421 U.S. 560 (1975).

275. 29 U.S.C. § 482(b).

276. The enforcement provisions of the FDCA did not circumscribe the FDA's inherent discretion to decide which enforcement actions to pursue. *Chaney*, 470 U.S. at 837.

277. *Id.* at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

278. *Id.* at 839 (Brennan, J., concurring).

279. *Adams*, 480 F.2d at 1162; see 42 U.S.C. § 2000d-1 (2006).

280. 42 U.S.C. § 2000d.

281. 42 U.S.C. § 2000d-1.

282. *Adams*, 480 F.2d at 1161 n.1.

283. *Id.* at 1164.

mitted desegregation plans that were unacceptable.²⁸⁴ But HEW took no action.²⁸⁵ In addition, HEW failed to take enforcement actions against hundreds of other school districts that were out of compliance or to develop a program for enforcement with respect to vocational and special-needs schools.²⁸⁶

Based on the *Chaney* framework, the DACA program would likely be unreviewable. First, though admittedly a stark example of implementing proposed legislation through enforcement discretion, it does not annul any statutory command directly and in whole. Put differently, there is no provision of the INA that specifically addresses the category of individuals eligible for deferred action under the DACA program. They are scattered among a variety of groups subject to deportation under the INA. Thus, the Obama Administration cannot be said to have abdicated its responsibilities under the INA, either as a whole or with respect to any particular provision.²⁸⁷ Notwithstanding the DACA program, the Administration has deported an unprecedented number of undocumented immigrants.²⁸⁸ Rather, the Administration has identified a category of individuals as low priorities for removal under the Act and allocated the Executive's resources elsewhere.²⁸⁹ Second, the INA has never been interpreted to command DHS to bring enforcement proceedings in every case of a violation of the Act or under conditions relevant to the DACA program.²⁹⁰ Thus, this is not a statute like the LMRDA in which Congress has limited the agency's enforcement discretion.

Similarly, the George W. Bush Administration's policy (if it was an official policy) of eschewing pattern or practice race-discrimination lawsuits also would likely have been unreviewable. Although the Employment Litigation Section did not bring a pattern or practice lawsuit until Bush's second term, it did not completely avoid racial-discrimination lawsuits under Title VII. During George W. Bush's first five years in office, the DOJ filed thirty-two complaints alleging violations of Title VII.²⁹¹ Though the Bush DOJ enforced Title VII much less aggressively than the Clinton DOJ, which filed thirty-four complaints under

284. *Id.*

285. *Id.*

286. *Adams v. Richardson*, 356 F. Supp. 92, 95–98 (D.D.C. 1973).

287. For a detailed analysis of what the INA commands, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 170–83 (2012).

288. Michael D. Shear, *Seeing Citizenship Path Near, Activists Push Obama to Slow Deportations*, N.Y. TIMES, Feb. 23, 2013, at A12.

289. *Cf. Adams*, 356 F. Supp. at 95–98. Justice Scalia claimed in *Arizona v. United States* that “[t]he husbanding of scarce enforcement resources can hardly be the justification for this” due to the costs of suspending enforcement. 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting). But surely it would take more resources to proceed with deportation than to review an immigrant's file (which must be done in either case) for purposes of DACA.

290. *Arizona*, 132 S. Ct. at 2499 (“A principal feature of the removal system is the broad discretion exercised by immigration officials.”); see Martin, *supra* note 287, at 170–83.

291. CITIZENS' COMM'N ON CIVIL RIGHTS & CTR. FOR AM. PROGRESS, *supra* note 20, at 29.

Title VII during its first two years,²⁹² it would be hard to describe this as an abdication of its responsibilities under the Act comparable to HEW's inaction under Title VI in *Adams v. Richardson*.

In sum, the Court's presumption against the reviewability of enforcement decisions provides the President with a powerful extra-legislative veto to check statutory mandates he opposes so long as Congress has not spoken clearly and precisely in the language of command and the President does not completely abandon the enforcement of the statute.

C. DECISIONS NOT TO IMPLEMENT A STATUTE THROUGH RULEMAKING

Agency decisions not to implement a statutory mandate through rulemaking are subject to somewhat greater scrutiny than enforcement discretion. There is no presumption against the reviewability of agency decisions whether to engage in rulemaking.²⁹³ Thus, when several states, local governments, and environmental organizations sought review of the Bush EPA's denial of a rulemaking petition to regulate greenhouse-gas emissions, the Court reviewed the Agency's decision not to act.²⁹⁴ The Court identified two "key differences" between rulemaking and enforcement decisions.²⁹⁵ First, rulemaking decisions are "less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation."²⁹⁶ Second, rulemaking decisions arise out of denials of petitions for rulemaking that the plaintiff generally has a right to file.²⁹⁷ Accordingly, they are subject to judicial review, although such review is "extremely limited" and "highly deferential."²⁹⁸ On the merits, the Court held that the EPA had jurisdiction to regulate greenhouse-gas

292. *Id.* at 29.

293. See *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). *But see* *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (absent statutory requirements, "the choice . . . between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency"); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (same).

294. *Massachusetts*, 549 U.S. at 528. The Clean Air Act provides the reviewing court with authority to overturn any action that is "arbitrary, capricious, . . . or otherwise not in accordance with law." 42 U.S.C. § 7607(d)(9) (2006). Although plaintiffs sought review of the EPA's denial under the Clean Air Act, the Court's analysis is equally applicable to suits under the APA, which includes the same language. See 5 U.S.C. § 706(2)(a) (2006). Although the EPA did not argue that *Chaney* applied to rulemaking decisions, perhaps feeling constrained by the D.C. Circuit's longstanding position that it did not, see *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 3–4 (D.C. Cir. 1987), the EPA contended that based on the same considerations, a "particularly deferential standard applies on judicial review of such a decision," Brief for the Federal Respondent at 37–39, *Massachusetts*, 549 U.S. 497 (No. 05-1120), 2006 WL 3043970. Therefore, the EPA argued that even if it had jurisdiction, it had not exceeded its "considerable discretion" to deny rulemaking petitions. *Id.* at 36 (quoting *Action for Children's Television v. FCC*, 564 F.2d 458, 479 (D.C. Cir. 1977)).

295. *Massachusetts*, 549 U.S. at 527.

296. *Id.* (quoting *Am. Horse Prot. Ass'n*, 812 F.2d at 4).

297. *Id.*

298. *Id.* at 527–28 (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)). The Court essentially adopted the position of the D.C. Circuit in *American Horse Protection Association*, 812 F.2d at 3–4. Though the four dissenting justices did not expressly endorse the majority's view of the reviewability question, neither did they voice any

emissions²⁹⁹ and that the EPA had abused its discretion by grounding its inaction in nonstatutory factors.³⁰⁰ Thus, the Court exercised a check on the Bush Administration's extra-legislative veto.

The Supreme Court's reasons for distinguishing between rulemaking and enforcement decisions are not entirely satisfactory. Although ad hoc enforcement decisions may be more frequent, more likely to involve factual rather than legal issues, less formal, and unlikely to arise from the denial of a petition, the same cannot be said of enforcement policies like the one shielded from review in *Chaney*. The FDA's enforcement policy involved legal questions about the FDA's jurisdiction and the goals of the FDCA, it was well considered and subject to public explanation, and it arose from a petition for the FDA to take enforcement action.³⁰¹ Yet enforcement policies are shielded from review just like ad hoc enforcement decisions. Moreover, some enforcement policies, such as the FDA's policy in *Chaney* and the DACA program, have far greater policy implications than many run-of-the-mill rulemaking proceedings.

Nevertheless, the Supreme Court may have felt that this was a case in which Congress had given a clear statutory command that could not be skirted, akin to the way in which the LMRDA, cited in *Chaney*, detailed when the agency must bring an enforcement action.³⁰² Thus, even a presumption like the one made in *Chaney* would not have saved the Bush EPA. This seems to be what the majority believed. The Clean Air Act provides that the EPA "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any . . . new motor vehicles . . . which in [the Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."³⁰³ The Court interpreted this as a "clear statutory command" that the Administrator form a judgment about the danger of greenhouse-gas emissions.³⁰⁴

If the majority had been less convinced of the statute's clear statutory command, the Executive likely would have received significantly more leeway due to the deference the Supreme Court often grants agency interpretations of law.³⁰⁵ In *Chevron, U.S.A., Inc. v. National Resources Defense Council*, the Court held that courts must defer to agencies' reasonable interpretations of the statutes they are charged with administering.³⁰⁶ Under *Chevron*, judicial review

disagreement on this score. See *Massachusetts*, 549 U.S. at 535–49 (Roberts, C.J., dissenting); *id.* at 549–69 (Scalia, J., dissenting).

299. *Massachusetts*, 549 U.S. at 528.

300. *Id.* at 534.

301. *Heckler v. Chaney*, 470 U.S. 821, 823–24 (1985).

302. See *supra* notes 272–76 and accompanying text.

303. 42 U.S.C. § 7521(a)(1) (2006) (emphasis added).

304. *Massachusetts*, 549 U.S. at 533.

305. This was the argument made by the dissent. See *Massachusetts*, 549 U.S. at 550 (Roberts, C.J., dissenting) ("Where does the [Clean Air Act] say that the EPA Administrator is required to come to a decision on this question . . . ?").

306. 467 U.S. 837, 844 (1984).

of agency interpretations involves a two-step process. First, the court must ask whether “Congress has directly spoken to the precise question at issue.”³⁰⁷ If congressional intent is unambiguous, then the court must act as the faithful agent of Congress and give that intent its effect, approving consistent agency interpretations and rejecting inconsistent ones.³⁰⁸ But if the court determines that Congress has not directly addressed the precise interpretive question, then the court asks “whether the agency’s answer is based on a permissible construction of the statute.”³⁰⁹ Scholars have come to view *Chevron* as a significant shift in the allocation of interpretative authority over regulatory statutes from judges to agencies.³¹⁰

The interpretive question in *Chevron* was the meaning of a “stationary source” of air pollution as used in the Clean Air Act.³¹¹ Following the election of President Ronald Reagan on a deregulatory platform, the EPA adopted a plant-wide definition of “source” in areas that did not meet National Ambient Air Quality Standards (“nonattainment areas”).³¹² Consequently, a plant could install or modify a piece of equipment without meeting the permitting requirements of the Clean Air Act if the total emissions from the plant did not increase. Previously, the EPA had defined source to require a permit for the installation or modification of any single pollution-emitting device.³¹³ The Court concluded that although Congress had sought to advance environmental objectives while allowing for reasonable economic growth,³¹⁴ it had not reconciled these competing interests at the level of specificity required to choose among the different definitions of source.³¹⁵ Consequently, the Reagan EPA was able to curtail the reach of the Clean Air Act by means of *Chevron* deference.

In addition, during the 2012–2013 Term, the Supreme Court made it clear that the *Chevron* framework also applies to agency interpretations of their own statutory jurisdiction.³¹⁶ Therefore, if the scope of an agency’s statutory jurisdiction is ambiguous, a court will defer to reasonable interpretations that expand or contract its power to act.

Thus, if the Supreme Court had found the meaning of “air pollutant” in the Clean Air Act ambiguous, the Court might have found the Bush EPA’s interpretation excluding greenhouse gases from the definition reasonable. In addition, notwithstanding the Supreme Court’s command in *Massachusetts v. EPA*, the

307. *Id.* at 842.

308. *Id.* at 842–43.

309. *Id.* at 843.

310. *See, e.g.,* Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 *LOY. U. CHI. L.J.* 141, 146 & n.20 (2012) (collecting scholarship discussing the importance of *Chevron* to the shift in interpretive authority).

311. 467 U.S. at 842.

312. *Id.* at 848.

313. *Id.* at 856.

314. *Id.* at 863.

315. *Id.* at 865.

316. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1869 (2013).

Bush Administration managed to stall the EPA for nearly two years and kick the endangerment finding to the next administration.³¹⁷ Courts are generally reluctant to compel agency action, using a multifactor test that considers, among other things, the effect of expediting delayed action on the agency's competing priorities.³¹⁸ Consequently, as with enforcement discretion, the Executive can often point to other ways it is implementing an act to defend its inaction.

Therefore, although decisions not to implement a statute through rulemaking are subject to judicial review and the agency must "ground its reasons for . . . inaction in the statute,"³¹⁹ *Chevron* deference and the reluctance of courts to compel agency action typically allow the Executive to retain substantial control over the timing, manner, and scope of statutory implementation, granting the President an important extra-legislative veto over statutory mandates he opposes.³²⁰

* * *

In sum, judicial review permits some of the benefits of the extra-legislative veto, while checking more aggressive forms of executive lawmaking and excessive destabilization of government policy. When the Executive comes into direct conflict with a clear statutory mandate (for example, if Congress has specified the precise conditions requiring enforcement or promulgation of a rule), a court will act as the enacting coalition's faithful agent. But a court will permit extra-legislative vetoes of weak or nontransparent legislative bargains. Thus, the Executive may ease the rigor of the Clean Air Act's permitting scheme, but it may not eliminate the permitting requirements entirely; the Executive may decline to apply the INA to DREAMers, but it may not abandon all deportations under the INA; and the Executive may decline to defend DOMA, but a court may review a decision not to enforce it.³²¹

The Supreme Court's approach safeguards us from the worst dangers of the extra-legislative veto, but it also limits the full potential of an executive check on legal mandates. The Court may have found the right way to balance the benefits and risks of the extra-legislative veto, but it may also be caught in something of a Catch-22. On the one hand, if the Court relaxes its constraints on

317. See *supra* notes 145–46 and accompanying text.

318. See Sant'Ambrogio, *supra* note 14, at 1411–14 (discussing judicial review of agency delays); see also *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984) (setting forth a multifactor test for deciding whether to compel agency action unreasonably delayed).

319. *Massachusetts v. EPA*, 549 U.S. 497, 535 (2007).

320. An interpretation weakening a statute may of course be based on a good-faith reading of the statutory text. My point is simply that interpretive deference is a tool presidents can use to weaken statutory mandates, not that all narrowing constructions are necessarily motivated by a desire to do so. Nevertheless, although it is theoretically possible for a president to carefully interpret a statute without regard to his policy agenda, it is hard to imagine.

321. This assumes that a party has standing to challenge the Executive's nonenforcement. Cf. *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661–62 (2013) (holding that proponents of a state constitutional amendment approved by the voters of California did not have Article III standing to defend the measure in court when state executive officials declined to appeal an adverse judgment declaring the measure unconstitutional).

the extra-legislative veto, maximizing its power to protect the people from laws gone bad, the Court will transform the President into our Legislator in Chief.³²² On the other hand, if the Court increases its scrutiny of extra-legislative vetoes, acting as the (overly) faithful agent of Congress and reducing enforcement and jurisdictional discretion, the Court will shrink the veto's potential benefits. Therefore, the next Part considers whether other institutional mechanisms might help to improve the regulation of the extra-legislative veto.

IV. ENHANCING THE BENEFITS AND MITIGATING THE RISKS OF THE EXTRA-LEGISLATIVE VETO

Judicial review acts as a check on executive lawmaking and policy instability threatened by enforcement discretion, but it does little to ensure the transparency of enforcement policies.³²³ Conversely, judicial review of rulemaking does a better job promoting transparency but limits the President's power to protect the people from laws gone bad.³²⁴ This Part considers how various institutional mechanisms can improve extra-legislative vetoes exercised by means of enforcement discretion and rulemaking.

A. ENSURING THE TRANSPARENCY OF ENFORCEMENT POLICIES

The Supreme Court's presumption against the reviewability of enforcement decisions gives the President a powerful extra-legislative veto while preventing him from annulling whole statutes.³²⁵ But it does little to ensure the transparency of government policy. If the President wishes to benefit a special interest at the expense of the public good, the Court's presumption makes this easy to do.³²⁶ The Executive need not even admit that it is failing to defend the law because the Court does not require any justification for enforcement decisions unless the Executive completely abdicates its responsibilities under the statute.³²⁷ There are several ways to improve transparency in this area.

1. Reserving the Presumption Against Reviewability for Transparent Enforcement Policies

The Supreme Court could encourage the transparency of enforcement policies by reserving the presumption against reviewability to policies that are publicly disclosed, perhaps through one of the mechanisms discussed below in

322. Indeed, courts can do little to harness the full potential of the extra-legislative veto because allowing the President to annul duly enacted law is a nonstarter.

323. See *supra* section III.B.

324. See *supra* section III.C.

325. See *Heckler v. Chaney*, 470 U.S. 821, 833 n.4 (1985) (the presumption against reviewability of enforcement decisions does not apply when the Executive wholly abdicates its responsibilities under the statute).

326. See Bhagwat, *supra* note 260, at 157 (describing how enforcement discretion allows agencies to hide legislative and judicial judgments).

327. See *Chaney*, 470 U.S. at 833 n.4.

section IV.A.2. If the policy were formalized and transparent, a court would merely ask whether the Executive is abdicating its responsibilities under the statute. If the policy is neither formalized nor transparent but the challengers can show more than ad hoc decision making, a court would apply a more searching but still deferential review.³²⁸ Even if the Executive's policy would generally survive such review, judicial findings of fact would at least bring hidden policy changes to light. In addition, even deferential judicial review would provide some disincentive for the Executive to engage in stealth repeals that it does not want disclosed.³²⁹

Unfortunately, litigation is a costly way to ensure transparency.³³⁰ Moreover, if the Executive did not survive review, a court might find itself in the uncomfortable position of ordering the Executive to bring an enforcement action that is ultimately unsuccessful, wasting more resources, even if the Executive had not abandoned enforcement of the statute.³³¹ In addition, it is easy for the Executive to drag its feet on enforcement actions it opposes.³³² Therefore, courts are not institutionally well equipped to police the transparency of enforcement policies.

2. Precommitting the Executive Branch to "Best Practices"

The Executive Branch is the source of extra-legislative vetoes and is therefore in the best position to regulate their use. But ad hoc self-regulation depends on the political incentives of the moment. Therefore, the Executive should precommit itself to using certain "best practices" in implementing enforcement policies.

The Obama Administration's implementation of the DACA program enhanced the attributes and minimized the risks of the extra-legislative veto. First, as with any policies owned by the President, it was highly transparent.³³³ To the extent that the President takes responsibility for enforcement decisions and memorializes new policies in the public record, the extra-legislative veto will avoid the problem of stealth repeals and increased congressional monitoring costs. In addition, transparency makes both public and congressional deliberation possible, although not inevitable. The policy decision was extensively covered in the press and has become the subject of legal and policy debates.³³⁴ Although Congress did not immediately take up the issue of immigration

328. This could be a deferential form of arbitrary and capricious review.

329. By definition, stealth repeals have political costs if they are disclosed to the general public. See *supra* section II.C.2.a.

330. See Cass R. Sunstein, *On the Costs and Benefits of Aggressive Judicial Review of Agency Action*, 1989 DUKE L.J. 522, 536-37 (1989).

331. Cf. Sant'Ambrogio, *supra* note 14, at 1411-14 (discussing the difficulty courts have with compelling agency action).

332. Cf. Sant'Ambrogio, *supra* note 14, at 1412 & n.171 (noting that courts routinely decline to compel agencies to act even when they have dragged their feet for years).

333. See *supra* notes 122-30 and accompanying text.

334. See *supra* notes 122-30 and accompanying text.

reform,³³⁵ public and electoral approval of the extra-legislative veto did ultimately put the DREAM Act back on Congress's agenda.³³⁶

An executive order could precommit the Executive Branch to transparency through the use of formal policy memoranda, such as the one Secretary of Homeland Security Janet Napolitano issued in connection with the announcement of the DACA program.³³⁷ Furthermore, an executive order might require agencies to submit proposed enforcement policies, like proposed rulemakings, to the White House and Congress in advance of their implementation.³³⁸ This could also be done with agency jurisdictional decisions if they are not already part of a formal rulemaking proceeding. Such transparency would avoid stealth repeals, lower congressional monitoring costs, and give Congress the opportunity to deliberate on changes in government policy before they are implemented.

In addition, an executive order should require formal enforcement discretion policies to be time limited and periodically reviewed to ensure that they continue to be appropriate ways of enforcing the statute. This would accomplish two things. First, it would lend legitimacy to the President's actions by showing that the Executive is not permanently rewriting the law. Second, it would provide Congress with a record to help determine whether further legislative action is appropriate. Indeed, the Executive should send Congress a report on the policy's successes and failures at the end of the review process. Though these procedures may, like litigation, incur some costs,³³⁹ they are likely to be much less than those of litigation and represent investments in improved policymaking dialogue.

This does not mean that enforcement policies should necessarily be subject to formal notice-and-comment rulemaking. Although there are informational advantages to notice-and-comment procedures, they also involve substantial time and effort.³⁴⁰ Consequently, requiring rulemaking to set enforcement policies might discourage agencies from adapting their enforcement policies to a changing

335. After all, the Democratic Senate leadership had urged the President to exercise his enforcement discretion after Republicans blocked the DREAM Act.

336. In 2010, a Gallup poll found that 54% of Americans supported giving legal status to illegal immigrants who came to this country as children if they joined the military or went to college. Paul Steinhauer, *Poll: 54 Percent Support DREAM Act*, CNN (Dec. 10, 2010), <http://politicalticker.blogs.cnn.com/2010/12/10/poll-54-percent-support-dream-act/>. President Obama's decision to shield the DREAMers from the INA is widely viewed as contributing to his electoral victory in 2012.

337. Memorandum from Janet Napolitano, *supra* note 122.

338. *Cf.* Exec. Order No. 12,866, 3 C.F.R. 638, 646–48 (1993), *reprinted in* 5 U.S.C. § 601 (2006) (directing agencies to submit proposed rulemaking to the White House Office of Information and Regulatory Affairs for advance review).

339. *Cf.* PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 168 (2009) (assessing the costs of OIRA review of agency rulemaking).

340. *See* Letter from Jacob E. Gersen, Assistant Professor of Law, Univ. of Chi. Law Sch., & Anne Joseph O'Connell, Univ. of Cal., Berkeley Sch. of Law, to Jessica Hertz, Office of Mgmt. & Budget (Feb. 27, 2009), *available at* http://www.reginfo.gov/public/jsp/EO/fedRegReview/Anne_Joseph_OConnell.pdf (finding that significant rulemaking proceedings between 1995 and 2008 took 503.4 days and that even routine rulemaking proceedings during the period took 385.3 days).

environment or encourage them to conceal such adjustments.³⁴¹ Moreover, it is difficult to draw a line between ad hoc enforcement decisions and a broader enforcement policy.

In sum, executive precommitment to such procedures would help ensure that enforcement policies are politically responsive and protect the people from poor applications of the law, while still engaging Congress in interbranch deliberation and creating opportunities for policy experimentation.

3. Enhancing Transparency Through Framework Statutes

Congress could also enhance the transparency of enforcement policies by means of framework statutes. For example, Congress could amend the APA to require the Executive to state enforcement policies in writing, explain their goals and rationales, limit their scope and duration, and provide a mechanism for periodic review. This would not ultimately require the Executive to change its policy without further legislative action, but like the National Environmental Policy Act, which requires all government agencies to prepare Environmental Assessments and Environmental Impact Statements,³⁴² it would provide a basis for further policy deliberation. In addition, it would help the current Congress assess whether the Executive is exercising its enforcement discretion consistent with Congress's view of the law's most important objectives.

Of course, Congress has the power to draft statutes that circumscribe the Executive's enforcement discretion *ex ante*.³⁴³ But negotiating and drafting legislation at a high level of detail would be costly and reduce the flexibility needed by the Executive in a complex and dynamic postindustrial society. In most cases, it is better for Congress to allow the Executive to address unforeseen circumstances as they arise.

B. GRANTING THE EXECUTIVE JURISDICTIONAL DISCRETION

The reconceptualization of the extra-legislative veto in Part II provides additional support for the Supreme Court's recent decision clarifying that agencies may obtain *Chevron* deference for interpretations of their statutory

341. See Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992) (arguing that the ossification of rulemaking encourages agencies to engage in "alternative, less participatory regulatory vehicles"). *But see* Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950–1990*, 80 GEO. WASH. L. REV. 1414, 1421–22 (2012) (concluding based on empirical analysis that ossification is neither a serious nor widespread problem).

342. National Environmental Policy Act of 1969, 42 U.S.C. § 4332(2)(C) (2006) (requiring federal agencies to prepare a statement discussing: "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented").

343. See *supra* notes 272–76 and accompanying text.

jurisdiction just like other forms of statutory interpretation.³⁴⁴ Consequently, it is now clear that the Executive may expand and contract its jurisdiction where Congress has not clearly defined its boundaries.³⁴⁵ Granting the Executive Branch such jurisdictional discretion will achieve some of the benefits of an extra-legislative veto, allowing the President to protect the people from poor applications of the law and to protect himself from conflicts with his political constituency. In addition, so long as agencies define their statutory jurisdiction in response to petitions for action,³⁴⁶ changes in the jurisdiction that they claim or disclaim should be transparent.³⁴⁷ This transparency will in turn enhance the deliberation-forcing effects of the changes, allowing Congress and the public to debate the appropriate scope of the agency's jurisdiction. If Congress disagrees with the Executive's interpretation, Congress can, with sufficient political consensus, amend the law to expand or contract the agency's jurisdiction.³⁴⁸

Moreover, if courts provide the Executive with room for reasonable interpretations of ambiguous grants of authority, the Executive will have less motivation to make strained or disingenuous arguments to justify its action or inaction.³⁴⁹ Finally, the jurisdictional discretion granted to the Executive exists within statutory constraints, inasmuch as there are limits to how much expansion or contraction of agency jurisdiction the text of the statute will bear.³⁵⁰ Thus, executive lawmaking and policy fluctuations will be restrained by the current legislative text and subject to additional restraint if Congress disagrees with the Executive's interpretation and takes further legislative action.

Of course, the refusal of the Bush Administration to regulate greenhouse-gas emissions suggests that the White House may continue to stall agency action even when the Supreme Court has held that the agency not only has jurisdiction

344. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1874–75 (2013). Of course, agencies are not always entitled to *Chevron* deference for their statutory interpretations. *See, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 237 (2000) (holding that *Chevron* deference is only appropriate for agency interpretations of their organic statutes when Congress delegates to the agency power to make rules with the force of law and the agency's interpretation of the statute is promulgated pursuant to that authority); *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) (withholding *Chevron* deference for informal interpretations of statutes). *But see* *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (granting *Chevron* deference given "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time").

345. *City of Arlington*, 133 S. Ct. at 1874–75.

346. *See, e.g., id.* at 1867, 1874 (agency interpreted its jurisdiction in response to a petition for rulemaking); *Massachusetts v. EPA*, 549 U.S. 497, 510–11 (2007) (same); *Heckler v. Chaney*, 470 U.S. 821, 832–33 (1985) (agency interpreted its jurisdiction in response to a petition for enforcement action).

347. *See supra* notes 293–94 and accompanying text.

348. *See supra* notes 302–10 and accompanying text.

349. *Cf. Watts, supra* note 195, at 42 (arguing that crediting political reasons for agency decisions would encourage agencies to disclose political factors in rulemaking rather than "hiding behind technocratic façades").

350. *See supra* notes 307–09 and accompanying text.

but is statutorily compelled to act.³⁵¹ Would it be better to simply broaden the presumption against the reviewability of enforcement decisions to include all agency decisions over whether to exercise jurisdiction? In other words, an agency's decision not to engage in rulemaking would be presumptively unreviewable unless plaintiffs could show that the statute constrained the Executive's discretion to act, as the Court seemed to believe the Clean Air Act did in *Massachusetts v. EPA*,³⁵² that the Executive based its decision not to act on an erroneous interpretation of its jurisdiction; that the Executive was abdicating its responsibilities under the statute; or that the Executive's inaction raised constitutional concerns.³⁵³

Although this approach would undoubtedly save significant time and money spent litigating agencies' regulatory jurisdiction, for several reasons, it does not seem worth the benefits. First, in most cases, the Executive is unlikely to drag its feet to quite the same extent as the Bush Administration did with the regulation of greenhouse-gas emissions. The human contribution to climate change is a highly salient and politically controversial issue. It is not terribly surprising that the Bush Administration tried to block the regulation of greenhouse-gas emissions to avoid a conflict with an important political constituency—in this case, the oil industry.³⁵⁴ But the White House is unlikely to have the time or will to exert such effort with respect to a wide range of issues.³⁵⁵

Second, despite White House obstruction, the Bush EPA did manage to issue an advanced notice of proposed rulemaking and obtain additional public comments and information on the contributions of greenhouse gases to global climate change.³⁵⁶ Thus, although the EPA moved slowly, it moved. Because of the complexity of many regulatory issues, it is better for civil-service professionals within the regulatory agencies to continue to analyze regulatory problems than to simply ignore them, even if the agency ultimately delays taking action. The next administration will benefit from this work if it decides to proceed with regulation in the area.

Third, many statutes have no practical effect until implemented through rulemaking. Rulemaking often gives meaning to the statute passed by Congress and the parties that will be subject to its commands.³⁵⁷ Thus, unlike instances when an agency decides not to bring an enforcement action, when an agency

351. See *supra* note 145 and accompanying text.

352. See *supra* notes 302–04 and accompanying text.

353. For discussion of *Heckler v. Chaney*, see *supra* notes 271–86 and accompanying text.

354. See, e.g., Darren Samuelsohn & Robin Bravender, *EPA Releases Bush-Era Endangerment Document*, N.Y. TIMES (Oct. 13, 2009), <http://www.nytimes.com/gwire/2009/10/13/13greenwire-epa-releases-bush-era-endangerment-document-47439.html> (reporting that the Bush Administration retreated from a proposed endangerment finding concerning greenhouse-gas emissions after pressure from, among others, the oil industry).

355. See Eshbaugh-Soha, *supra* note 50, at 266.

356. See *supra* notes 145–46 and accompanying text.

357. See CROLEY, *supra* note 194, at 116 (noting that Congress's regulatory legislation typically increases, rather than decreases, agencies' regulatory authority).

decides not to engage in rulemaking, there may be no legal command with the force of law defining the legal standards to which parties must conform their conduct. If the Executive's discretion to exercise its jurisdiction were limited only by abdication of its statutory responsibilities, significant gaps would remain in what the law requires.

In sum, providing agencies with discretion to exercise their jurisdiction when the statute is ambiguous permits some of the benefits of the extra-legislative veto while providing a judicial check on excessive executive lawmaking and policy instability. But presumptively shielding agency decisions not to exercise their jurisdiction, particularly through rulemaking, would permit much greater executive lawmaking and hinder the ability of future administrations to change regulatory directions.

V. THE STRONG PRESIDENTIAL NONENFORCEMENT THEORY

President Obama's decision not to defend DOMA reinvigorated and deepened an important debate about whether the President should enforce laws he believes are unconstitutional.³⁵⁸ Most recently, Professors Delahunty, Devins, Prakash, and Yoo have articulated a provocative presidential nonenforcement theory, arguing that the President has a constitutional duty *not* to enforce laws he believes are unconstitutional.³⁵⁹ The presidential nonenforcement theory is based on the premise that (1) the President has his own constitutional vision and (2) the President's oath to "preserve, protect and defend"³⁶⁰ the Constitution and the Take Care Clause command the President to enforce the Constitution when he believes it conflicts with a federal statute.³⁶¹ Accordingly, the President should not enforce laws he believes are unconstitutional unless and until the Judiciary holds that the law is constitutional.³⁶² Even then, under the strong version of the theory, the President should only abide by judicial judgments in the case at bar.³⁶³

Rather than engage in the interpretive debate over the constitutionality of nonenforcement, which has been the focus of the literature to date, this Part offers an assessment of presidential nonenforcement as an extra-legislative veto using the framework developed in Part II. It concludes that although nonenforcement possesses many of the benefits of other extra-legislative vetoes, it is less effective at promoting congressional deliberation over controversial policies, while running the risk of excessive executive lawmaking and policy destabilization.

Presidential nonenforcement would dramatically increase the President's power

358. For a collection of the literature, see *supra* note 24.

359. See Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 509.

360. U.S. CONST. art. II, § 1, cl. 8.

361. Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 532–33.

362. Devins & Prakash, *supra* note 24, at 574–76.

363. See Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 574–76.

to protect the people from laws that the President views as unconstitutional and to protect himself from conflicts with his political constituency created by the dead hand of past enacting coalitions.³⁶⁴ Because the Executive must inform Congress of its decision not to enforce a statute, nonenforcement would also be transparent. Thus, it has the potential to encourage public deliberation regarding policies that may be unconstitutional. For example, if the Obama Administration had decided not to enforce DOMA in addition to not defending the law, the President would have shielded same-sex couples married under state law from DOMA's negative impact, solidified the President's standing with an important political constituency, and furthered public deliberation of the law's constitutionality.

But presidential nonenforcement would likely not have the same congressional deliberation-forcing benefits as other extra-legislative vetoes. Nor would it ensure a high level of political support for contested policies. For those laws the President ignores based on constitutional objections, Congress will find it difficult to respond. If Congress passes new legislation, the President can veto it. If Congress overrides the President's veto, the President can, based on the nonenforcement theory, continue to disregard Congress based on his constitutional vision. Congress must await judicial resolution of the matter, and even then, according to the strong version of the theory, the President must do no more than abide by judgments in individual cases.³⁶⁵ Moreover, the Executive's decision not to enforce a statute will bar judicial review if no party has standing to challenge the law.³⁶⁶ In these cases, it may be more akin to an absolute rather than a limited veto power. Consequently, Congress has little to deliberate, and even the unanimous support of Congress for the policy will be unavailing.

In addition, the Supreme Court might ultimately disagree with the President's constitutional vision, impeding a robust interbranch dialogue. Although the President can recommit himself to legislative repeal, the procedural roadblocks will remain, and the Court's pronouncement will undoubtedly undermine the President's constitutional and legislative positions. Just as the threat of a court striking down a statute as unconstitutional can force legislative action,³⁶⁷ judicial approval is likely to impede legislative action. Furthermore, if the

364. Presidents already decline to enforce laws that intrude on executive power, and this part of their theory is not particularly controversial. See Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 546 & n.196, 560–61; Meltzer, *supra* note 24, at 1199–1201.

365. See Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 574–76. Devins and Prakash acknowledge that the President need not persist in nonenforcement if it becomes futile in light of consistent judicial disagreement. Devins & Prakash, *supra* note 24, at 574–76.

366. See Devins & Prakash, *supra* note 24, at 571–72 & n.302; May, *supra* note 8, at 992–95; see also *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (shielding from appellate review a judicial order declaring a state law unconstitutional because state executive officials did not appeal the decision).

367. DADT, for example, was repealed against the background of judicial holdings that it was unconstitutional. John Schwartz, *Ban on Gays in the Military Stays in Effect*, N.Y. TIMES, Nov. 13, 2010, at A10.

Executive refuses to enforce the law, there is little incentive for further legislative action, other than a congressional expression of displeasure. The only direct check on Executive non-enforcement available to Congress is impeachment, but this is so politically costly as to be inappropriate for all but the most egregious Executive decisions not to enforce the law.³⁶⁸

Of course, Congress can respond to the Executive's veto indirectly, even if it cannot override nonenforcement directly. Indeed, because of the difficulty of legislative action, Congress (or components thereof) often expresses its displeasure indirectly. For example, Congress may withhold funds from other presidential priorities, block the confirmation of presidential nominees, or frustrate the President's legislative agenda more generally.³⁶⁹ But such collateral attacks are less-than-ideal ways of furthering an open and vigorous interbranch dialogue over the President's constitutional views and are likely to have negative consequences for unrelated policies and personnel.³⁷⁰

At the same time, presidential nonenforcement may not achieve the full potential of other extra-legislative vetoes as a check on bad laws. The nonenforcement theory limits the Executive's veto to laws the President disapproves for constitutional reasons; he may not decline to enforce laws based on policy or political reasons.³⁷¹ It shares this characteristic with presidential decisions not to defend laws. By contrast, extra-legislative vetoes exercised by means of enforcement discretion or statutory interpretation do not simply implement the President's constitutional vision; like the contemporary use of the Article I veto, they also protect the people from policies the President deems unwise based on his unique national perspective. Of course, this limit on the scope of presidential nonenforcement may be a virtue or a vice, depending on one's perspective.

368. U.S. CONST. art. II, §§ 2–4.

369. See *United States v. Windsor*, 133 S. Ct. 2675, 2702, 2705 (2013) (Scalia, J., dissenting) (“Congress . . . has innumerable means (up to and including impeachment) of compelling the President to enforce the laws it has written. . . . Nothing says ‘enforce the Act’ quite like ‘. . . or you will have money for little else.’”).

370. Alternatively, some scholars argue that Congress should have standing to sue the Executive to compel it to enforce the law. See, e.g., Abner S. Greene, *Interpretive Schizophrenia: How Congressional Standing Can Solve the Enforce-But-Not-Defend Problem*, 81 *FORDHAM L. REV.* 577, 582 (2012); see also Frost, *supra* note 107, at 919 (proposing that Congress “take a more active role in federal litigation, both to provide the courts with the legislative perspective on interpretive questions and to counter executive influence”). A full discussion of the doctrinal viability and normative desirability of legislative standing is beyond the scope of this Article. Nevertheless, it is noteworthy that in *United States v. Windsor*, the Supreme Court dodged the question of whether the House of Representatives had standing to intervene in the case as a party to defend DOMA. 133 S. Ct. 2675, 2688 (2013). Put simply, it is not clear whether Congress has standing to defend a general law the Executive does not enforce, let alone compel the Executive to enforce such a law. Moreover, even if Congress were to have standing to defend federal laws in court (or is permitted to present arguments as an amicus party), Congress cannot itself override the President's nonenforcement. Rather, Congress can merely ask a court to do so. Thus, Presidential nonenforcement is not a limited extra-legislative veto like enforcement or jurisdictional discretion, in which Congress may directly override the President.

371. Delahunty & Yoo, *supra* note 24, at 798–803; Devins & Prakash, *supra* note 24, at 532–33; Yoo, *supra* note 125.

Advocates of presidential nonenforcement argue that it will not dramatically increase the President's power vis-à-vis Congress because the President has a limited constitutional agenda.³⁷² But it is also important to recognize that this same constraint may limit the value of presidential nonenforcement. Alternatively, the constitutional-reason requirement may not limit the veto's reach at all but merely prompt the President to look for constitutional justifications to implement his policy preferences.³⁷³ But this is even more problematic because it motivates the President to be disingenuous about his reasons for nonenforcement,³⁷⁴ undermining the extra-legislative veto's transparency and deliberation-forcing benefits.

Presidential nonenforcement not only fails to achieve the full deliberation-forcing benefits of other extra-legislative vetoes, but it also entails additional risks. The unilateral nature of nonenforcement and the power of the President to ignore any constitutionally objectionable provision of a statute create the risk of excessive executive lawmaking. The President acting alone could repeal a law or rewrite it to remove any provision he finds constitutionally objectionable. If no party has standing to challenge the nonenforcement, there will be no direct check on the President's extra-legislative veto. Thus, nonenforcement may be akin to the line-item veto that the Supreme Court held unconstitutional in *Clinton v. City of New York*,³⁷⁵ at least within its constitutional domain.

Moreover, each new presidential administration could revisit the law's constitutionality. If Mitt Romney had been elected President in 2012, for example, he might have refused to enforce the individual mandate of Obamacare on the grounds that it was unconstitutional, upsetting the reliance interests built around this component of the law, such as the prohibition on excluding coverage for preexisting conditions and the elimination of lifetime caps on benefits.³⁷⁶ And a subsequent Democratic administration might have changed course once again. Thus, unilateral nonenforcement may exacerbate ongoing fluctuations in government policy.

Of course, in some cases such policy changes may be no more dramatic in scope than those implemented by means of enforcement discretion. The number of immigrants impacted by the DACA program is far greater than the number of military personnel that would have been impacted by President Clinton's nonenforcement of the law excluding HIV-positive individuals from serving in the military (if the law had not been repealed).³⁷⁷ But in the case of enforcement

372. See, e.g., Devins & Prakash, *supra* note 24, at 556–57.

373. This is the concern expressed by Professors Kerr and Meltzer. See Kerr, *supra* note 92; Meltzer, *supra* note 24, at 1229. In the case of DOMA, however, its nonenforcement could easily be defended based on the President's independent constitutional vision.

374. Cf. Watts, *supra* note 195, at 42.

375. 524 U.S. 417, 448–49 (1998).

376. See *Key Features of the Affordable Care Act by Year*, U.S. DEP'T OF HEALTH & HUM. SERVS., <http://www.hhs.gov/healthcare/facts/timeline/timeline-text.html> (last visited Sept. 17, 2013).

377. HIV-positive military personnel number in the hundreds, Matthew M. Burke, *No Postings Yet for HIV-Positive Marines, Sailors Since Policy Change*, STARS & STRIPES (May 23, 2013), <http://www>.

discretion, there are legislative and judicial checks on the Executive. Congress may respond to the President's enforcement discretion by reducing or eliminating such discretion with new legislation imposing greater policy stability. The Judiciary will enforce these limits. By contrast, Congress has no direct legislative response available to it under the strong presidential nonenforcement theory, and the judicial check will depend on whether a party has standing to challenge the Executive's nonenforcement.

In sum, presidential nonenforcement is a problematic extra-legislative veto. Although it dramatically increases the President's power to protect us from laws that the President sees as unconstitutional, it also increases the President's lawmaking power vis-à-vis Congress. At the same time, it would neither reach all laws gone bad nor be likely to facilitate robust deliberation between the political branches over controversial policies—a core function of the extra-legislative veto. At best (assuming a party has standing to challenge nonenforcement), presidential nonenforcement creates a dialogue between the Executive and the Judiciary—a dialogue in which the Supreme Court has the final word. Congress in most cases would be relegated to attacking other presidential policies to express its displeasure or submitting its constitutional arguments to the courts.

This is not to say that presidents should always enforce laws they deem unconstitutional. But the framework developed herein suggests that presidents should have particularly compelling reasons to not enforce such laws, particularly where Article III standing doctrines may preclude any type of judicial check on their nonenforcement.

CONCLUSION

The extra-legislative veto plays an important role in our Madisonian system. It allows the Executive to shield the people from oppressive laws; to adapt policies to individual cases and broad social, political, and economic change; to protect the President from conflicts with his political constituency created by the dead hand of past political coalitions; and to promote deliberation regarding controversial policies. In this way, it has helped our Madisonian system adapt to increasing congressional gridlock in our deeply partisan age. So long as institutional constraints on the extra-legislative veto ensure its transparency, enhance policymaking dialogue between the political branches, and preserve Congress's supremacy in lawmaking, we should welcome the Executive's ability to protect the people from laws gone bad.

[stripes.com/news/us/no-postings-yet-for-hiv-positive-marines-sailors-since-policy-change-1.222048](https://www.stripes.com/news/us/no-postings-yet-for-hiv-positive-marines-sailors-since-policy-change-1.222048), whereas immigrants eligible for deferred action under DACA number in the hundreds of thousands, see Preston, *supra* note 122.

