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Presidential Inaction and the Separation of Powers

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James Madison famously articulated a functional account of our governmental structure; he and his Federalist brethren created overlapping authority to prevent any single branch of government from acting unilaterally to dictate policy for the nation as a whole. And for more than two hundred years, the focus has been on just that: action. But the Framers and their intellectual heirs have failed to update their story to account for the government we have. In the modern administrative state, the President’s refusal to enforce duly enacted statutes—what we call “presidential inaction”—will often dictate national policy and yet will receive virtually none of Madison’s checks and balances. This asymmetry between action and inaction cannot be justified if we are to be faithful to Madison’s notion that inter-branch competition lies at the core of our constitutional regime. This Article therefore seeks to re-envision the law and theory of separation of powers by viewing it through the lens of presidential decision-making, rather than the impoverished distinction between action and inaction.

But even though presidential inaction deserves checks and balances as a matter of theory, we lack those safeguards as a matter of practice. In particular, the Article suggests that when the President and his agencies choose not to act pursuant to the legislative will, the separation of powers breaks down. For while Congress can use its traditional powers to enforce checks and balances when the President pursues action out of line with its wishes, those tools are simply inadequate when it comes to policing inaction, in some cases because Congress lacks the motivation or the knowledge to intervene and in others because the technical requirements for intervention are not met. Moreover, courts have been reluctant to review Executive refusals to act for reasons that are readily recognizable.

Refocusing separation of powers to account for inaction—and recognizing the shortcomings of the Executive’s coordinate branches—illuminates a structural bias in our constitutional system: the failure of Congress and the courts to police inaction will inevitably bias outcomes toward less government intervention than the enacting Congress intended, and thus less than the Constitution requires. The relative institutional capacities of the various players make the solution clear: our approach would call on Congress to assume the role of robust adversary to the Executive, a role it can play far better than the Judiciary can. Moreover, it would offer new insights on old problems, from administrative deference to statutory interpretation to federalism.

* The authors thank Heather Gerken, Jerry Mashaw, Jennifer Nou, and Daryl Levinson for their insightful comments on an earlier draft. All errors are the authors’ own.
INTRODUCTION

Imagine two Presidents. The first believes in a robust role for the federal government. The second thinks extensive government action is disruptive and infringes upon individual liberty. Each is elected in decisive fashion, and each claims a mandate to advance her vision. But these Presidents will face decidedly different legal and constitutional terrains as they attempt to implement their preferred policies. For while the first President may achieve her goals—may expand the reach of the federal government—only through newly enacted laws or by extending the role of existing administrative agencies, the second President can do so by simply opting not to act—that is, she can fail to enforce existing laws. This is not a partisan argument—on different issues, different parties will be the party of “big-government.” What matters is not politics, but rather the fact that, to enact her policy preferences, the President who wants to expand the role of the federal government will require congressional authorization and funding, not to mention acquiescence from the Judiciary. The other President will face neither check; to stop enforcing laws, she can merely direct her agencies accordingly.

This discrepancy reveals a blind spot in our theory of the relationship between the political branches. Scholars and theorists from the Founding to the present have focused solely on the problem of aggrandizement through action. They wring their hands when the President acts beyond the presumed limits laid out by congressional statutes,1 when the President pursues war-like activities without congressional approval,2 and when the administrative state grows beyond the bounds of congressional oversight.3 And yet they seem to worry far less—and in some cases not at all—when the President fails to act, when he prosecutes a war less zealously than Congress wanted, or when he does not regulate in a particular area.

But it is not self-evident that we should worry more when a President takes affirmative steps that go beyond congressional authorization than when she chooses not to enforce duly enacted statutes. Of course, a President’s decision to enforce a federal law beyond what Congress intended raises serious constitutional issues relating to the requirements of bicameralism and presentment and, more generally, the separation of powers. But is the Clinton Administration’s over-enforcement of the Voting Rights Act4 any more problematic than the second Bush Administration’s under-enforcement of the same Act? Indeed, the same problems—a President out of step with Congress, avoiding accountability—arise when a President under-enforces a federal

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3 See, e.g., Jerry L. Mashaw, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1999).
law—for example, when the Obama Administration decided not to enforce the Controlled Substances Act with respect to medicinal marijuana or when the second Bush Administration chose not to enforce the Clean Air Act with respect to automobile emissions.

The utility of presidential inaction has become so ingrained in our political culture that both major political parties have attempted to use it as a policy tool during the 2012 presidential campaign. Republican candidate Mitt Romney has said that his first executive act would be unilaterally to waive all obligations under the Affordable Care Act—in other words, to choose not to enforce that law. President Obama directed his Department of Homeland Security not to enforce the nation’s immigration laws against certain undocumented immigrants. Does either of those decisions implicate the constitutional mandate that the President “take care that the laws be faithfully executed” any less than a decision to require more than the statute requires?

Perhaps, in certain circumstances, the answer is yes. We do not intend to argue here that all executive inaction is constitutionally suspect. Indeed, resource constraints and discretion granted by the legislature will often insulate inaction from such criticism.

Our point, instead, is that theorists should give equal constitutional consideration to presidential action and inaction. Once a law is duly enacted in accordance with Article I, Section 7 of the Constitution, the President bears an obligation to comply not only with the outer limits of that statute, but also with its baseline requirements. When Congress enacts a regulatory regime and expressly requires that the President regulate, for example, the President may not do so in ways Congress did not authorize, but nor may she refuse to regulate at all.

But the Constitution’s formal requirements are only part of the story. The essence of James Madison’s theory of government is that, to function smoothly, the federal government’s “several constituent parts [must], by their mutual relations, be the means of keeping each other in their proper places.”

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5 See discussion infra Subsection II.B.iii.
6 See discussion infra Subsection II.B.i.
7 Mitt Romney, Republican Presidential Debate in Ames, Iowa (Aug. 11, 2011) (“And if I'm president of the United States, on my first day, I'll direct the secretary of HHS to grant a waiver from Obamacare to all 50 states.”).
9 U.S. CONST. art. II, § 3.
10 Id. art. I, § 7.
11 Perhaps the best example of a judicial decision recognizing the basics of this argument is Train v. City of New York, 420 U.S. 35 (1975), which addressed language in the Impoundment Control Act of 1974 that expressly precluded the President from refusing to spend money Congress appropriated and required that he spend.
presidential action is to ignore the last century of political development. The sheer size of the modern federal government presents the twenty-first-century President with unprecedented power to implement her agenda both by directing her agents to act and, critically, not to act. When President Obama directs his Attorney General not to enforce the nation’s marijuana laws, when President Bush directs his Environmental Protection Agency to pursue his own goals at the expense of enforcement of congressional mandates, when any President makes policy by choosing not to enforce duly enacted statutes, she has encroached on Congress’s authority to make law. The rise of the modern administrative state has thus placed the spotlight on a new problem for Madisonian separation of powers: the problem of presidential inaction.

In a sense, the similarities and differences between action and inaction are a well-trodden subject. We encounter them in criminal law and philosophy in the distinction between killing someone and letting him die; in the constitutional design discussion of positive and negative rights; and, even in American constitutional law, in the “state action” doctrine and the DeShaney line of cases. Scholars and judges seem to understand the general difficulty of policing ubiquitous inaction, the difficulty of identifying workable baselines, and the inevitability of resource constraints. But the separation of powers literature so far has failed to recognize the unique constitutional valence of executive policymaking through inaction.

To his credit, Justice Thurgood Marshall noted the problem of executive inaction in his concurrence in Heckler v. Chaney, the only Supreme Court opinion to recognize the theoretical identity between presidential action and inaction (though the Court stopped short of allowing judicial review of a President’s decision not to enforce). Justice Marshall emphasized the functional similarities between “negative” and “affirmative” orders, noting that “one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.” Following Justice Marshall, modern administrative law scholars have recognized that policy can be made through presidential inaction. But they have failed to appreciate the constitutional implications of this insight.

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17 Id.
Modern constitutional theorists, on the other hand, have ignored the threat of presidential inaction almost entirely. Instead, they have devoted thousands of pages to the problem of presidential action. Professor Sunstein describes his theory of separation of powers as reflecting a “system in which dangers [are] thought to lie principally in governmental action rather than failure to act.” Professors Ackerman and Hathaway make analogous arguments in the national security domain, criticizing how the modern President can act—for example, by waging limited war—without worrying about congressional checks. Even Professors Levinson and Pildes, who recognize and highlight the backwardness of separation of powers theory as applied to modern, party-based government, focus almost exclusively on how unified government allows runaway presidential action. These contributions are compelling, but they ignore the crucial dynamic we describe here.

Because presidential inaction is under-theorized, those interventions that have poked at the periphery of the problem have remained underdeveloped. For example, in the hours after President Obama announced that his Department of Homeland Security would no longer bring enforcement proceedings against certain undocumented immigrants, news websites were awash with arguments that the President was acting beyond his “prosecutorial discretion.” Professor Yoo went as far as to proclaim that the President’s decision “illustrates the unprecedented stretching of the Constitution and the rule of law.” That line of inquiry is worth pursuing, but the breathless reactions to the President’s policy have thus far failed to tell the reader exactly why the decision is unconstitutional, and they have ignored the differences between constitutionally permissible discretion and impermissible inaction. In short, they have lacked the vocabulary to discuss the issues raised.

In short, this Article aims to provide that vocabulary by constitutionalizing the problem of presidential inaction. It seeks to recover and extend Justice Marshall’s insight by re-envisioning the law and theory of separation of powers by placing presidential action and inaction on the same plane, as theoretically similar modes of presidential decision-making. When the President intentionally abandons her duty to enforce the laws passed by Congress, she is unilaterally making policy for the whole nation, contrary to

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23 There are, of course, nuances to this definition, which we discuss in depth in Part II.
Madison’s vision that national policy would be the product of interbranch cooperation and competition. If our system is to encourage this “[a]mbition . . . to counteract amibition,” Madison’s theory of separation of powers must be updated to account for the possibility of presidential inaction.

Once it is acknowledged that presidential inaction demands some form of checks and balances, the Constitution’s failure to provide those checks is striking. Existing doctrine and institutional design draw a sharp distinction between action and inaction: judges are loath to review executive refusals to act, and Congress is often impotent (and, in some cases, unwilling) to step in to defend its preferred policies. Constitutional law and politics thus has no way to take into account what has become a fundamental aspect of modern American government. Indeed, today’s checks and balances may be better characterized as merely “action to counteract action.” In a very real sense, this Article is part of a larger project: the attempt to link constitutional theory to the realities of modern administration.

This recognition allows us to re-examine several aspects of constitutional design in a new and more realistic light. To ignore the reality of inaction is to leave our separation of powers theory in the nineteenth century. It was perhaps a perfect fit for the politics Madison designed, but it fails to account for much that goes on in the government that exists today.

But the stakes may even be greater than a need to update our theory of the separation of powers. Our blindness to the possibility of inaction fuels an imbalanced political structure that imbues the modern Executive with more power to change the scope of government than the Framers—or even the architects of the New Deal—ever imagined. A President pursuing action faces the full gauntlet of Madisonian checks and balances, from the formal requirements of bicameralism and presentment to the modern, functional congressional vetogates; the President seeking inaction faces virtually none. A President’s ability to abdicate her constitutional responsibilities, unchecked by Congress or the courts, places a thumb on the scale in favor of deregulation, allowing Presidents of either party to unilaterally abandon those governmental functions to which they are opposed. Even those who believe that the Constitution and its system of checks and balances are intended to be frictional cannot justify this imbalanced structure. The Constitution does make it difficult to pass legislation; we do not criticize that basic feature. But once legislation is passed, the President is obligated to enforce that law. Put simply, if the

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24 THE FEDERALIST NO. 51, supra note 12, at 322 (James Madison).

25 Savvy readers will recognize two obvious counterexamples: the controversy surrounding the Impoundment Act of 1974 and the Supreme Court’s decision in Massachusetts v. EPA, 540 U.S. 497 (2007). We think these are rare exceptions that prove the rule. Unlike most cases of inaction, President Nixon’s decision to impound funds was very public, and so Congress had no trouble identifying the issue and mustering support to him in. Similarly, President Bush’s decision regarding regulation of automobile emissions fell short of the Clean Air Act’s clear baseline level of required regulation. These two factors—publicity and clarity of delegation—play an important role in our theory of inaction, and we discuss them more fully in Part II.
President does not want to enforce a law, she must advocate for its repeal. She may not simply ignore it.

This Article proceeds in three parts. Part I makes the case that separation of powers theory should take presidential inaction into account. It starts by noting that, while the Framers articulated a functional theory of the separation of powers concerned with inter-branch cooperation and competition, scholars have applied that theory only to affirmative executive action. Yet the modern administrative state has created new and threatening opportunities for Presidents to use inaction as a policymaking tool. The challenge to the prevailing approach is thus clear: there is no theoretical difference between the role of presidential action and inaction in the constitutional scheme, and any complete constitutional theory must deal with this new form of presidential policymaking.

While Part I argues that, as a theoretical matter, executive inaction poses the same problems and should face the same checks as inaction, Part II explains why that is not how our system operates as a practical matter. We illustrate that Presidents can and do make policy by refusing to act and that, in our current constitutional scheme, this inaction often goes unchecked. Part II looks closely at the mechanics of inaction, examining several prominent examples and laying out a rough definition of the kind of inaction we see as threatening. Further, Part II emphasizes that the tools Congress and the courts use to police executive action are inapplicable to the type of presidential inaction we deal with here.

Finally, Part III turns to the implications of our observations for constitutional law and legal doctrine. Beyond illustrating that our separation of powers theory is broken with respect to presidential inaction, Part III focuses on the deeper consequences of that state of affairs. Unchecked inaction calls into question the way we think about Congress’s role, to be sure, but more insidiously, it threatens the constitutional equipoise the Framers envisioned. It does so by allowing the “small government” President we met at the outset to pursue her own policy goals in a way that a “big government” President may not; this inequity results in a bias toward smaller government that our conventional concept of checks and balances simply does not tolerate and cannot counter. Part III also explores some ways institutional designers might get around this theoretical failure, most notably by granting Congress greater power—and greater incentive—to police executive inaction. We conclude by returning to President Obama’s recent immigration announcement. A complete understanding of the constitutional dimensions of presidential inaction allows us to better engage with the question of whether the Obama Administration’s new policy is, in fact, impermissible and, if so, what Congress and the courts might do about it.

I. A BLIND SPOT IN OUR CONSTITUTIONAL THEORY

Madison famously articulated a functional account of our governmental structure, creating overlapping authority to prevent unilateral policymaking by any single branch. Yet his account and that of his successors—modern
separation-of-powers scholars—focuses solely on the problem of policymaking through action. Scholars of a different stripe—those in the field of administrative law—have recognized that presidents can make policy through inaction, and yet they have ignored the constitutional consequences of that fact. In this Part, we reconcile these two literatures, concluding that, in order to be consistent with Madison’s theory of separation of powers, our system of checks and balances must take into account executive refusals to act. In short, we constitutionalize the problem of presidential inaction.

A. Madison and the Tools of Power

“[T]he great problem” the Framers sought to solve was to design institutions of governance that would provide “practical security” against the excessive concentration of political power in one branch of government. For Madison, constitutional provisions clearly delineating limited domains of authority for each branch were of limited utility, for “a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.” Instead, he wrote, the solution was to empower the officials in each branch to counter overreach by the other branches—and to give them an incentive to use that power. By giving “those who administer each department the necessary constitutional means and personal motives to resist encroachments of others,” the Framers sought to create a system in which competition among the branches would limit overreach by all—in which “[a]mbition [would] be made to counteract ambition.” In other words, “[i]f one branch fell under the control of a would-be monarch or tyrannical cabal, the other branches might provide a check by using their constitutional powers to block oppressive measures . . . .”

While an anti-tyranny theme does resound in these passages, Madison also discussed a subtler element of the separation of powers. He sought to ensure that the branches would compete with each other—and that they would limit each other’s power—by defining overlapping domains of authority and thus inciting political actors to defend their domains against “encroachment[].” Madison thus gave form to Montesquieu’s great insight by creating various checks on each branch, the idea being that Congress would check the President to protect its own role as lawmaker (e.g., by withholding

26 The Federalist No. 48, supra note 12, at 308 (James Madison); see also Levinson & Pildes, supra note 20, at 2316.
27 The Federalist No. 48, supra note 12, at 313 (James Madison).
28 The Federalist No. 51, supra note 12, at 321-22 (James Madison).
29 Levinson & Pildes, supra note 20, at 2319.
30 The Federalist No. 51, supra note 12, at 321-22 (James Madison).
31 “When the legislative and executive powers are united in the same person or body, . . . there can be no liberty.” The Federalist No. 47, supra note 12, at 297 (James Madison) (quoting Montesquieu).
funding for unauthorized acts\textsuperscript{32}, just as the President could veto congressional impositions on her role as Chief Executive.\textsuperscript{33}

More generally, the Framers’ theory of checks and balances is a functional one, meant to prevent one branch from unilaterally dictating national policy.\textsuperscript{34} In 1787, when the Republic was newly formed and the greatest perceived threat was a tyrannical government, Madison applied this general principle in the language of action in Federalist 51.\textsuperscript{35} Nevertheless, the underlying theory is meant to limit political action that changes the state of affairs in some way, and nothing in the theory suggests that it should apply any more to action than to inaction.

By this account, although Madison’s language would seem to evince a particular concern with each branch’s affirmative acts, a president’s decision to implement her own preferred policies by inaction presents the same problems as overreach through action. Indeed, assuming, as the Framers did, that Presidents are driven by a “lust for self-aggrandizement,”\textsuperscript{36} one would expect them to seek to impose their own goals on the system of which they are a part. This is doubly true in a modern political system in which government officials care more about the interests of themselves and their parties than those of their departments.\textsuperscript{37} While Presidents may often—perhaps even usually—be able to achieve their partisan goals by directing their agencies\textsuperscript{38} to act contrary to the will of Congress, nothing prevents a President from seeking to achieve other goals by directing her agencies \textit{not to act}. To put it more concretely, a President may grab power for herself just as easily by using the regulatory

\begin{footnotes}
\item[32] U.S. CONST. art. I, § 8, cl. 1.
\item[33] \textit{Id.} art. I, § 7, cl. 2.
\item[34] To be sure, the Framers were evidently more worried about an overreaching Congress than an Executive run amok. \textit{See THE FEDERALIST NO. 48, supra note 12 (James Madison). But that focus was premised on the political realities of the time, not on any reasoned belief that the Executive Branch was the right place to leave discretion. To the extent that there is any “original understanding” of the separation of powers, it is that “if either one grows too strong we might be in trouble.” Greene, \textit{supra} note 1, at 125. The Framers’ support for a strong executive depended upon the limited powers they gave to the President, as well as upon the need for an executive strong enough to counteract an overreaching legislature. In the post-New Deal world, however, those factual assumptions have been displaced. \textit{Id. Thus, the President must also be the focus of the modern “aggrandizement” inquiry.}
\item[35] \textit{THE FEDERALIST NO. 51, supra note 12, at 322, 321 (James Madison).}
\item[37] \textit{See Levinson & Pildes, supra note 20, at 2318.}
\item[38] We cast the problem in terms of \textit{agency} inaction for the simple reason that virtually everything the President does today is channeled through her departments, agencies, or staff. We can imagine marginal cases where the President takes action herself, but those are exceptions and do not call into question our basic theory of inaction. Furthermore, we take as given the idea that the Executive is “unitary”—that is, that the President’s agencies generally submit to his preferences, or, alternatively, that the President “controls” the entire Executive Branch. \textit{See STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).}
\end{footnotes}
process to narrow the ambit of the Clean Air Act as by using that process to extend the Act’s reach.

The fact remains that in most cases, inaction is likely to serve the same policymaking goals—and to provoke the same pathologies and the same costs—as action. It is thus impossible to embrace Madison’s account of legislative-executive separation of powers without accounting for inaction.

B. Constitutional Scholars Have Ignored Inaction

That conclusion has yet to be embraced by courts or in the academy (with the exception of Justice Marshall). Rather, both judges and scholars have focused exclusively on the problem of presidential action, and they have therefore overlooked the constitutional dimensions of executive inaction.

Consider, for example, the seminal formulation of modern separation of powers doctrine, presented in Justice Jackson’s famous concurrence in the Steel Seizure Case. He recognized that, as much as the Constitution divided authority among the branches, it made their authority overlapping, thus creating the interdependence and competition that would protect against tyranny by any single branch. This account underlies his famous tripartite theory of Presidential power, and yet that scheme focused entirely on the problem of presidential action. To wit, Justice Jackson suggested that we are in Zone 1 “[w]hen the President acts pursuant to an express or implied authorization of Congress,” we have entered Zone 2 “[w]hen the President acts in absence of either a congressional grant or denial of authority,” and we have reached Zone 3—where the President’s power is at its “lowest ebb”—“[w]hen the President takes measures incompatible with the expressed or implied will of Congress.”

Scholars are equally susceptible to this criticism. Professor Sunstein, among the first to theorize the role of the modern administrative state in our constitutional structure, argues that constitutional “dangers [are] thought to lie principally in governmental action rather than failure to act.” But the myopic focus on action runs deeper than mere words. It is evident in the problems separation of powers scholars identify, in the solutions they propose, and in the assumptions underlying their basic claims. The scholars’ failure even to account for the possibility of inaction along these three dimensions suggests a

39 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”).
40 Id. at 636-38 (emphasis added).
41 Id. See also Buckley v. Valeo, 424 U.S. 1 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”)
42 Sunstein, supra note 18, at 433.
fundamental oversight in the prevailing theories about the role of the President in our constitutional structure.

First, scholars articulate a set of problems that are generally disconnected from presidential inaction. For example, Professor Ackerman suggests that we overhaul several of the essential features of our system of government to prevent “a vicious cycle” in which “Presidents break legislative impasses by ‘solving’ pressing problems with unilateral decrees that often go well beyond their formal constitutional authority.” Ackerman’s concern is plainly executive action, and he never suggests any concern over a President “solving pressing problems” by failing to act. Runaway action is also the theme of Professor Greene’s analysis of the constitutional dimensions of rise of the administrative state. Greene notes that agencies are able progressively to reach beyond their congressional authorization because Congress is generally unable to override the President’s veto of any legislation sanctioning the agency. But Greene’s discussion of executive overreach presumes that the problem occurs only when a President acts beyond Congress’s intent. Indeed, the mechanism he describes does not function when the executive refuses to regulate; when the president’s choice is inaction, Congress has not passed any new law, and so there can be no entrenching veto. More basically, by focusing on the issue of bureaucratic growth, which is inherently an action-oriented problem, this work largely ignored the problem of inaction.

Moreover, action has left its mark on virtually every solution proposed in the literature. For example, Ackerman—writing mainly in the context of executive war powers—proposes that congressional legislation be subject to default sunset provisions and supermajority requirements for reauthorization. Yet those solutions would be entirely ineffective as a response to the problem of presidential inaction. Ackerman’s solution would not be responsive, for example, if the President failed to execute a war Congress had authorized by statute. In other words, if Congress wanted to remain in Iraq through 2012, and President Obama completed his troop withdrawal, a sunset provision on the

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44 Greene, supra note 1, at 126.
45 Cf. Mashaw, supra note 3, at 193 (explaining the rise of the administrative policymaking as following, in part, from the fact that the President can successfully veto congressional attempts to correct agency overreach). The focus among constitutional administrative law scholars on the expansion of the administrative state is echoed in Gary Lawson, The Rise and Rise of the Administrative State, 107 HARV. L. REV. 1231 (1994).
46 That is, Congress cannot respond by legislating to counter the President’s decision. See infra Section II.C.
47 Ackerman, supra note 2, at 1047.
Iraq War authorization would be of no use. Greene’s solution to the entrenchment concern outlined above is similarly unresponsive to inaction. He proposes that we allow concurrent resolutions to block executive regulations—effectively a legislative veto. However, that solution focuses exclusively on the promulgation of new regulations; a concurrent resolution to “block” executive inaction would face very different obstacles. Greene’s tool thus would be entirely ineffectual with regard to presidential inaction, a point we discuss in greater detail in Section II.C.

Finally, even when not stated outright, action operates in the background of much of the scholarship. For example, Professor Strauss easily accepts that Congress’s power of the purse and its veto override prerogative are sufficient to protect against executive aggrandizement. But these tools are largely impotent in the face of presidential inaction. Strauss’s theory of the separation of powers thus cannot be said to consider the potential impropriety of presidential inaction as a matter of separation of powers.

No doubt many of the theories just described could account for inaction. Indeed, we doubt that any of the scholars mentioned would argue that inaction is not possible, or that it is definitely not a constitutional problem. But that is precisely our point: although inaction is possible and potent, the academic community has ignored its constitutional dimensions.

C. Administrative Law Scholars Recognize Inaction, But Not Its Constitutional Dimensions

Administrative law scholars, on the other hand, have readily recognized that unilateral policymaking can happen through inaction. Yet, those scholars view the problem entirely through the lens of the Administrative Procedure Act (APA) and administrative law—an outcome that ignores the core constitutional concerns.

Administrative law scholars first saw the potential for presidential inaction in the 1980s, when they began to note that the Reagan Administration

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49 To be sure, it is important to conduct a separate analysis of this problem in light of the President’s inherent power over foreign relations, but the assumption that a President’s decision to pursue a war and his decision not to do so are different in some fundamental way is a vestige of the impoverished distinction between action and inaction that we have tried to discredit here.

50 Greene, supra note 1, at 126.

51 See discussion infra Subsection II.C.i.


53 This may be changing, albeit in a slightly different context. Benjamin Ewing and Professor Douglas Kysar recently argued that the courts should respond to legislative inaction. See Benjamin Ewing & Douglas A. Kysar, Prods and Pleas: Limited Government in an Era of Unlimited Harm, 121 YALE L.J. 350 (2011). We share a common premise: the need for a constitutional theory that accounts for the problem of inaction. Indeed, for those persuaded by Ewing and Kysar on the problem of legislative inaction, executive inaction is an easier case.

was pursuing its political preference for deregulation through various administrative decisions. Implicitly, these scholars acknowledged a new baseline: a system of public rights protected by the administrative state. Against this baseline, scholars recognized that deregulation and inaction are both forms of policymaking. At first, courts were somewhat receptive to these concerns. The Supreme Court even went as far as to reverse the Reagan Administration’s attempt at auto-industry deregulation on the grounds that regulation and deregulation were indistinguishable as a matter of administrative law. But deregulation is an easy case for judicial review. Rescinding a prior regulation offers a concrete incident to trigger judicial intervention, and the prior regulation provides a baseline against which the decision may be judged. Pure agency inaction (i.e., the true failure to act or enforce in a particular way) is a much harder case. To wit, just two years later, in Heckler v. Chaney, the Supreme Court held that agency inaction is presumptively unreviewable under the APA.

Scholars immediately objected to the breadth of that claim, recognizing that the issues raised by action, deregulation, and agency inaction are functionally identical. Sunstein proclaimed that “[t]he concerns that support the APA's presumption of reviewability appear no less applicable to review of inaction than to review of action.” Then-Professor Merrick Garland recognized—albeit a bit more cautiously—that inaction should be treated the same as deregulation but also recognized the unique prudential concerns raised by inaction. Since Chaney, administrative law scholars have called for one primary solution: judicial review of agency inaction under the APA.

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


57 Cass Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177, 212 (“[S]ubversion may result from deregulation and inaction as much as from regulation.”).


59 See Garland, supra note 55, at 516 (describing the prudential reasons—“the inadequacy of the agency record and the problem of allocating agency resources”—why courts find deregulation easier to review than inaction).


62 Garland, supra note 55, at 579.

Yet in more than three decades of unchecked presidential policymaking through inaction, these scholars have never recognized, or least never articulated, the constitutional dimensions of the problem. Instead, they have attempted to read and interpret the APA in a way that would justify an administrative solution to the problem. But, in so doing, they have missed the forest for the trees. The problem of “abdication” may be statutory, but it is also deeply constitutional. Thus what we need is a constitutional theory that accounts for presidential inaction.

D. A Theory of and for Presidential Inaction

On the modern, functional account of separation of powers and in the shadow of the administrative state, inaction presents the same problems as action. Indeed, the modern President has the power of inaction at his disposal, and this creates a deep constitutional problem: he can abdicate his constitutional obligations to “take Care that the Laws be faithfully executed” and thus assume a unilateral policymaking role for the whole country. Under any theory of the separation of powers, some form of inter-branch competition must exist to check the awesome power of inaction. Indeed, it is impossible to have a fully theorized account of legislative-executive separation of powers without accounting for inaction.

At the heart of our claim is Madison’s functional account of separation of powers. For Madison and his intellectual successors, the overarching aim of the separation of powers is “to protect the citizens from the emergence of tyrannical government by establishing multiple heads of authority in government, which are then pitted one against another in a continuous

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65 See Bhagwat, supra note Error! Bookmark not defined., at 183 (arguing for judicial review of agency inaction under a more deferential standard of review than action); Bressman, supra note Error! Bookmark not defined., at 1696 (calling for judicial review of even arbitrariness claims, but under the structure of the political question doctrine); Cheh, supra note Error! Bookmark not defined., at 265, 286 (recognizing “the modern face of executive inaction” as a “political tactic” and suggesting that courts must “police nonenforcement”).

66 Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (reviewing agency inaction when alleged as “an abdication” of its statutory duty).

67 U.S. CONST., art. II, § 3.

68 See, e.g., Saikrishna Bangalore Prakash, Hail to the Chief Administrator: The Framers and the President’s Administrative Powers, 102 YALE L.J. 991 (1993); Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 VIRGINIA L. REV. 647 (1996) (discussing Prakash’s characterization of the President’s role). See also infra notes 146-152 and accompanying text for a discussion of the relevance of the statutory baseline.

69 See discussion supra Sections I.A-B.
struggle.” Madison’s dual anti-tyranny and anti-encroachment themes are central to this account of separation of powers, and both conceptions help illustrate how presidential inaction trips the same alarms as action.

The problem of executive inaction is particularly striking in the context of the modern administrative state. At first glance, inaction may appear less troubling than action, because inaction is, at least in the abstract, wholly responsive; that is, a President can use it only to thwart Congress’s affirmative plans, not to put a new plan into motion. One might argue that that constraint limits the President’s ability to intrude upon legislative power through inaction. By contrast, when the President claims new areas of authority for himself, either through broad delegation or through novel constitutional theories, she can pursue infinite policymaking options. However, when cast in the shadow of the modern administrative state, it becomes clear that inaction offers just as much opportunity for entrepreneurial executive policymaking as action does. Consider, for example, that the last five decades have witnessed enormous growth in federal intervention across a variety of domains. The current federal government is intimately involved in the day-to-day regulation of environmental issues, civil rights, criminal law, and even so-called moral issues. With each successive Congress and presidential administration (both Republican and Democratic), the scope of the federal government has grown dramatically. Against this backdrop, modern Presidents have unprecedented opportunities to make policy by rolling back that expansion unilaterally—by failing to appoint agency heads, by refusing to enforce certain laws, or by instructing their agencies not to regulate. That is, although inaction may seem inherently responsive, the sheer scope of modern administration gives a President unprecedented opportunities to make policy through inaction.

Importantly, in most cases, inaction is likely to serve the same policymaking goals—and provoke the same constitutional questions—as action. Policymaking is an abstract principle; any refusal to act may quickly be

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71 It is also worth acknowledging the normative valence some scholars have attributed to this historical development. The transition to an administrative state reflected a shift in our society’s goals and even its first principles. Professor Sunstein argues that we have moved from an emphasis on private autonomy—the primary value of the common law—to an emphasis on public rights, the protection of which was the primary impetus for the administrative state. Sunstein, supra note 61, at 667-68. Indeed, Professor Ackerman argues that the post-New Deal society thoroughly embraced the federal government as a protector of public rights. See Bruce Ackerman, We the People: Transformations (1991). One need not accept this normative account to accept our theory, but it helps provide context for our argument that, today, executive inaction amounts to a genuine form of policymaking.
recast as a decision to do something.\textsuperscript{72} A president’s choice to stop defending the Defense of Marriage Act (DOMA)\textsuperscript{73} is indistinguishable in the abstract from a president’s choice to enforce a law allowing same-sex couples the benefits of marriage.\textsuperscript{74} By Madison’s anti-tyranny conception, the unilateral ability of a President to dictate national policy is precisely what the separation of powers was meant to prevent. It may be bombastic to call a President who fails to act a “tyrant,” but that is the functional effect of inaction.\textsuperscript{75}

Nor is the case any weaker if the purpose of the separation of powers is recast in terms of self-preservation and encroachment. Consider an analogy to \textit{Clinton v. City of New York},\textsuperscript{76} in which the Supreme Court struck down the Line Item Veto Act of 1996.\textsuperscript{77} Executive inaction is functionally a line-item veto, and “[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes.”\textsuperscript{78} That power is left to Congress under Article 1, Section 7, and executive repeal aggrandizes that authority. When President Obama decided not to federally prosecute medicinal marijuana cases, he essentially vetoed a major line-item in the Controlled Substances Act of 1970.

Or take the legislative veto case, \textit{INS v. Chadha}.\textsuperscript{79} The rationale for calling Chadha’s deportation a legislative act (which then required bicameralism) was that it “had the purpose and effect of altering the legal rights, duties, and relations of persons.”\textsuperscript{80} Once one realizes that the President acts against the baseline of a congressional statute, it becomes clear that inaction has that same effect on legal rights. It is not merely responsive, but rather is directly harmful. When President George W. Bush decided not to regulate auto emissions under the Clean Air Act despite the fact that Congress had passed a statute requiring the Environmental Protection Agency (EPA) to do so, the Administration’s decision infringed upon the public’s statutory right to live in a world in which such emissions are limited. As Justice Marshall recognized in \textit{Heckler v. Chaney}, the failure of the federal government to

\begin{itemize}
  \item \textsuperscript{73} Defense of Marriage Act, Pub. L. No. 104-199, \S 3(a), 110 Stat. 2419, 2419 (1996) (codified at 1 U.S.C. \S 7 (2006)).
  \item \textsuperscript{74} There are certainly counterarguments—for example, the argument that action infringes on individual liberty in a way the Framers worried about, while inaction does not. See Sunstein, supra note 61, at 663-65. However, none of these objections negates the fundamental point that our separation of powers theory should not distinguish between the two. See discussion \textit{infra} Section III.B .
  \item \textsuperscript{75} Moreover, if we accept the normative claim that the administrative state reflects our societal recognition of public rights, perhaps a President who fails to enforce such rights \textit{deserves} the title.
  \item \textsuperscript{76} 524 U.S. 417 (1998).
  \item \textsuperscript{77} Pub. L. No. 104-130, 110 Stat. 1200.
  \item \textsuperscript{78} 524 U.S. at 438 (emphasis added).
  \item \textsuperscript{79} 462 U.S. 919 (1983).
  \item \textsuperscript{80} Id. at 952.
\end{itemize}
enforce matters a great deal for public entitlements and obligations.\textsuperscript{81} As such, inaction constitutes a legislative act and thus encroaches on Congress’s power.

But does it matter whether the executive pursues a particular policy goal through action or inaction? Of course it does, for all sorts of prudential reasons. For example, as the Court noted in \textit{Chaney}, inaction is difficult to detect, and it is not obvious what should trigger review of the executive’s refusal to act.\textsuperscript{82} But while it may be true that inaction should not be subject to judicial review for a host of prudential reasons, that does not mean that inaction is different from action in any fundamental sense.

While the Court and administrative law scholars have treated inaction as a technical problem with (or without) technical solutions—and separation-of-powers scholars have missed it altogether—we instead see the problem as structural. No functional rationale can explain why Congress and the courts should be allowed to police action but not inaction. Indeed, the underlying reasons for checks and balances should apply equally to presidential policymaking, notwithstanding formal distinctions between action and inaction. Put another way, the existing constitutional structure can work properly only if the branches have the tools to police the boundaries of all of their coordinate branches’ decisions, no matter their form.

Today, however, Congress and the courts simply lack the tools to police inaction. Where the President wants to act, he must win the support of Congress and have his actions upheld by the judiciary. But where the President pursues a policy of inaction, Congress and the courts are powerless. Put simply, while our theory of separation of powers calls for checks on executive inaction, in practice we have none. This fundamental failure is the subject of the next Part.

\section*{II. Executive Inaction: A Study}

The executive inaction we criticize here represents a President’s determination on policy grounds\textsuperscript{83} that a specific law should no longer be enforced. This phenomenon is neither rare nor obscure. Even confining ourselves to the most-publicized decisions of the two most recent presidential administrations, we have identified four prominent examples of policy-motivated executive inaction: President George W. Bush’s decisions not to enforce (1) environmental regulations or (2) civil rights laws; and President Obama’s decisions not to (3) defend DOMA or (4) enforce federal medicinal marijuana laws. In each of these examples, the President was able unilaterally to pursue a policy agenda through inaction.

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 831-33 (majority opinion).
\item “Policy” is a bit of a blunt term for our specific purposes. We simply mean to invoke the idea of the President’s policy platform. That is, if the President had complete say over which laws should exist, would she support a specific law? If not, the objection sounds in “policy” and is the source of our concern.
\end{enumerate}
\end{footnotesize}
But isn’t the Executive justified in pursuing some inaction based on reasonable grounds? Of course. Congress might expressly leave a statutory mandate quite broad, allowing an agency to draw on its expertise to determine the appropriate level of enforcement. Take, for example, the Food, Drug, and Cosmetic Act, which grants the Food and Drug Administration (FDA) broad discretion to ensure public safety and prevent false advertising. Congress fully contemplated and duly authorized the FDA to exercise discretion to enforce (or not to enforce) the Act. Indeed, a major source of the modern President’s power is the discretion to choose her preferred level of enforcement within the congressional scheme. Additionally, the President must often choose to under-enforce specific programs due to resource constraints that prevent him from funding every program fully. When resources are scarce—as they usually are—the President will likely draw on her own policy inclinations in deciding what to spend money on. But reasoned discretion in light of a broad statutory scheme or resource constraints is not the policy-motivated executive inaction with which we take issue.

Rather, we criticize inaction in the absence of such rationales. Take, for example, the four examples enumerated above. Although these Presidents rationalize these acts as falling within agency discretion or as reflecting necessary prioritization given limited resources, there is evidence that those explanations are pretext; they seem to reflect each President’s policy preferences (e.g., deregulation from a conservative President, expansive social policy from a liberal one). And, in effect, they amount to unilateral decisions by each President to repeal non-trivial portions of the U.S. Code. (Of course, the informal nature of inaction means that a future President may be able to reverse such a decision; in that sense, inaction is not identical to repeal. However, even if every instance of inaction were eventually reversed, the period during which a law was not being enforced would amount to a unilateral repeal for the length of the sitting President’s term, contrary to the requirements of the Constitution.) This is the policy-motivated executive inaction we mean to criticize.

In this Part, we build a rough definition of policy-motivated executive inaction and test it against our empirical examples. First as an objective matter, we ask whether the President’s level of enforcement failed to meet some statutory baseline—usually a federal statute requiring the President to regulate a particular substantive area. If so, there can be no claim of congressionally authorized executive discretion. Second, we ask whether there is any reason to

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84 Notice that Justice Marshall concurred in the judgment in Heckler v. Chaney, in which the Court rejected a legal challenge to the FDA’s decision not to enforce its normal licensing protocols as to lethal injection drugs. He did so on precisely these grounds, namely that the FDA’s inaction was within the bounds of the original congressional mandate.


86 For an excellent and timely example of legal analysis arguing that a particular non-enforcement decision could not plausibly be justified on resource-allocation grounds, see Justice Scalia’s dissent in Arizona v. United States, 567 U.S. ___ (2012) (Scalia, J., dissenting), slip op. at 20-21.
doubt that the President’s under-enforcement was the result of resource constraints. And third, we ask whether the outcome is consistent with the President’s prior public policy statements. (The second and third questions act as proxies for policy motivation, though from different perspectives). If the answer to each question is “yes,” the President has engaged in policy-driven inaction, and all of our separation-of-powers-motivated concerns apply.  

As will become apparent, the evidence of policy-motivated inaction will often be circumstantial; we do not purport to be able to identify it with one-hundred percent accuracy in every case. Instead, we offer these factors as tools for interested courts and scholars to begin to understand the role inaction plays in American policymaking.

This Part proceeds in three steps. In Section II.A, we describe the four prominent examples of executive inaction mentioned above to better orient the reader to the problem of presidential inaction. In Section II.B, we delve more deeply into the rough typology described above in order to distinguish policy-motivated executive inaction from less-problematic presidential decisions. Finally, in Section II.C, we discuss why the practical checks on executive inaction are both fewer and weaker than with respect to executive action. If Part I concludes that executive inaction deserves checks and balances as a matter of theory, Part II shows that we lack them as a matter of practice.

A. Recent History of Presidential Inaction

As these case studies will show, policy-motivated presidential inaction is identifiable, common, and prominent. Because our purpose is simply to convince the reader of that basic fact, rather than to provide an exhaustive overview of how and when Presidents have under-enforced various laws, we focus on illustrative examples, intentionally chosen to be well known to even the generalist reader. Additionally, by focusing on such examples, we draw from a variety of procedural and substantive contexts: agency rulemaking, affirmative civil rights litigation, defensive constitutional litigation, and criminal prosecution. We recognize that these case studies raise distinct concerns, even within the rubric of presidential inaction (a decision not to regulate is not quite the same as a decision not to defend a particular law, for example), but our basic point remains the same: in each of these cases, the Executive was able to change federal law—to engage in unilateral policymaking that was contrary to the congressional will embodied in a duly

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87 Both the second and third factors are necessarily under-inclusive. A President may reasonably fall short of her enforcement duties for reasons are not resource-related (e.g., inherent tension between two enforcement mandates). Similarly, a President may engage in impermissible inaction without any public evidence that it was policy-motivated. These may or may not be instances of the inaction we find problematic, but disentangling the two factors and determining the true motivation for a particular decision not to act would be difficult and would no doubt obscure the clear case against policy-based inaction. Thus, we exclude those examples from our study.
enacted statute—by refusing to do something required of her.\footnote{As a preliminary caveat, because we have chosen high-profile examples, we recognize that elements of these examples will not perfectly fit the typology for executive inaction we lay out in Section II.B. Nonetheless, we think that they accurately capture the essence of the constitutional concerns surrounding presidential inaction.} Finally, it is important to understand that these are examples of policymaking through inaction; whether the courts or Congress responded effectively is a separate question (and one we take up in the next Sections).

1. Environmental regulation

The events leading up to the Supreme Court’s decision in Massachusetts v. EPA\footnote{540 U.S. 497 (2007). Although a controversial 5-4 decision at the time, six (or perhaps seven) Supreme Court Justices recently appeared to reaffirm its continuing validity in American Electric Power Co. v. Connecticut, 131 S. Ct. 2527 (2011).} provide the most prominent example of under-enforcement of environmental laws during the past two presidential administrations. The Clean Air Act requires the federal government, via the EPA, to regulate “air pollutants . . . which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.”\footnote{Clean Air Act § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2006).} In 1999, in response to growing concern over climate change, a group of environmental advocates asked the EPA to classify vehicle emissions as air pollutants.\footnote{Massachusetts v. EPA, 540 U.S. 497, 510 (2007).} The EPA rejected the petition on two grounds: first, regulating carbon dioxide was outside of its statutory authority; and second, even if regulating the emissions in question was within its authority, such regulation would be bad policy.\footnote{68 Fed. Reg. 52922, 52925-29 (Sept. 8, 2003). The heading of the section describing this ground for EPA’s decision is labeled “Different Policy Approach.” Moreover, the ruling explicitly states that the EPA disagrees with the approach urged by petitioners and instead “agree[s] with the President.” Id.} Specifically, it would conflict with the President’s views on the science behind climate change, interfere with his approach to domestic fuel efficiency standards, and threaten his international negotiations with China on similar matters.\footnote{Id. at 529-31.}

The Supreme Court rejected both of the EPA’s claims. First, as a matter of statutory interpretation, the Court read the language in the Clean Air Act expansively,\footnote{Massachusetts v. EPA, 540 U.S. 497, 510 (2007).} holding that it “unambiguously”\footnote{Id. at 529.} extended to greenhouse gas emissions from vehicles. Second, while recognizing that the Act does allow the EPA some discretion to determine whether these pollutants “endanger public health and welfare,” the Court expressly rejected the contention that the EPA could consider policy issues in making that judgment.\footnote{Id. at 532-35.} Because the EPA’s
own reports concluded that carbon emissions did endanger public welfare,⁹⁷ the plain language of the Clean Air Act obligated the EPA to regulate.

The Court’s opinion makes it clear that this is an easy case of policy-motivated inaction (and thus one of the few cases in which a court considered itself competent to perform meaningful review). The two-part statutory analysis effectively establishes a congressional baseline, which the EPA did not satisfy. Congress explicitly told the President to regulate air pollutants that met certain requirements; the statute left it to him to decide how—but not whether—to do so. Moreover, the EPA made no attempt to cite resource constraints and, in fact, cited the President’s own policy objections as the basis for its decision. As such, this is perhaps the clearest example of policy-motivated inaction we have at our disposal. As the Court put it, “the President[’s] authority does not extend to the refusal to execute domestic laws” that require specific action.⁹⁸

2. Civil Rights Enforcement

Much has been written about the Bush Justice Department’s under-enforcement of civil rights laws,⁹⁹ and we will not rehearse the vivid details of those excellent accounts here. We do, however, emphasize a few facts—relating to the Civil Rights Division’s duties to enforce Section 5 of the Voting Rights Act of 1965 (VRA)¹⁰⁰—that suggest that the Administration’s inaction was motivated by policy preferences, rather than by any sound reason for exercising discretion.

Compared to the Clean Air Act, it is less immediately apparent that Section 5 of the VRA imposes a baseline enforcement requirement on the

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⁹⁷ See id. at 511.
⁹⁸ Massachusetts v. EPA, 540 U.S. at 534. While the Court’s intervention in Massachusetts v. EPA might indicate that the problem of executive inaction can be policed in the status quo, it is the exception that proves the rule. Judicial checks on executive inaction are quite weak, see infra Section II.C, and this case is famous for its outlier status. What’s more, the Supreme Court did not actually decide the issue; it remanded for further review.
Justice Department. By its text, Section 5 forbids certain “covered” jurisdictions from implementing any change in “any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting” without first (1) obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change “does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color” or (2) submitting the change to the Attorney General and receiving no objection within 60 days. While this text may not reveal a clear baseline enforcement requirement, “it is important to focus on the entire scheme of § 5.”

Shortly after Section 5 was upheld in *South Carolina v. Katzenbach*, the Attorney General promulgated various regulations, including the following standard for preclearance submissions:

> Section 5 provides for submission of a voting change to the Attorney General as an alternative to the seeking of a declaratory judgment from the U.S. District Court for the District of Columbia. Therefore, the Attorney General shall make the same determination that would be made by the court in an action for a declaratory judgment under section 5: whether the submitted change neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group.

Therefore, just as a federal court bears an affirmative obligation to ensure that any submitted change complies with the statutory requirements protecting minority voting power, the Attorney General interpreted Section 5’s preclearance scheme to impose the same obligation on him. What’s more, Congress amended Section 5 on multiple occasions, never once altering this interpretation. As a result, Section 5 has generally been described as a “shield,” precisely because it was assumed that the Attorney General bore an affirmative duty to ensure that preclearance submissions properly protect minority voting. With this scheme in mind, it appears that the congressional baseline in this context is a requirement that the Civil Rights Division object when submissions have the purpose or effect of denying or abridging the right to vote on account of race.

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102 383 U.S. 301 (1966).
104 See Lorillard v. Pons, 434 U.S. 575, 580 (1978) (“Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change . . . .”).
105 Heather K. Way, *A Shield or A Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1440 (1996). This affirmative duty has proven essential, as “Section 5 has been critical to the Act’s success with respect to both first- and second-generation issues.” Pamela S. Karlan, *Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act*, 44 HOUS. L. REV. 1, 6 (2007).
However, during the second Bush Administration, the Division consciously chose not to meet this requirement. Evidence of that decision abounds. While some point to the Division’s individual preclearance decisions as evidence of politicized under-enforcement,\(^{106}\) that argument is not necessary for our purposes. One need only look at the systematic evidence to comprehend the scope Administration’s inaction with respect to the VRA: throughout its two terms, the Administration severely understaffed the unit tasked with reviewing preclearance submissions. Between 2001 and 2006, the number of preclearance submissions had increased by 75%,\(^ {107}\) but the staff had been cut to one-third of its previous level.\(^ {108}\) During this period, preclearance approval rates fell to their lowest in the history of the VRA. Only one out of every 2,000 submissions received an objection during the Administration’s first five years in office, compared to one out of every 500 during the previous fifteen years.\(^ {109}\) The Administration had largely chosen not to enforce Section 5, relative to the apparent baseline requirement.

Moreover, just as the evidence of nonenforcement is overwhelming, so too is the evidence that it was motivated by the Administration’s policy priorities. There is no evidence of any resource constraints that could justify the Bush Administration’s decision to under-enforce federal civil rights laws. Between 2001 and 2006, the congressional appropriation for the Civil Rights Division grew from $92 million to $107 million. Furthermore, the number of full-time Division employees grew from 104 to 109 in that period.\(^ {110}\) This coincided with public statements by the Bush Administration reflecting its

\(^{106}\) Erosion of Rights, supra note 99, at 36-38 (describing the anecdotal evidence for the politicization hypothesis, including (1) the Division’s intentional decision to preclear a Mississippi redistricting scheme that diluted minority voting power, on the basis that it helped Republicans in the state legislature; (2) its decision to preclear Republican House Speaker Tom DeLay’s infamous mid-decade Texas redistricting plan over the express recommendation of career staff, and (3) its to preclear a Georgia voter identification law that would suppress minority turnout, because such laws generally help Republican candidates.)

\(^{107}\) Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 110 (2007) [hereinafter Changing Tides] (responses of Wan Kim, Assistant Attorney General) (“While 7,080 submissions were received in 2006, only 4,121 were received in 2001. . . .”).

\(^{108}\) Changing Tides, supra note 107, at 115, 118 (statement of Joseph Rich, former Voting Section Chief). Requests by the career staff to increase the number of analysts for preclearance submissions were denied. Id. at 118.


view, as a policy matter, that religious freedom claims were more worthy of the Justice Department’s attention than voting rights suits. In short, the Administration’s actions with respect to the Voting Rights Act—a statute that had not been altered during President Bush’s term, and one that suffered from no obvious constitutional defect—are a paradigmatic example of policy-motivated presidential inaction.

3. Defense of Marriage Act

A very recent example of executive inaction is President Obama’s 2011 decision not to defend Section 3 of DOMA against constitutional challenge. As a baseline, the Department of Justice “generally defend[s] a law whenever professionally respectable arguments can be made in support of its constitutionality.” If the Justice Department decides, however, that it will not defend a particular law, the Attorney General must write a letter to the Speaker of the House informing him or her of the decision and the underlying rationale. The idea that the President should defend federal laws has constitutional roots. Although there is a vast debate over the scope of the President’s duty to defend laws she believes are unconstitutional, the debate generally assumes that the President’s argument for why the law is unconstitutional falls within the constitutional mainstream. This constitutional background, combined with the rarity with which Presidents attempt to forego defense of federal laws, suggests that the relevant baseline is


112 Then-professor and now California Supreme Court Justice Goodwin Liu offered the theoretical defense that the Bush Administration was, in fact, reallocating resources towards alternative enforcement priorities, including human trafficking and religious discrimination. See Liu, supra note 99, at 81. However, given the scope of the politicization of the Civil Rights Division, he too ultimately concludes that the Bush Administration appears to have acted “on political whim.” Id. at 82. It should be noted that Justice Liu’s essay hints at the deep checks-and-balances concerns that motivate this Article; however, he limits the scope of his concern to the Civil Rights Division only.

113 We recognize, of course, that the Obama Administration has technically chosen to not defend DOMA but still enforce the law. The distinction, while important, does not affect our argument. The decision not to defend a law against constitutional challenge nevertheless represents an act of policy-motivated executive inaction.


116 See, e.g., Johnsen, supra note 127, at 12 (“If Presidents were to disregard laws routinely based solely on their own constitutional views, they would deprive Congress of the ability to enact effective legislation premised on its considered constitutional views to the contrary even by a two-thirds majority over a constitutionally based veto.”); Waxman, supra note 114, at 1087-88 (describing the only circumstance when he refused to defend a congressional law as where it would have required asking the Supreme Court to limit Miranda v. United States, 384 U.S. 436 (1966)). But see Prakash, supra note 128, at 1621 (suggesting that the Executive is duty-bound to follow his own view of the Constitution, irrespective of current doctrine).
that the President and her Attorney General do have a duty to defend federal laws that are not clearly unconstitutional.\textsuperscript{117}

And yet, in February 2011, Attorney General Eric Holder informed House Speaker John Boehner that, on the President’s orders, the Justice Department would not defend DOMA.\textsuperscript{118} In brief, the rationale was that Obama and Holder believed that sexual orientation qualified as a suspect classification, thus triggering a heightened level of scrutiny against which DOMA would certainly fail in court.\textsuperscript{119}

This is another case of policy-motivated executive inaction. The Attorney General’s letter to Speaker Boehner did not mention any practical rationale for the Administration’s decision not to defend DOMA (e.g., lack of resources).\textsuperscript{120} Nor were DOMA cases such an overwhelming part of the Justice Department’s docket that we might infer a resource-based motivation.\textsuperscript{121} To the contrary, the decision appears to stem from the Candidate Obama’s 2008 open letter to the LGBT community, in which he called for DOMA’s repeal.\textsuperscript{122} Moreover, soon after the Obama Administration decided not to defend the law, the Administration went on the record in support of repealing the Act\textsuperscript{123}—this after extending employment benefits to same-sex partners of federal employees\textsuperscript{124} and successfully pushing for the repeal of Don’t Ask Don’t Tell.\textsuperscript{125} The Administration’s consistent attempts to advance LGBT rights


\textsuperscript{119} Id. As of the time of writing, Congress has hired a private group, represented by Paul Clement, to defend DOMA, although opponents of that effort have been successful in all of their challenges following the February 2011 decision. See Windsor v. United States, 10 No. 10-8435 (S.D.N.Y. June 6, 2012); Gill v. Office of Personnel Mgmt., 682 F.3d 1 (1st Cir. 2012); Golinski v. U.S. Office of Pers. Mgmt., No. 10-00257, 2012 WL 569685 (N.D. Cal. Feb. 22, 2012).

\textsuperscript{120} Letter from Holder to Boehner, supra note 118.

\textsuperscript{121} The Attorney General’s letter merely identifies two cases in which DOMA was being challenged. Complaint for Declaratory and Injunctive Relief, Pedersen v. Office of Personnel Management, No. 310 CV 1750 VLB (D. Conn. Nov. 9, 2010), 2010 WL 4483820; Complaint, Windsor v. United States, No. 10 CV 8435 (S.D.N.Y. Nov. 9, 2010), 2010 WL 5647015.


through various political means—executive order and legislative repeal—lends further support to the view that politics and policy motivated President Obama not to defend DOMA.

One might argue that this is a case in which policy preferences merely coincide with a legitimate constitutional case for inaction. Recall the debate over the scope of the Executive’s duty to defend laws she believes are unconstitutional. Some suggest the President must always defend a law, no matter her view of its constitutionality;\(^\text{126}\) some argue that the President has discretion to refuse to defend in certain cases;\(^\text{127}\) and some make the case that the President may never defend unconstitutional statutes.\(^\text{128}\) But, as we mentioned above, this debate generally assumes that the President’s argument for why the law is unconstitutional falls within the constitutional mainstream. The Obama Administration’s argument on DOMA, on the other hand—that sexual orientation is a suspect class—runs contrary to clearly established precedent.\(^\text{129}\) Therein lies the problem: if the President is able to adopt a minority constitutional theory to justify refusing to defend a federal law, it remains the case that she is able unilaterally to set national policy against the baseline established by Congress.\(^\text{130}\)

4. Medicinal Marijuana

Our final example of policy-motivated presidential inaction is the Obama Administration’s decision not to enforce federal drug laws prohibiting the sale or use of medicinal marijuana in states that have legalized the drug for those purposes. The relevant statute is the Controlled Substances Act (CSA), originally passed in 1970, which bans the possession, cultivation, and distribution of specified substances, including marijuana.\(^\text{131}\) Critically, the CSA


\(^{127}\) See, e.g., Dawn E. Johnsen, Presidential Non-enforcement of Constitutionally Objectionable Statutes, 63 LAW & CONTEMP. PROBLEMS 7 (2000).


\(^{130}\) It is true that Congress can, and did, defend DOMA, thus preventing the Executive’s refusal to defend from being an outright repeal of a law. Notwithstanding that point, when the Executive Branch publicly announces that it believes a federal law is unconstitutional, even if that decision is based on a minority theory of the Constitution, it is unlikely that the law will be upheld even when defended by another party. Indeed, we have been unable to find any prominent case in which the Executive refused to defend a law and yet the law was upheld in the federal courts.

does not distinguish between personal, professional, and medical uses; all are presumptively illegal. Indeed, this was one conclusion of the 2005 Supreme Court case *Gonzalez v. Raich*.\(^{132}\) The Supreme Court reasoned that Congress intended the CSA to be a “comprehensive regime”\(^{133}\) for drug regulation, that is, one that disallowed any exceptions, even for noncommercial intrastate consumption.\(^{134}\) Thus, after *Raich*, the statutory baseline was clear: the President must enforce the CSA even against medicinal uses of marijuana.

But in October 2009, the Department of Justice announced that it would no longer prosecute individuals using medicinal marijuana in “clear and unambiguous compliance” with state laws authorizing such use.\(^{135}\) There were multiple caveats: the memorandum was meant only to guide federal prosecutors and not to override their discretion, and it did not extend to marijuana use associated with violence or to pretextual use.\(^{136}\) However, the Attorney General’s decision effectively legalized retail use of medicinal marijuana in fourteen states.\(^{137}\) Put differently, the real effect of the Obama Administration’s decision was to rewrite drug laws, if not to remove a subset of them from the books entirely, at least while the President is in office.

The Administration’s decision effectuated another of Candidate Obama’s campaign promises. In a March 2008 interview with an editor of the *Oregon Mail Tribune*, then-Senator Obama said:

> When it comes to medical marijuana, I have more of a practical view than anything else. I mean, my attitude is that if it’s an issue of doctors prescribing medical marijuana as a treatment for glaucoma or as a cancer treatment, I think that should be appropriate . . . .

> . . .

> What I’m not going to be doing is using Justice Department resources to try to circumvent state laws on this issue. Simply

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132 545 U.S. 1 (2005). The plaintiffs were two elderly women, Angel Raich and Diane Monson, who were growing and personally using a small amount of marijuana for medicinal purposes, under a California statute that permitted such cultivation and use. CAL. HEALTH & SAFETY CODE ANN. § 11362.5 (West Supp. 2005). After the Drug Enforcement Agency raided Monson’s home and destroyed her plants (but did not prosecute), Raich and Monson challenged the CSA’s constitutionality, alleging that the Interstate Commerce Clause could not extend to their backyard.

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

134 See *id.* at 13 (“To effectuate these goals, Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA.”).


136 *Id.* at 2-3.

because I want folks to be investigating violent crimes and potential terrorism.\textsuperscript{138}

Shortly after President Obama’s inauguration, Attorney General Holder reaffirmed that that promise would be the policy of the Justice Department,\textsuperscript{139} and in October 2009, the policy was formalized in the aforementioned memorandum. One need not strain to recognize that this under-enforcement was policy-motivated.

That being said, the Attorney General’s memorandum did mention resource constraints as one justification for the decision: “[P]rosecution of individuals with cancer or other serious illnesses who use marijuana as part of a recommended treatment regimen consistent with applicable state law . . . is unlikely to be an efficient use of limited federal resources;”\textsuperscript{140} the President would prefer that the government use those resources to “investigat[e] violent crimes and potential terrorism.”\textsuperscript{141} Resource-driven non-enforcement decisions—especially in the context of criminal prosecutions—are an inevitable part of the Chief Executive’s role, as we discuss below,\textsuperscript{142} and thus we take this objection seriously.

However, the resources claim in this case seems pretextual. Since its announcement, the Obama Administration has mostly reversed its position on medicinal marijuana,\textsuperscript{143} an odd decision if resources were truly the motivating rationale. That is, if the initial concern was reallocating resources to efforts to fight terrorism and violent drug trafficking, it seems doubtful that any ill effects from permitting medicinal marijuana use in the last two years were sufficient to justify reverting to the prior regime.\textsuperscript{144} We cannot be sure, of course, but the available evidence suggests that this was always a policy-motivated decision.

\begin{itemize}
  \item \textsuperscript{138} Interview between Barack H. Obama, Senator from Ill., and Gary Nelson, Editor for Mail Tribune (Oregon), Mar. 22, 2008, http://granitestaters.com/candidates/video_obama_02.html.
  \item \textsuperscript{140} Ogden Memorandum, \textit{supra} note 135, at 2.
  \item \textsuperscript{141} Nelson Interview, \textit{supra} note 138.
  \item \textsuperscript{142} See discussion infra Section II.B.
  \item \textsuperscript{144} It may be true that the Obama Administration’s ultimate position on medicinal marijuana will not be a case of executive inaction. Nevertheless, we view the Obama Administration’s flip-flop on the medicinal marijuana question as demonstrating the problem of executive inaction.
\end{itemize}
**B. Identifying Policy-Motivated Executive Inaction**

While we are confident that the foregoing stories accurately capture examples of policy-motivated inaction, that conclusion is not necessarily obvious in every case. What is needed, then, is a method to distinguish unchecked, policy-motivated inaction—a constitutional pathology—from the more mundane discretionary acts or resource-allocation decisions any executive or prosecutor must make everyday. From the four instances of potential presidential inaction described above, we can identify the inaction that poses serious constitutional issues; it is the kind that falls short of a well-recognized congressional baseline. Lest we capture too much of Washington’s day-to-day political struggles in our definition, we further restrict the label “policy-motivated inaction” for decisions that both cannot be explained by a lack of resources and achieve an ultimate outcome that coincides with the President’s publicly stated policy preferences.

Before articulating these principles, it is worth noting that although the evidence of policy-motivated inaction will often be circumstantial, little rides on whether these distinctions perfectly distinguish permissible and impermissible presidential decisions. Inaction falls along a continuum. For some failures to enforce that fall in line with the President’s policy agenda, there will be a plausible resource-based explanation. For others, the congressional baseline might be less than perfectly clear. It suffices to say that there is some presidential inaction that is a constitutional problem; we offer these factors as tools for interested courts and scholars to begin to understand the role inaction plays in American policymaking, but in the end, it will be up to Congress (and, in some cases, the courts) to decide when to respond to presidential inaction.\(^{145}\)

Our first principle is the most basic: presidential inaction occurs when the President falls short of a congressional baseline. It is a reality of modern lawmaking that Congress vests broad enforcement discretion in the Executive. For both political and practical reasons, “Congress has until recently relied almost entirely on the discretionary model in delegating authority to regulatory agencies.”\(^{146}\) Thus, we see statutory grants that would allow a range of enforcement, with some minimum requirements—*the executive “shall” do X*—and some maximum authority—*the executive “shall not” do X.* (A well-

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\(^{145}\) After all, separation of powers has always been messy. The Framers set up institutions to encourage political fights to work out these issues. When it comes down to political battles, the definition does not much matter. Instead, the institutional designer should do as Madison did—we must simply empower the right institutions to fight back. This Section is an attempt to provide policymakers and scholars with a sense of the factors they might use to do so.

\(^{146}\) See e.g., Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 Duke L.J. 819, 823 (“For both political and institutional reasons, Congress has until recently relied almost entirely on the discretionary model in delegating authority to regulatory agencies.”); see also Richard J. Pierce & Sidney A. Shapiro, *Political and Judicial Review of Agency Action*, 59 Tex. L. Rev. 1175, 1198 (1981); Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 Int. Rev. L. & Econ. 239 (1992).
known example is the statute at issue in the *Overton Park* case, which provided that the Secretary of Transportation “shall not approve” construction through a public park unless “no feasible or prudent” alternative was available.\(^{147}\)

Notwithstanding the broad discretion given to the Executive, the President still might fall short of the statutory baseline,\(^{148}\) as the examples above confirm. The Clean Air Act did not leave it to the President to decide whether to regulate air pollutants; that was a baseline requirement.\(^{149}\) Nor did the Controlled Substances Act allow the President to decide which drugs laws to enforce; the Supreme Court deemed the CSA to be a comprehensive scheme for the regulation of all drug use.\(^{150}\) Perhaps the statutory baselines in the Voting Rights Act and the Executive’s duty to defend federal statutes are less clear, but even there, scholars are generally in agreement that the Presidents’ actions fell short of the baseline set by Congress.\(^{151}\) Thus, even if not explicitly written into the statutory code, each law requires some baseline level of enforcement, and falling short is a presumptive case of executive inaction.\(^{152}\)

Our second principle recognizes that the President may have a constitutionally justified rationale for falling short of the congressional baseline. In such cases, the decision not to enforce the law would not be the sort of policy-motivated presidential inaction we criticize. An obvious example is resource constraints. Enforcing the statutory and regulatory code, given limited funding and staff, will necessarily require that the President under-enforce some laws, even below statutory baselines. This observation is not only descriptively accurate;\(^{153}\) some even argue that resource-allocation is inherent in the President’s constitutional role.\(^{154}\) As the Executive, the

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\(^{148}\) See Prakash, *supra* note 68. Prakash presents two readings of the Take Care Clause. The moderate version views the President as a pure fiduciary; the more robust version gives him broad discretion to decide how to enforce statutes. Yet, under neither view is the President given discretion to refuse to follow the baseline established by duly enacted statutes. See also *Amar, supra* note 68 (discussing Prakash’s observations in light of the Opinion Clause).

\(^{149}\) *Massachusetts v. EPA*, 540 U.S. 497, 528 (2007); see discussion *supra* Subsection II.A.1.

\(^{150}\) *Gonzales v. Raich*, 545 U.S. 1, 24 (2005); see discussion *supra* Subsection II.A.5.

\(^{151}\) See discussion *supra* Subsections II.A.2-4.

\(^{152}\) Note that this is not how the term “inaction” might be deployed in public debate. For example, if a President is enforcing a law below the maximum level, there will likely be a special interest group that would lobby and litigate for a higher level, arguing that the current level of enforcement is tantamount to inaction. Rhetorical appeals aside, this is not what we mean by “inaction.” We use the statutory baseline because it connects with our motivating concern, a violation of separation of powers. Where the President differs from Congress in his interpretation of the statute, that poses no separation-of-powers issue.


\(^{154}\) Saikrishna Prakash, *Regulation Presidential Powers*, 91 CORNELL L. REV. 215, 257 (2005) (reviewing *Harold J. Krent, Presidential Powers* (2005)) (“In other words, the President is to carry out his duties the best he can given the constraints of time, resources, and funding. When he does this, he fulfills his constitutional obligations.”).
President is *supposed* to make the hard resource-balancing decisions that cannot be entrusted to a 538-person political body that will always want the best for its members’ individual constituencies. As Professor Strauss notes, “Attending to these conflicts seems an inevitable aspect of a chief executive’s function.”\(^{155}\) Other constitutional requirements may also come into play. For example, if the President believes a congressional statute interferes with one of her Article II powers, that might justify not enforcing the law.\(^{156}\) Where those conflicts are in play, the President may pursue a policy of inaction without triggering the concerns we have outlined here.

Our third principle is a nod to political realism: we criticize *policy-motivated* inaction, because it reflects the unilateral decision-making of the President and is thus most troubling under the Madisonian separation-of-powers theory. Thus, a relevant factor is whether the President’s falling short of a congressional baseline dovetails with a previous statement of public policy preference. Such extrinsic evidence cannot demonstrate a causal connection, but it does provide support for an inference that the President’s inaction was policy motivated.\(^ {157}\)

The examples above demonstrate how the second and third principles accord with the sort of problematic presidential inaction we mean to address. In these examples, there is overwhelming evidence that the President’s policy preferences aligned with the inaction at issue, from the Bush Administration on civil rights to the Obama Administration on DOMA. But it would be presumptuous to infer policy-motivated inaction on that basis alone. If the President had been meaningfully resource-constrained and Congress had not fully funded all of its statutory obligations, we would not fault the President for drawing on his own policy preferences in deciding his enforcement priorities. Thus, it is crucial to recognize that there were *no meaningful resource constraints* in most of these examples, whether for the EPA, the Civil Rights Division, or the Civil Division (defending DOMA).\(^ {158}\) Admittedly, the medicinal marijuana example is a harder case, as the Obama Administration

\(^{155}\) Strauss, *Fourth Branch*, *supra* note 70, at 642.

\(^{156}\) *Cf.* M.B.Z. v. Clinton, 131 S. Ct. 2897 (2011). Note that she must distinguish the “Take Care” Clause, which requires the Executive to enforce congressional statutes, from other Article II powers, which reflect the independent powers of the President.

\(^{157}\) Our methodology draws on analogues in other areas of law. Most familiarly, in criminal law, public statements about a criminal goal can be taken as evidence of criminal intent. In antitrust, courts infer collusion when parallel conduct is accompanied by certain other facts and circumstances, what are called “plus factors.” Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224, 1243 (3d Cir. 1993).

\(^{158}\) See discussion *supra* Subsections II.A.1-4. What constitutes a “meaningful” resource constraint certainly depends on the context. We concede, of course, that every agency has a budget and hence is resource constrained in a technical sense. However, the inquiry here is whether a particular inaction can be *justified* based on resource constraints. For example, if an agency decides to pursue inaction, although neither its budget nor its mandate has been materially changed in the last decade, then it is fair to conclude that the agency’s decision was not driven by meaningful resource constraints.
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did claim that the question was one of resources.\textsuperscript{159} However, as explained above, the extrinsic evidence suggests that the President invoked the resource rationale as pretext for a policy decision. It is this policy-motivated executive inaction—identified through the principles articulated in this Section—that is a separation-of-powers problem.

C. A Problem Without Any Checks

With the subject now properly defined, we return to our basic claim: the structure of the Constitution demands that the branches have the tools to resist tyranny and encroachment from their coordinate branches—whether in the form of action or inaction—but in practice, Congress and the courts lack those tools. When the President wants to act, she must win the support of both houses of Congress and have her actions upheld by the judiciary. Moreover, she must avoid provoking the wrath of Congress after she makes a decision; the legislature may respond to action it does not like with hearings, budget sanctions, or any number of other procedural tools. But where the President pursues policy through inaction, Congress and the courts are all but powerless to stop her.\textsuperscript{160}

What is odd is that a brief glance at the relative institutional capacities of Congress and the courts suggests that the precise qualities that make inaction unsuited to judicial review make Congress a particularly able body to perform such oversight. And yet, as the examples above demonstrate, Congress has not filled that role. In the following Sections, we ask why and offer some preliminary thoughts on what institutional designers might do about it.

1. Weak Judicial Tools

The case against Congress is complicated; the argument that the courts are institutionally incapable of policing inaction is not.\textsuperscript{161} For while many take Massachusetts v. EPA as an indication that the courts can check executive inaction, that case is the exception that proves the rule. Only a truly blatant

\textsuperscript{159} See discussion supra Subsection II.A.5.

\textsuperscript{160} We restrict the inquiry to legislative and judicial checks on Executive power. To be sure, there are non-structural checks on all Executive decisions, the most obvious being the ability to vote out a do-nothing President. Two responses are readily apparent. First, the voters are going to have a harder time recognizing and policing inaction than action, because the problem isn't always a "do-nothing" President. President Bush did a lot of things; he has simply failed to enforce some laws. Of course, the voters could have punished him for failing to enforce the civil rights laws if they wanted to, but (1) one-issue voters are rare and (2) there are no doubt less-public instances of inaction that are unlikely to be subject to such a check.

Second, even if the voters do punish an inactive President, that does not remove the bias in favor of inaction we articulate below. See Part III.A infra. If one believes that at least some inaction will go un-remedied in a subsequent, more active administration, then a President's decision not to enforce a law will lead to less action in the long run than Congress intended when it passed each law.

\textsuperscript{161} Although Congress is the primary culprit failing to police presidential inaction, the courts are a more useful starting point for this discussion. Our focus returns to Congress in the next section and, more significantly, for much of Part III.
case of executive inaction—indeed, one that fit our typology perfectly and was incredibly high-profile—could even plausibly result in some judicial review (and even then, merely remand to the lower court for further review). For the vast majority of cases, on the other hand, for both doctrinal and prudential reasons, the courts will always under-enforce limits on executive inaction.

As a doctrinal matter, agency review of executive inaction is almost nonexistent. It is true that the APA includes “failure to act”\textsuperscript{162} in its definition of “agency action;” ostensibly, Section 706 of the Act would allow judicial review at least of agency inaction.\textsuperscript{163} However,\textit{ Heckler v. Chaney} directly held that most “failure[s] to act”—or at least agency refusals to take enforcement action—are presumptively unreviewable. The Court reasoned that enforcement decisions are subject to prosecutorial discretion\textsuperscript{164} and thus fall under the 701(a)(2) exception to judicial review.\textsuperscript{165} Because the case remains good law, most executive inaction is presumptively unreviewable.

Moreover, the limited doctrinal options for review are incredibly narrow. For example, under\textit{ State Farm} (the auto deregulation case), only agency action that actually and systematically deregulates is subject to APA review; informal choices and one-off decisions not to enforce existing regulations fall outside the scope of the case.\textit{ Massachusetts v. EPA} provides another option. Because the plaintiffs were able to convince the Court that regulation of “air pollutants” was not subject to agency discretion under the Environmental Protection Act,\textsuperscript{166} they were effectively able to override \textit{Chaney}’s presumption against reviewability.\textsuperscript{167} Yet, it is worth noting that judicial review would be unavailable in three of the four high-profile examples of executive inaction from Part II.\textsuperscript{168} Surveying these and other doctrinal options for judicial review of agency inaction, Professor Staszewski concludes that “courts rarely order agencies to promulgate regulations or take enforcement action, and even when they require agencies to fulfill mandatory statutory obligations (such as meeting congressionally imposed deadlines), courts are not ordinarily empowered to dictate the form that such actions must take.”\textsuperscript{169}

In short, current doctrine simply does not allow for robust judicial review of executive inaction.

\textsuperscript{163} Id. § 706 (2006).
\textsuperscript{164} 470 U.S. 821, 831 (1985) (“[F]or refusal[s] to take enforcement steps . . ., we think the presumption is that judicial review is not available.”).
\textsuperscript{165} 5 U.S.C. § 701(a)(2) (exempting agency action that was “committed to agency direction by law” from judicial review).
\textsuperscript{166} See supra notes 89-98 and accompanying text.
\textsuperscript{167} Some authors describe this as judicial review of “nonpromulgation.” Deacon, supra note 61, at 805.
\textsuperscript{168} We mention “high-profile” to emphasize that low salience instances of executive inaction, of which there are surely many, will almost certainly go unchecked if high salience instances do not even merit judicial review.
Beyond the doctrinal limits, there are three prudential reasons why judicial review would be a poor check on executive inaction, linked to the three stages of a potential lawsuit: justiciability, merits, and remedy. First, it will be difficult to define a “case” of inaction that is suitable for review. Second, courts will face a series of line-drawing questions that would make them quite deferential to the Executive on the merits. And third, courts would likely be wary of granting a remedy that amounts to telling the Executive how and when to act. As such, even if we were to assume that judicial review of agency inaction were permitted, the courts would prove a hollow hope.

Consider the first problem: what is a judicial “case” of inaction? One might conceive of this question as one of standing, as some scholars have done. But we do not think of this as a standing issue because, if Chaney were in fact overruled, it would be relatively easy for a plaintiff to meet the three Lujan factors for Article III standing and argue that the APA’s “failure to act” language recognizes a legally protected interest for prudential standing. Separate from the standing question is the question of finality. When is an agency deemed not to have acted rather than simply to be engaging in a prolonged review? The APA does allow judicial review of action “unlawfully withheld or unreasonably delayed,” but failure to meet that burden of “unreasonable” delay will likely keep many cases of inaction out of court. A related concern is the resources point, discussed in Section I.B. If the judiciary were to review every potential case of executive inaction, the costs would be astronomical. A fair guess is that courts would be forced to devise some sort of prudential limits to confine their docket to cases with either a credible plaintiff or non-frivolous claims on the merits. As such, courts’ general desire for a clear “case” would significantly weaken judicial review.

Even if the courts were willing to reach the merits of a case, they would likely defer on a series of questions that require drawing difficult lines. First, a court would have to determine the statutory baseline. In some cases, such as Massachusetts v. EPA and Train v. New York (the impoundment case), this question might be amenable to the traditional tools of statutory interpretation. But what of the Securities and Exchange Act, which speaks of protecting

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170 Bressman, supra note Error! Bookmark not defined., at 1670-75.
171 Bhagwat, supra note Error! Bookmark not defined., at 182 (“In addition, it is often difficult to identify when an agency has failed to act--at the least, delay and inaction can be difficult to distinguish--so that there is often no clear focus for judicial review of agency inaction.”).
174 Bressman, supra note Error! Bookmark not defined., at 1693 (“I am aware that this solution has considerable costs, both in terms of administrative flexibility and administrative efficiency.”).
against national crises? Is that a statutory minimum? If so, what obligations does it place on the SEC? If the statute were carried to its literal end, a court would likely balk at defining duties that are incommensurate with the SEC’s historical role and available budget.

Second, even if the court is willing to draw a baseline, what happens when the President claims that he was engaging in resource prioritization? Non-enforcement decisions “tend to involve a complex balancing of many factors, including the likelihood of success in litigation and whether agency resources are better spent elsewhere,” factors that courts are not well suited to review. This is a real concern; as we have acknowledged, the reality is that some executive inaction is properly justified on resource grounds. And while we have been willing to label an invocation of resources as pretextual based on the information available to us, it is unclear whether a court would do so. Not only would it face significant informational constraints, but the norms of the federal judiciary—as seen across many doctrinal areas—are to defer to the Executive. Indeed, in most cases, such deference might even be appropriate. However, the effect in some meritorious cases would be to deny the plaintiff proper relief.

The final issue is one of remedy. This is sometimes framed as a question of separation of powers—that is, whether it might be a violation of the Constitution for the Judicial Branch to dictate how the Executive enforces the laws. But this seems to mischaracterize the harm. The very premise for judicial review of executive inaction would be that the Executive has failed to meet the requirements of the Constitution. Nevertheless, even divorced from the constitutional dimension, it might still be worrisome for courts to dictate that the Executive act in a particular way, especially given the complicated resource and enforcement priorities they might interfere with. Thus we have yet another reason to believe the courts will be deferential on executive inaction cases.

The net effect is clear: the courts will always under-enforce federal statutes in the face of presidential inaction. Indeed, even before Heckler v. Chaney, then-Professor Garland suggested that inaction should be subject to a

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

177 Bhagwat, supra note Error! Bookmark not defined., at 182.

178 Cf., e.g., Holder v. Humitarian Law Project, 130 S. Ct. 2705 (2010) (deferring to the Executive’s assertion that material support of the humanitarian wings of terrorist organizations would undermine federal anti-terrorism efforts).


180 See Garland, supra note 55, at 564-65.

more deferential standard of review than action.\textsuperscript{182} That assertion fits squarely into the broader story of this Section. Not only are there fewer checks on executive inaction than on action, but each of those checks is significantly weaker in comparison to the analogous checks on action.\textsuperscript{183}

2. Weak Congressional Tools

While the previous discussion has emphasized the comparative weakness of judicial checks on inaction vis à vis action, the inefficacy of legislative checks on inaction is nearly as clear, in part because Congress has so many tools to police executive action.

a. Congressional Tools To Police Action

The constitutional structure and institutional realities of the federal system provide Congress with numerous tools to check the kind of presidential aggrandizement Madison worried about. First, while modern Presidents have invariably claimed the initiative when it comes to proposing legislation,\textsuperscript{184} no President may take lawful action in the domestic arena without official authorization by statute. Indeed, even laws that have the President’s support must pass through numerous “veto-gates” before they become law.\textsuperscript{185} Not only must each house of Congress pass the statutory authorization, but the bill may die at any number of stages, including committee or conference, or by filibuster on the Senate floor. One need only consider the trials and tribulations involved in the passage of the Patient Protection and Affordable Care Act to appreciate the time, effort, and luck necessary to pass modern legislation.\textsuperscript{186} Moreover, once Congress has approved a law that would grant the President some authority, it must fund the initial delegation and (often) approve the President’s nominee to head a new agency.\textsuperscript{187} President Obama’s new

\textsuperscript{182} See Garland, supra note 55, at 563.

\textsuperscript{183} It is worth mentioning that two other avenues for judicial checks on executive inaction—implied statutory rights of action and § 1983 suits—have also been limited by the Supreme Court. See Thompson v. Thompson, 484 U.S. 174, 188-92 (1988) (Scalia, J., concurring) (summarizing the Court’s skepticism on implied rights of action); see also Gonzaga Univ. v. John Doe, 536 U.S. 273 (2002) (applying the implied rights of action test to beneficiary enforcement claims under § 1983). While these methods are beyond the scope of this Article, the doctrine supports our basic conclusion that the Judiciary is largely without tools to police executive inaction.


\textsuperscript{186} See Lawrence R. Jacobs & Theda Skocpol, Health Care Reform and American Politics: What Everyone Needs to Know (2010).

Consumer Financial Protection Bureau, for example, was unable to exercise its legal authority until Congress had approved its head.\textsuperscript{188}

But Congress’s influence does not stop after it has given the President authority to act. It may take any number of steps to influence executive actions. For example, the legislature may order studies and reports of agency action and hold oversight hearings to evaluate agency behavior.\textsuperscript{189} Where the issues are salient to Congress and the public, such oversight hearings can be quite successful.\textsuperscript{190} More informally, Members of Congress may communicate directly with agencies, a practice known as “jawboning.”\textsuperscript{191} Further monitoring occurs through informal staff contacts and agency liaisons.\textsuperscript{192}

In fact, monitoring agency action is sufficiently important to Members of Congress that the legislature has considered or enacted multiple statutes to institutionalize review of executive action. The Congressional Review Act,\textsuperscript{193} for example, requires certain agency decisions to be submitted to Congress for preclearance sixty days before they are put into effect, and “Corrections Day” once allowed for fast-track consideration of legislation that would “correct” agency actions that Congress decided were misguided.\textsuperscript{194} Moreover, Congress has considered giving itself absolute veto power over every regulatory decision through the Regulations from the Executive In Need of Scrutiny (REINS) Act, which so far has made it through only the House of Representatives.\textsuperscript{195} The REINS Act would limit executive action by requiring both houses of Congress to actively approve newly promulgated regulations that have $100 million or more in cumulative impact.\textsuperscript{196} Proponents of the REINS Act commonly cite the EPA’s anticipated regulation of greenhouse gases\textsuperscript{197} as the impetus for the Act, further confirming that Congress is primarily concerned with—and only has the tools to deal with—action.


\textsuperscript{191} Jack M. Beermann, Congressional Administration, 43 SAN DIEGO L. REV. 61 (2006).

\textsuperscript{192} Croley, supra note 189, at 12.


\textsuperscript{194} See John Copeland Nagle, Corrections Day, 43 UCLA L. REV. 1267 (1996); Croley, supra note 189, at 48.

\textsuperscript{195} H.R. 10, 112th Cong. (Dec. 7, 2011).


Furthermore, Congress has the power to sanction agencies—and thus to bring them in line with its preferences—if the aforementioned inquiries turn up agency action Congress is unhappy with. These tools “extend[] ultimately from Congress’ fundamental power of legislation . . . and its corollary power to spend, or refuse to spend, money.” For example, Congress can use its statutory power to influence agency decision-making. Congress can “expand or contract the scope of an agency’s authority by amending or, in the extreme, by repealing the agency’s enabling act or other important pieces of legislation that give an agency its power.”

Perhaps more realistically, Congress can punish agencies that stray too far from its preferred policies, “curtail[ing] executive [agency] action by limiting agency funding [or] personnel.” In theory, agencies that do not carry out Congress’s manifest desires may see their budget, and thus their power, diminish or disappear altogether. For example, in 1997, after the FDA promulgated new rules on tobacco, some Members of Congress resisted appropriating money for the FDA to enforce the new rule. Similarly, officials in OMB were “sufficiently impressed by a threat to the appropriation for its Office of Information and Regulatory Affairs that it took steps to subject OMB-agency interactions to greater Congressional and public scrutiny.” Congress’s power to limit an agency’s authority and budget provide it with several positively Madisonian tools for preventing the President and her agencies from acting in ways that are inconsistent with Congress’s will.

198 Croley, supra note 189, at 11. For discussions of Congress’s ability to use appropriations riders and earmarks, among other powers, to bring agencies in line, see Thomas O. McGarity, Presidential Control of Regulatory Agency Decisionmaking, 36 AM. U. L. REV. 443 (1987); and Beermann, supra note 191.

199 Croley, supra note 189, at 11; Harold Bruff, Presidential Power and Administrative Rulemaking, 88 YALE L.J. 451, 464 (1979). As Justice Kagan notes, the first regulatory agencies were conceived of as mere “transmission belts” for congressional directives. Elena Kagan, Presidential Administration, 114 HARV. L. REV. 2245, 2255 (1995). However, due to the increasing complexity of regulation, it may be impossible for Congress to achieve its regulatory goals by enacting detailed statutory prescriptions. Jack M. Beermann, The Turn Toward Congress in Administrative Law, 89 B.U. L. REV. 727 (2009). Thus, even when Congress has sought to control regulatory policy by statute, it has done so by mandating results rather than by specifying mechanisms to achieve goals. Mark Seidenfeld, A Big Picture Approach to Presidential Influence on Agency Policy-Making, 80 IOWA L. REV. 1, 8 (1994).


201 Greene, supra note 1, at 171; see also Croley, White House Review of Agency Rulemaking: An Empirical Investigation, 70 U. CHI. L. REV. 821, 832 (2003) (“[A]gencies are ever worried about their budgetary health as well as the scope of their regulatory jurisdiction, and for those reasons must be overly solicitous of the preferences of members of Congress, who after all control agency budgets and define the boundaries of agency authority.”).

202 Croley, supra note 189, at 73-74.

203 McGarity, supra note 198 at 475. See also Croley, supra note 189, at 55-66 for a good case study of the give and take between the White House, Congress, and the EPA on rulemaking.
b. Ineffective for Inaction

Thus, virtually no affirmative executive policy can be implemented without some basic approval from Congress, and Congress may at any time revisit executive action. However, despite the fact that executive action and inaction are theoretically indistinguishable as instruments of policymaking, Congress has fewer tools at its disposal to counteract inaction, and the available tools are weakened by certain institutional features of Congress. That is, for reasons related to the Constitution, the rules of Congress, and practical necessity, Congress will tend to under-enforce limits on inaction.

There are several formal reasons for Congress’s impotence when it comes to inaction. Most basically, a president’s decision not to enforce a law is not subject to Congress’s power to legislate. If the President decides not to enforce a law, this does not require the support of a committee chairman, a vote on the floor of either house, or reconciliation in committee. And the statutes providing for periodic review of regulations do not apply to inaction as a textual matter—they only require that Congress review rules that agencies actually promulgate. Put another way, the most powerful and robust checks on action—vetogates, bicameralism, and congressional review—are entirely absent for inaction.

Of course, many of Congress’s formal and informal tools for policing executive action would seem to apply just as well to inaction. Congressional committees, for example, could hold oversight hearings to ensure that the President and her agencies are not systematically under-enforcing the laws relative to the congressional baseline. But such review is rarely a practical or a theoretical reality, and when it is, it is comparatively ineffectual.

The practical constraints on Congress’s ability to influence agency decisions have to do with the way the institution is organized. It is difficult, first, for Congress to monitor agency actions, because it is not designed to collect and analyze information effectively. While none of the formal oversight powers is particularly difficult for Congress to draw upon as a procedural matter, in practice it cannot provide the kinds of meaningful oversight described above unless it knows what agencies are doing. Indeed, “scholars [have] noted . . . the widespread lack of knowledge and interest among

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204 Consider, for example, the examples in the discussion supra Section II.A.
205 As a methodological matter, we cannot prove the weakness of congressional tools with respect to inaction through empirical examples, because our basic point is that such examples are exceedingly rare. We can, however, infer as much. There is a cottage industry criticizing Congress’s tools with respect monitoring runaway executive power. When one investigates the underlying rationale of these criticisms, though, it is apparent that they would apply with even greater force when it comes to executive inaction. Thus, to the extent these tools are weak when applied to action, it is even less likely that they will effectively check inaction.
206 Croley, supra note 189, at 12.
members of Congress, evident in repeated surveys and actual cases, regarding obviously important administrative decisions."

Perhaps the most fundamental check on Congress’s power over agencies, though, is the fact that Congress is a plural body. The punishments described here require the action of the full Congress—action that is costly and difficult to accomplish. In addition, “a particular agency may be subject to oversight by several committees that have competing goals.” Indeed, Congress’s ability to exercise its budgetary power to curtail runaway executive action requires the Authorizing and Appropriations Committees of both Houses to discover and agree on an effective budgetary sanction—a tall task for a polarized, intensely political body. In addition, even support from a simple majority is not enough: to impose its most effective sanctions, Congress must gain the approval of two-thirds of both Houses (in order to overcome an almost-certain presidential veto). For example, during the Clinton presidency, the Republican Congress often found that the President was capable, through the veto power, of forcing the return of funding to agencies. More broadly, and perhaps more perniciously, Congress is often simply unable to generate a coherent policy agenda, let alone coherent action to reprimand agencies. As an institutional and practical matter, Congress is simply not a good overseer of agency action.

Each of these troubles is exacerbated when the issue is executive inaction. The reason for this is quite simple. Inaction is, by definition, less public than action, and Congress’s oversight tools—both formal and

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207 Kagan, supra note 199, at 2256. But see Croley, supra note 189, at 33 (discussing the McCubbins/Noll/Weingast argument that administrative procedure facilitates legislative control by reducing the costs of congressional monitoring).

208 Kagan, supra note 199, at 2259.


210 McGarity, supra note 198, at 475.

211 MASHAW, supra note 3 (explaining how this mechanism contributes to the rise of the administrative state).

212 Kagan, supra note 199, at 2259 n.38 (citing David Baumann, The Art of the Deal, 39 NAT’L J. 2700, 2701 (1999) (noting that "the conventional wisdom around town is that Clinton always wins these budgetary showdowns" and he "has extraordinary leverage during . . . negotiations"); David E. Rosenbaum, Bush Rules! It’s Good To Be the President, N.Y. TIMES, Jan. 28, 2001, at A4 (noting findings by the National Resources Defense Council that Clinton had succeeded in blocking more than seventy appropriations riders that aimed to relax regulatory requirements)).

213 Seidenfeld, supra, at 11.

214 For an empirical argument that Congress rarely sanctions agencies, see Croley, supra note 189, at 106 (“Once the complexities of the relationship between legislators and agencies are taken into account . . . the picture changes. Legislative influence over agency-level regulatory decisions becomes more precarious.”). As such, structural decisions about the scope of agency authority—including funding—are rare. David B. Spence, Administrative Law and Agency Policymaking: Rethinking the Positive Theory of Political Control, 14 YALE J. ON REG. 407 (1997) (arguing that structural decisions about the scope of agency authority are infrequent).
informal—require that Congress identify a decision it doesn’t like and take positive steps in response. Whatever trouble Congress has in identifying and reacting to executive action, those structural shortcomings will apply with extra force to inaction.  

Consider the case of oversight hearings. The problems with having hearings to check executive inaction are largely prudential. Let us assume Congress theoretically structured an agency to require hearings on all agency decisions, including decisions not to act. There would be two problems with this kind of statutory requirement with respect to instances of inaction. First, short of the President or his agency heads announcing a halt to enforcement of a particular delegation, it is not clear what event could trigger such hearings when the issue is inaction, though the Impoundment Control Act may provide a useful guide. Second, Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction; this is a basic question of bandwidth. The reasons behind the weakness of hearings as a check are not particularly important. What is important is that as both a theoretical and an empirical proposition, hearings simply are not a useful check on inaction.

Conditioned funding similarly fails. As a theoretical matter, we might understand this as following from the risky position Congress assumes when it threatens to withhold funding on the basis of executive inaction. Budget fights are protracted zero-sum battles, and every Member of Congress must choose carefully how to allocate his or her political capital. It is possible that executive inaction could justify a Member taking up the cause. But, because inaction will always be less salient and thus less likely to provoke the interest of a Member’s constituents, it is exceedingly unlikely that any Member would choose to fight what would only be a personal cause, especially when that would require compromising on other priorities. Moreover, in the extreme case, conditioned funding would be no check at all, for if a President believed

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215 Cf. infra notes 196-203 and accompanying text.

216 For an example of this kind of statutory requirement, see National Environmental Policy Act, 42 U.S. C. 4321 et seq. (2006).

217 It is, of course, possible that this might happen, as in the case of Attorney General Holder and medicinal marijuana. See discussion supra Section II.A.5.

218 Cf. discussion infra Subsection II.C.ii.

219 Some readers have pointed to the case of Ann Gorsuch as an example of a successful oversight hearing to counteract executive inaction. Gorsuch, the head of the EPA during the Reagan Administration, essentially engaged in wholesale environmental deregulation, and then was attacked in oversight hearings, attempted to assert executive privilege, was held in contempt, and ultimately resigned due to the controversy. See Patrick Warren, Servants and Reformers: The Roles of Appointees under Separation of Powers, at 2 (Apr. 24, 2007), http://www.stanford.edu/group/peg/3_may_2007_papers/servantsandreformers-PW.pdf. We believe this is the exception that proves the rule, as we were unable to find any other example of a successful oversight hearing against executive inaction.

220 It is difficult to prove the negative, but we know of no examples of Congress threatening to withhold funding on the basis of executive inaction.
in a severely limited federal role and pursued inaction across the board, congressional threats to withhold funding would be completely ineffective.\textsuperscript{221} The net result is clear: Congress will tend to allow the President to under-enforce federal statutes.

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

All of this is not to say that Congress and the courts have \textit{no} tools to police presidential inaction. Most importantly, where Congress is clear about its desired baseline level of enforcement, the President will be unable to go below that baseline. The Nixon-era controversy over presidential impoundment of allocated funds provides one—perhaps the only—stark example of Congress using baselines to control the President. In response to President Nixon’s decision not to spend some of the funds allocated for specific purposes, Congress passed the Impoundment Control Act of 1974, which expressly required the President to spend funds that Congress had allocated for specific purposes.\textsuperscript{222} The impoundment controversy is perhaps most useful as evidence that such congressional intervention is rare—Congress has only stepped in where the President’s decision not to act was particularly public, and thus where it was relatively easy for Congress to identify the issue and generate support for a legislative response. Read in that light, the case bolsters our argument that Congress could play a role as arbiter of inaction but often does not, for both legal and prudential reasons.

Our point here is to illustrate the gap in our constitutional system of separation of powers. As Part I argued, there is no principled reason why strong checks on policy decisions—transparency, accountability, democracy—should apply to executive action but not inaction. And yet, as this Part has demonstrated, the congressional and judicial tools that comprise our current system of separation of powers either do not apply or are substantially weaker when applied to inaction. Executive inaction is a largely unchecked facet of executive authority.

\textsuperscript{221} See discussion \textit{infra} Section III.B.

III. THE IMPLICATIONS OF INACTION: SMALL-GOVERNMENT BIAS, POTENTIAL SOLUTIONS, AND A WAY FORWARD

Recognizing this hole in our constitutional system of separation of powers leads us to new insights on old problems. Most importantly, as we argue in Section III.A, unchecked presidential inaction reveals a structural imbalance in our constitutional theory—a bias in favor of smaller government. The action-oriented scholarship in both the separation-of-powers and administrative law fields would lead one to believe that we should be concerned not about a bias toward smaller government, but about a growing Executive, or the “rise and rise” of the administrative state. But, by focusing exclusively on action and ignoring inaction, these scholars have missed a far more troubling power bestowed on the President: the power effectively to take federal laws off the books, at least for the duration of her term. Nor is this merely conjecture. As our examples have demonstrated, it is the system we have, attributable to an action-oriented theory of separation of powers.

Yet we might be able to modify the tools of separation of powers to account for the problem of presidential inaction. In Section III.B, we attempt to resuscitate the role of Congress as a robust adversary of the Executive. While the legislature’s current tools are clearly inadequate, congressional review could avoid the constitutional and prudential concerns that plague judicial review. Moreover, once one recognizes that presidential inaction presents the same separation-of-powers problems affirmative executive overreach, the implications for other areas of public law become clear. Indeed, although our theory speaks most clearly to reforms within Congress that would empower that body to check presidential inaction, a new focus on the functional similarities between action and inaction points in other promising directions as well—to new takes on statutory interpretation, agency deference, and even federalism.

To illustrate the point, in Section III.C we apply our theory to a timely and high-profile example: President Obama’s decision not to enforce the nation’s immigration laws with respect to certain categories of undocumented immigrants. We focus on the key issue identified above—the baseline level of enforcement required by Congress—and suggest that the issue is far more complicated than the public discussion has let on. Although we offer some tentative thoughts on the constitutional propriety of the decision, our purpose is to provoke a discussion, and not to be the final word.

A. Structural Bias

The blind spot in scholarly thinking about presidential inaction has papered over a structural bias in the relationship between the political branches: unchecked inaction will lead inexorably to less federal regulation

223 See Ackerman & Hathaway, supra note 19.
224 See Lawson, supra note 45.
than would otherwise occur, even if some inaction is reversed by future administrations. This is true because it is more difficult to pass new legislation than it is for a President to stop enforcing old laws. Thus, assuming future Presidents do not reverse all such inaction, over time more and more laws will go unenforced, whereas Congress can rein in overreach in the other direction.

A symmetrical relationship would present no such problems: If a President desiring action needs to get Congress to pass enabling legislation, a President desiring inaction should have to convince Congress to repeal the prior legislation. Only then would action and inaction face the same checks and balances, from both Congress and the judiciary. But in reality, Presidents pursuing inaction will face a significantly less challenging constitutional terrain in advancing their goals.

1. The Mechanism of the Structural Bias

Virtually every President is “small government” in some domain. Liberal Presidents generally desire a smaller federal role with respect to criminal law and social-moral issues. Conservative Presidents prefer that the federal government pursue less economic regulation. The examples and arguments in Part II illustrate that these Presidents will face a path of almost no resistance to pursue their preference for inaction in a particular policy realm. And if every President chooses to pursue inaction in her preferred domain, the net effect (especially because we have some liberal Presidents and some conservative ones) is a government that substantially under-enforces rights and privileges relative to what Congress has authorized through legislation. Assuming that not every decision not to act will be reversed by the next President with different ideological preferences, over time we will see a bias toward less and less government action. (Remember also that, even if every decision not to enforce the law were eventually reversed, the period during which a law was not being enforced would amount to a unilateral four- or eight-year repeal, contrary to the requirements of the Constitution.)

Moreover, the existing tools for checking the President will often worsen the problem of inaction. It takes little imagination to foresee what a small-government President would do if confronted with a congressional threat to defund a program (especially a related one) because she decided to stop enforcing a set of laws. This President would happily allow funding to be cut off, because that would allow her to regulate even less. Inaction, by its very nature, is exacerbated, not ameliorated, by conditioned funding. A President who prefers limited government will be thrilled that his inaction prompts Congress to cut programs further.


226 See discussion supra Section II.B.
The asymmetry is further exacerbated by the inter-temporal nature of the relationship between the branches, and thus by the fact that our government is often divided between the two major parties.\textsuperscript{227} The statutory baseline is generally established by a past Congress. Of course, it is possible that the current Congress shares the values of the enacting Congress and that it will attempt to apply the (albeit weak) checks available to combat inaction. But it is also possible that the current Congress will be indifferent to the new President’s policies.\textsuperscript{228} Assuming that Congress’s ability to act is a scarce resource, a system that forces the current Congress to intervene to protect the desires of a past Congress will prove costly, thus further enabling Presidents to pursue inaction.\textsuperscript{229} The point is essentially one of burden shifting, but the effect—as in other constitutional instances\textsuperscript{230}—is significant.

The upshot is this: the structural bias described here is not caused by changing political alliances or public preferences; it is structural, deeply ingrained in the way the branches interact with each other. In other words, our constitutional theory of separation of powers—when it fails to provide meaningful checks on executive inaction—essentially places a thumb on the scale in favor of less government intervention.

2. Objections and Responses

We can imagine three objections to the structural bias concern articulated here. The first is that inaction is not a problem at all, or at least not as big a problem as runaway action, because it is only reactive, not proactive. The second is that, because the Constitution is a libertarian document, it is actually meant to favor inaction.\textsuperscript{231} The third is that the mechanism we have

\textsuperscript{227} Cf. Levinson & Pildes, supra note 20.

\textsuperscript{228} Compare, for example, our discussion about budgetary priorities in subsection II.C.1.

\textsuperscript{229} Consider the alternative, a hypothetical world in which the President had to seek Congress’s affirmative approval to rescind legislation. In this world, the costly behavior is repeal, thus creating the likely outcome that only a situation where the current Congress truly does not care about the prior Congress’s preferences will result in a repeal. In all other instances, including where the current Congress is of mixed opinion about the past Congress’s preferences, the legislation will stand. Most crucially, those middle cases are where the system we have enables further inaction.

\textsuperscript{230} For example, the First Amendment especially disfavors prior restraints, not because they are substantively more restrictive of speech, but because they shift the burden of proof from the censor to the speaker. On the margin, by placing the burden on the censor, speech will be more protected. See Emerson, \textit{The Doctrine of Prior Restraint}, 20 LAW \& CONTEMP. PROBS. 648, 657 (1955).

\textsuperscript{231} See Lawson, \textit{supra} note 45, at 1233. But see AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY (arguing that the Constitution is actually a deeply liberal document). This is not to say, of course, that a liberal document necessarily cannot be a libertarian one. Nevertheless, Amar’s reading thoughtfully elucidates the idea that the Constitution was a practical document, one meant to enable the federal government to govern properly. Because such governance generally entails action, Amar’s reading is generally inconsistent with libertarian readings of the Constitution.
identified merely counteracts an otherwise overactive Executive Branch, so we end up with more or less the correct amount of government action in the end.

a. Inaction Can Only Be Reactive

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

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

Moreover, the problem of executive inaction is particularly striking in the context of the modern, comprehensive administrative state. That is, although inaction may seem inherently responsive, the scope of modern administration gives a President unprecedented opportunities to make policy through inaction. To put it another way, this objection gets at the size of inaction’s effect in the abstract but ignores the practical impact of the problem and its constitutional implications.

b. The Constitution as Libertarian Document

The second objection comes up short on two levels. First, the Constitution’s libertarian principles are fully accounted for in the formal requirements of bicameralism and presentment. The Constitution does not say much about the rules of Congress, but it does provide for bicameralism, the executive veto, and Congress’s power to override the veto. These rules (along with the modern vetogates) were designed to slow the pace of legislation, and to allow each branch to have its say. But once a bill makes it through the numerous structural barriers in Congress and is signed into law by the President (or overrides her veto), Article I, Section Seven of the Constitution dictates that it is the law of the land. Thus, it merits full enforcement by the Chief Executive (subject, of course, to resource constraints).

Moreover, there is a puzzling element to this objection even as a matter of constitutional originalism. Much of what makes presidential inaction constitutionally troubling is the unchecked power it vests in the Executive, a consequence of the modern administrative state. The objector must therefore be implying that we should take the Framers to have supported that outcome, because it accords with their libertarian values, notwithstanding the fact that
they could never have conceived of the administrative state.\textsuperscript{232} Not only is that implausible as a matter of specific intent, but the opposite is true: separation of powers—the foundational principle of the Constitution and the insight of its primary author—is about making sure that no single branch dictates national policy nor encroaches on the authority of the other branches, even if that policy accords with general a Burkan notion of deliberateness.\textsuperscript{233} Congress can, of course, set national policy in motion by passing laws and appropriating money for enforcement, but it does not unilaterally dictate national policy; each of those decisions is subject to checks: the President’s veto power and her power to direct her agencies to reasonably interpret and enforce the law, as well as judicial review. This Article attempts to advance that foundational principle and to reconcile it with the modern administrative state, a position we find more compelling than trying to infer the specific intent of the Framers on an issue far beyond their imagination.\textsuperscript{234}

Perhaps the counterargument might be phrased more specifically: if the Constitution gives the President the authority to put the laws into effect via the Take Care Clause, the argument goes, she must have the freedom to decide how, and thus whether, to do so. But the Take Care Clause cannot override the fact that the Constitution provides a rule of recognition: If Congress passes a law and the President signs it, it’s the law and the President must enforce it (in whatever way she sees fit). If action and inaction are indistinguishable as an ontological matter,\textsuperscript{235} it becomes clear that the decision not to enforce at all is just as constitutionally suspect as the decision to over-enforce. For example, one couldn’t argue that the President gets to arrest people for smoking cigarettes pursuant to her Article II, Section 1 authority to enforce the Controlled Substances Act; by the same token, then, one cannot argue that the President has the power not to arrest people for smoking marijuana under that same authority (assuming the Controlled Substances Act clearly criminalizes marijuana use) unless inaction is somehow fundamentally different from action. Of course, the President has discretion to choose not to act in some specific situations (where resources are at issue, for example), but those situations are different in kind, not just in degree.

c. The Goldilocks Argument: Inaction Produces Just the Right Amount of Government Intervention

The final objection is much more targeted, drawing on Jerry Mashaw’s descriptive explanation for why the administrative state exists. Mashaw explains how our structure of separation of powers has—against the will of

\textsuperscript{232} See Strauss, Fourth Branch, \textit{supra} note 70, at 582.

\textsuperscript{233} See discussion \textit{supra} Section I.A.

\textsuperscript{234} Cf. Jack M. Balkin, \textit{Framework Originalism and the Living Constitution}, 103 Nw. U. L. Rev. 549 (2009). Clearly a discussion of framework originalism is beyond the scope of this Article, but we believe that Professor Balkin’s defense suitably captures much of our opinions on why “skyscraper originalism,” \textit{id.} at 550, is an unpersuasive objection.

\textsuperscript{235} See \textit{supra} notes 13-15 and accompanying text..
Congress—allowed the Executive to become bigger than Congress initially intended. Thus, even if we accept that inaction will produce a structural bias, the effect is not “less government” but rather a rough cancellation that yields the “right-sized” government relative to what Congress actually intended.

Professor Mashaw’s theory is an elegant one, and we do not consider it an objection to our fundamental claim. On a basic level, Mashaw described how agency “policy” avoids congressional checks; such policy can be pursued through inaction (although he does not focus on that problem). Thus our theory is not inconsistent with his.

What is more, we do not intend to argue that the structural bias that we have identified justifies an inference about how much government intervention there should be. There are many factors at play in our constitutional scheme, some pushing in favor of smaller government, some pushing against. We have tried to suggest that a President will face few obstacles in regulating less than Congress intended, a bias that is contrary to what separation of powers theory should permit. Professor Mashaw has also outlined a bias that is contrary to what separation of powers theory should permit. Unless the reader objects simply that two wrongs make a right—we think it merely highlights how this Article adds to the discussion of the separation of powers. Up until this point, scholars have discussed only Professor Mashaw’s explanation for why a breakdown in separation of powers has allowed the Executive Branch to act and to grow. We have argued that it is critical to consider how a breakdown in separation of powers has allowed the opposite to occur.

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236 See Mashaw, supra note 3, at 193. Mashaw explains the rise of the administrative state as following from the power of the President’s veto. Let us assume that Congress initially only meant to authorize an executive agency to monitor three categories of business, and for an initial period of time the agency complies. However, at some point the agency oversteps its authority and decides to monitor a new (and related) category of business. Congress could theoretically pass legislation clarifying that is not within the power of the agency. However, the President would likely veto any such legislation, as it would constrain his Branch’s overall power. Thus Congress must accept the agency’s overreach, unless it can muster sufficient votes to be able to override his veto. Because that is comparatively rare, the net result is that agency overreach goes unchecked, and the administrative state grows.

237 An example already discussed in this Article is the vetogates theory, which argues that the many constitutional and institutional constraints of the legislative process will always produce less legislation (and thus presumably smaller government) than would result in their absence. See Eskridge, supra note 185.

238 We doubt the objector would take this position, as the assumption of equivalence is a subject of scholarly inquiry itself. Borrowing from another field, the existence of monopolies are generally thought to reduce output in a way that detracts from social welfare. However, if the good in question imposes negative externalities not properly accounted for in its price, there will be excess output, relative to the socially optimal level. But when we actually analyze a specific issue—e.g., whether the OPEC monopoly is actually bad for social welfare—it is an important question how these two forces intersect and whether they do, in fact, cancel out.
B. Creating Robust Checks on Inaction

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

Although constitutional scholars might first focus on a doctrinal solution to the inaction problem, we have made the case that judicial review is unlikely to be successful for basic, prudential reasons. The best way to escape the bias built into our constitutional system, then, is to think about separation of powers not at the level of constitutional doctrine, but at the level of institutional design. Rehabilitating Congress (and, in some very narrow situations, the courts) as a robust adversary to the President—drawing particularly, but not exclusively, on what Professor Chafetz calls Congress’s “soft power”—may be the only solution. Still, the reader must understand that the proposals herein are preliminary. The purpose of this Article has been to identify the separation-of-powers problems inherent in presidential inaction; future work will do the heavy lifting with regard to solutions. Nonetheless, in this Section, we suggest a few possible avenues for reform and discuss the dilemmas that those solutions present.

1. Congress as Legislator

The least ambitious proposal might be to use the unique legislative capabilities of Congress to overcome the institutional barriers to judicial review of inaction. Most obviously, where the President’s authority (and obligation) to enforce legislation is concerned, Congress could pass more specific legislative delegations that require the President to take action. Congress’s delegation to the EPA, at issue in Massachusetts v. EPA, provides a good example of such specificity. In the Clean Air Act, Congress explicitly required the EPA to regulate “air pollutants . . . which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare,” a mandate the Supreme Court found sufficiently specific to

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239 See discussion supra Subsection II.C.ii.


241 We thus exclude solutions internal to the Executive Branch. Although administrative law scholars have offered a number of useful policy proposals that would allow the President to police the agencies, see, e.g., Michael A. Livermore & Richard L. Revesz, Scrutinizing Inaction, HUFFINGTON POST (July 15, 2010), http://www.huffingtonpost.com/richard-l-revesz-and-michael-a-livermore/scrutinizing-inaction_b_647603.html, our focus is situations in which the President is the one acting out of line, so those solutions are inapt.

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

Contrast those statutes with the Securities Exchange Act, which includes broad statements of purpose but little in the way of requirements on the President. A Congress intent on avoiding presidential inaction with respect to banking regulation would instead have passed a statute prescribing the conditions under which regulation would be required, rather than leave it to the President to make that decision.

Note that, under this regime, courts would still ultimately review the executive’s decisions (a la Massachusetts v. EPA), but Congress would create the “case” and draw the hard lines that courts are unwilling to address.

2. Remedying Information Asymmetric

Many of the shortcomings in congressional oversight we explored earlier are, at root, problems of information asymmetry. Initiatives that bring greater transparency to executive decision-making could allow Congress to act as a meaningful check on inaction. For example, inspired by the REINS Act, Congress might require agencies to submit all decisions—including inaction—for ratification. If Congress failed to ratify, that would provide the courts with a justiciable vehicle to adjudicate the underlying issues.

Of course, any such solution would suffer many the same problems it is intended to combat; for example, even if Congress required an agency to submit all decisions not to act for legislative review, it is unlikely that Congress would have the motivation or the capacity to review every such decisions. Moreover, it is perhaps even more unlikely that an agency would submit willingly to such requests, and the same problem of the missing “trigger” arises—to wit, how would the agency (or Congress) decide which decisions would merit reporting? An agency head is not likely to conclude that failing to issue a regulation in response to a petition from an individual citizen should be made into a federal case, let alone his sense that “we didn’t do enough to go after insider traders today.”

3. Aligning Incentives

The problem is not entirely informational. Indeed, Congress was not unaware of the President’s decisions not to enforce the Clean Air Act or DOMA. To the contrary, in those high-profile cases, the President’s primary motivation in pursuing a policy of inaction was to make the issue politically

\[^{243}\text{We thank David Wishnick for pushing us with this evocative example.}\]
salient. Where information is not the problem, institutional designers need to find a way to motivate Congress to step in.

One approach would be to attempt to align the powers of Congress with results the Executive would find detrimental. Conditioned funding may exacerbate the problem of inaction by rewarding Presidents who prefer less government regulation as a general matter, but every Chief Executive—small government or big—is invested in maintaining her unitary power over the entire branch.244 Perhaps one solution would then be to allow Congress to fracture that President’s unitary authority and contract outside the administrative state to provide the set of services that the President is unwilling to provide. The litigation surrounding President Obama’s decision not to defend DOMA is an excellent example. The Administration made it clear that it would not carry out the duty assigned to it by the Constitution, so Congress responded by hiring someone not employed by the President—in this case, a private lawyer—to do the job.

This approach not only ensures that the congressional will is effectuated, but it also creates a powerful disincentive against the Chief Executive pursuing a policy of inaction. If Congress is waiting in the wings, ready to act, inaction will be both fruitless with respect to the policy question at issue (Congress will simply hire someone to do what the President is unwilling to do) and counterproductive with respect to the rest of the President’s power (it would take his unitary authority away).245 Similarly, Congress could profitably look to the states for help enforcing laws the President chooses to ignore. The potential role of the states as bulwarks against presidential inaction is a logical outgrowth of Professor Bulman-Pozen’s suggestion that the states can act to “safeguard” the separation of powers.246 Bulman-Pozen notes that if Congress is not satisfied with the executive’s performance, it can enlist the states and local governments to carry out its programs. But the states are all the more vital when the President chooses to pursue a policy of inaction contrary to the national legislature’s will. For while Congress can bring to bear all of its institutional power to prevent the President from acting out of line with its preferences (thus limiting the utility of the states as safeguards), it cannot do so when the President chooses not to act. Thus, where the President chooses inaction, the states could take on an even greater role in helping to implement Congress’s preferred policies.

244 See Strauss, Fourth Branch, supra note 70, at 597.
245 This might raise some constitutional concerns, but is likely acceptable so long as Humphrey’s Executor v. United States, 295 U.S. 602 (1935) remains good law. Of course, other concerns may prompt the President to choose not to act even where Congress threatens to make an end run around her executive authority—there is some evidence that President Obama knew the Republican Congress would hire an outside lawyer if he failed to defend DOMA, but he pursued that course nonetheless.
More broadly, inaction complicates the traditional debate between advocates of “cooperative” and “uncooperative” federalism. Cooperative-federalism scholars see the states as allies of the federal government. But if the President chooses to under-enforce a particular congressional enactment, the simple account of cooperative federalism cannot hold. It can no longer be the case that the states and local governments are allies of the entire federal government; after all, in our account, where the President fails to enforce the law, she is by definition at odds with the Congress. If the states are to cooperate with the federal government in a world of inaction, then, they must often choose sides.

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

The recent controversy surrounding Arizona’s strict immigration law, known as S.B. 1070, illustrates well the role of inaction in federalism. In response to a suit brought by the federal government to prevent the state from enforcing its own law aimed at strengthening immigration enforcement, Arizona argued that it was simply “supplementing” federal immigration enforcement in order to effectuate the will of Congress. The Justice Department, on behalf of the President, argued that, to the contrary, Arizona’s law frustrated Congress’s purpose, which was to grant the President discretion to enforce the immigration laws as he sees fit. The key, though, is precisely that: Congress’s intent. If it was Congress’s intent that the President enforce federal immigration law to the fullest extent possible, advocates of the states as safeguards of the separation of powers might suggest that Arizona be allowed to enforce its own law, because where the President refuses to carry out Congress’s policies, that body’s power to get what it wants is at its lowest ebb.

249 Brief for Petitioner at 7, Arizona v. United States, No. 11-182 (2012).
Then again, perhaps a better approach would be to require Congress affirmatively to invoke the states as partners to overcome presidential inaction.

4. Statutory Interpretation and Agency Deference: The “Presidential Inaction” Canon

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

Massachusetts v. EPA may be the best example of such a case. By requiring the EPA to promulgate environmental regulations, the Court put the question of inaction back in the hands of the legislature. Had the Court instead required that Congress police the President’s decision not to regulate by passing new, more specific enabling legislation or cutting funding for one of the President’s favored projects, it would have been left essentially impotent to combat the President’s decision. But rather than relying on the Congress to police President Bush’s decision not to act, the Court allowed room for the

253 See, e.g., Richard L. Hasen, The Democracy Canon, 62 Stan. L. Rev. 69 (2009) (collecting state cases in which judges have placed a thumb on the scale in favor of access to the ballot, among other democracy values).
254 See, e.g., Eskridge & Frickey, supra note 251, at 600-03 (arguing that the Supreme Court has enforced due process norms through its reliance on the rule of lenity and the rule favoring liberal constitution of statutes meant to protect discrete and insular minorities).
255 Id. at 605-07 (discussing the Court’s presumptions against “derogation of the President’s traditional powers” and “excessive delegation of legislative powers”).
256 See Section II.C supra.
President to pursue his policy if Congress acquiesced through a clearer statement that such inaction was statutorily acceptable. Such a presumption against inaction could solve many of the structural issues with congressional control of inaction while allowing the courts some role, contrary to the fatalistic position that such judicial action is never possible.257

Whether any of these doctrinal and structural reforms is worth pursuing depends, of course, on many factors. For present purposes, it is important simply to recognize the deep relationship between inaction and the structure of our polity, from the federal government on down.

C. The Theory Applied: President Obama’s 2012 Immigration Decision

As a coda to our theory of presidential inaction, we return now to the example first presented in the Introduction—President Obama’s decision not to deport certain undocumented immigrants—to assess whether it constitutes impermissible presidential inaction and, if so, what might be done about it. To summarize briefly, the President’s decision effectively implements portions of the DREAM ACT, a legislative proposal that would grant amnesty to undocumented immigrants who were brought to the United States as children and have never committed a felony. Although the Obama Administration made a strong push to get Congress to enact the DREAM ACT, it was never even voted on by the Senate. Almost a year later, the Obama Administration announced that the Department of Homeland Security would no longer seek deportation of DREAM-qualified immigrants.258 As mentioned above, some commentators and politicians responded with accusations of presidential overreach and promises to take the Administration to court. What was sorely lacking, amidst all this rancor, was an analysis of whether the Obama Administration’s policy was impermissible executive inaction, or even a discussion of what such an analysis might look like.

We have attempted to start that discussion here. At first glance, President Obama’s immigration announcement seems like a paradigmatic case of insidious presidential inaction. After all, the President essentially usurped an entire realm of policymaking from Congress; the legislature refused to pass the DREAM ACT, so the President codified elements of the law with his announcement, which, of course, was not subject to the formal requirements of legislative enactment. But as Section II.B explains, that kind of prima facie case is only the beginning of the inquiry. Once we have identified a candidate for the label “inaction,” it is critical to ask whether the President’s actions fell short of the baseline level of enforcement Congress intended to require with the legislative scheme in question. If it does, then we have presidential inaction, as opposed to mere discretion. But whether that inaction is permissible depends on the President’s motivation, as well as whether there is independent constitutional support for his use of discretion.

257 These fatalistic views are discussed in Section I.C supra.

Given the complexity of the legislative scheme surrounding immigration enforcement, Congress’s intent is not easy to discern. Of course, the subjects of the announcement were not properly admitted to the United States, so they are removable. Yet, the various immigration statutes at play grant the Attorney General the discretion not to initiate removal proceedings. Moreover, if such proceedings are initiated, the Attorney General may waive many admissibility conditions. Furthermore, even if an immigrant is found removable (i.e., that individual meets a statutory ground for deportability), the statute may allow him to qualify for and receive relief from deportation (e.g., cancellation of removal, or voluntary departure). Given the complexity of the immigration statutes and the presence of explicit legislatively granted discretion at virtually every stage, it is not easy to point to the text of the statute to conclude that there was a baseline enforcement requirement that the Obama Administration fell short of.

That said, as was the case with the Section 5 of the Voting Rights Act, we might find Congress’s intent in the structure or legislative history of the law, rather than on its face. But this, too, is no easy task. By providing for discretion in virtually every element of the legislative scheme, it may be argued that Congress could not have had much of an idea of what overall enforcement would look like. There are, however, two ways one might infer that Congress did not intend to grant the Attorney General such broad discretion. First, it might be pointed out that Congress made the Attorney General’s discretion explicit in a number of sections of the statute. He has the clear, textual authority to waive admissibility requirements, but that authority is subject to certain conditions. Congress granted him the power to delay removal for up to a year while an immigrant’s status is being investigated. By negative implication, then, it might be argued that he lacks such discretion where it is not clearly granted.

Second, one could distinguish between individualized and categorical discretion. That is, while the President has the discretion to make decisions in individuals cases, here, he carved out a group of people who would be exempted from the law entirely. This is more akin to legislation than to prosecutorial discretion, and as such, one might argue that it amounts to impermissible presidential lawmaking through inaction. There is some support for this argument. The Administration’s Napolitano Memorandum, which outlines the new immigration policy, suggests that the policy is based on a case-by-case determination of eligibility for waiver. However, as some commentators have noted, the Napolitano Memo’s case-by-case factors differ significantly from the Administration’s prior Memorandum (known as the Morton Memo), which articulated its approach to prosecutorial discretion.

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259 For a discussion of these features of the statute, see Arizona v. United States, 567 U.S. __ (2012), slip op. at 4.

in immigration enforcement. The Morton Memo also lists case-by-case factors, but those factors are incredibly detailed, encapsulating most possible individual circumstances that might merit delayed enforcement. The Napolitano Memorandum, on the other hand, lists five factors, all of which are sufficiently generalized that they could easily be found in a congressional statute. Given the policy-like language with which the Administration announced the changes, the Napolitano Memorandum appears to articulate an approach more akin to categorical exclusion, much like the Administration’s initial decision not to enforce the Controlled Substances Act with respect to medicinal marijuana.

But that conclusion is not so simple either. In the case of medicinal marijuana, the Controlled Substances Act made it very clear that medicinal marijuana could not be excluded from the ambit of the statute; the Supreme Court confirmed as much in *Raich*. There appears to be no equivalent language in the immigration laws. In fact, the Supreme Court recently held in *Arizona v. United States* that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials.” While the case did not present the issue of categorical under-enforcement of immigration laws, Arizona did argue (as discussed above) that Congress intended a greater level of enforcement than the Executive had pursued. The Court rejected that argument, explaining that Congress expressly granted broad discretion to the Executive. While it is an open question whether that discretion extends to categorical exclusions, the Court’s language is certainly broad enough to suggest that the President may be so empowered.

It thus appears that Congress did not establish a clear baseline of required enforcement in the various immigration statutes at issue in this case. As such, President Obama’s decision is probably not an impermissible act of policy motivated inaction. That said, given the nontrivial possibility that Congress did not imply a baseline level of enforcement, and because we are not immigration experts, any conclusions we reach here should be taken as tentative. It would therefore be imprudent not to complete the analysis.

We must turn, then, to the dual considerations of resource constraints and policy motivation. The latter is patently obvious in this case and may indeed be dispositive of the issue. Perhaps more than any of the examples discussed above, we know that the President’s decision was motivated by his policy preferences. The DREAM policy is a direct response to Congress’s refusal to pass a new statute softening the requirements of the old law. (Though if we are correct with respect to the baseline, it was not necessary to

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262 See supra Subsection II.A.iv.


264 *Id.* at 18 (recognizing “the principle that the removal process is entrusted to the discretion of the Federal Government”).
get the new law passed.) As such, we know that policy concerns motivated the President’s decision.

This is especially important because here, just as with medicinal marijuana, the President publicly justified his policy on the basis of limited resources.\textsuperscript{265} Moreover, there is a colorable claim that, in the area of immigration enforcement where resources are scarce, that justification may be real. Nevertheless, because the evidence suggesting that this was a policy motivated decision is quite clear—indeed, at his press conference, the President described the policy as the “right thing to do”—we need not linger on the resources question. We could conclude—assuming, again, that we knew the policy fell short of a congressional baseline—that the policy was impermissible policy-motivated inaction.

The final question is what might be done if the Administration’s enforcement does fall short of baseline requirements. Some members of Congress have suggested that they would sue the President over the policy.\textsuperscript{266} This position is doubly ironic: not only are the courts ill-suited to such challenges,\textsuperscript{267} but these Members of Congress are uniquely situated to solve the problem without recourse to the courts.\textsuperscript{268}

The Congress-oriented solutions we outlined above fall into four categories: clearer legislation, alleviating information asymmetries, aligning incentives, and using alternative delegees. Most of these solutions could be invoked in the immigration context. For example, Congress could pass legislation that imposes a true and clear baseline requirement on the President (by using words like “must” or “shall” and prescribing a definite level of enforcement, much like the 91st Congress did with the Clean Air Act). Alternatively, Congress could threaten to withhold funding for the President’s own priorities (health care, for example).

Finally, and perhaps most usefully, Congress could turn to the states for help. (This suggestion would combine the notion of aligning incentives and using alternative delegees.) We argued above that the states’ role as a safeguard of the separation of powers would be particularly important where the President has refused to enforce laws that affect the states. Nowhere is that truer than in the immigration context. In the S.B. 1070 litigation, Arizona argued that it was a more faithful representative of the congressional will with respect to immigration laws than the President was. The Supreme Court rejected that assertion, but Congress could make it a reality: in the DREAM


\textsuperscript{267} See supra Section II.C.

\textsuperscript{268} See supra Subsection III.B.1.
ACT context, Congress could *affirmatively ask* the states to take on a more constructive role; it could ask the states not to pass their own immigration laws, but to agree to enforce the federal laws currently on the books.

We do not intend to opine on the practical realities of such options; we mean only to point out that they exist and that they are more likely to yield success than litigation. If Members of Congress did sue the President, though, and if the courts were able to identify a baseline level of enforcement that the President failed to reach, this could be an appropriate case in which to implement the canon of construction we described above. This is a hard case; the President has used his interpretive authority to pursue a policy that may fall short of a congressional baseline, although it is not clear what that baseline is. The Court could thus enforce the separation-of-powers norm by erring in favor of requiring enforcement. The Court could thus allow Congress to avoid many of the structural barriers to intervention outlined above while still allowing Congress and the President to pursue a joint policy of under-enforcement if that is truly their aim.

**CONCLUSION**

We live in an era of “presidential lawmaking.”\(^{269}\) This insight is not new. However, theorists have failed to realize that presidential lawmaking can take a particularly insidious form: the decision not to enforce laws that have been duly passed by Congress. Once we have recognized that shortcoming, we can begin to suggest new rules, institutions, and doctrine that would more effectively serve the goals of the separation of powers.

Recognizing and beginning to combat unchecked presidential inaction has become even more important as the modern government has become one of “presidential administration.”\(^{270}\) Strong Presidents who are willing, and now able, to make policy through their agencies will only exacerbate the pathology of presidential inaction, rendering antiquated our notion of President and Congress in dialogue.

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

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\(^{269}\) Greene, *supra* note 1.

\(^{270}\) Kagan, *supra* note 199.