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## The Judicial Role in Constraining Presidential Non-Enforcement Discretion: The Virtues of an APA Approach

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THE JUDICIAL ROLE IN CONSTRAINING PRESIDENTIAL  
NONENFORCEMENT DISCRETION: THE  
VIRTUES OF AN APA APPROACH

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DANIEL E. WALTERS†

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## INTRODUCTION

Scholars, lawyers, and, indeed, the public at large increasingly worry about what purposive presidential inaction<sup>1</sup> in enforcing<sup>2</sup> statutory programs means for the rule of law and how such discretionary inaction can fit within a constitutional structure that compels Presidents to “take Care that the Laws be faithfully executed.”<sup>3</sup> Concerns about the excessive use of this kind of discretion to refrain from enforcement extend back to the constitutional debates, as historically oriented scholarship has now shown.<sup>4</sup> The Take Care Clause appears to have been more or less an explicit effort to disclaim the “dispensing” and “suspension” powers that the King of England claimed for himself leading up to the Glorious Revolution.<sup>5</sup> But the issue has become more immediately relevant in the wake of several high-profile instances where the Obama Administration announced prospective nonenforcement policies on immigration, health care, and marijuana, among other things.<sup>6</sup> Critics

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1 By “purposive presidential inaction,” I mean a President’s or an agency’s intentional decision to refrain from exercising enforcement authority granted to the Executive by Congress. I do not address a separate, but related, problem involving Presidents’ signing statements or refusals to act on laws they believe are unconstitutional. See generally Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000). Purposive executive inaction, as used in this Article, refers only to the President’s or an agency’s refusal to enforce constitutionally valid statutory programs.

2 I use “enforcing” in a broad sense. It is not restricted to enforcement of statutory requirements against individuals (i.e., adjudication or prosecution); rather, it refers to following through on statutory obligations. For instance, if the obligation is a deadline to promulgate rules or to act on a nondiscretionary duty, I consider failure to adhere to that deadline to be “nonenforcement.”

3 U.S. CONST. art. II, § 3.

4 See Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 796-803 (2013) (discussing the historical background of and the founding debates on executive power and the President’s duty to enforce the law); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 724-30 (2014) (presenting evidence that “confirms that the executive function has long been understood to entail some degree of discretion with respect to enforcement of statutory prohibitions”).

5 See Price, *supra* note 4, at 731 (“[I]t seems unlikely that early executive officials would have believed they held broad authority to decline enforcement of federal statutes.”).

6 See Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1184-1203 (2015) (providing background on immigration nonenforcement in the Obama Administration); Price, *supra* note 4, at 759-61 (highlighting the

deftly lay out several problems with this trend: it appears to be somewhat inconsistent with the original intent of the Framers;<sup>7</sup> it has been conducted mostly covertly, with little in the way of transparency and accountability;<sup>8</sup> and, perhaps worst of all, depending on one's political priors, it entrenches a reactive bias in policymaking,<sup>9</sup> particularly when divided government and legislative gridlock make it nearly impossible to develop new regulatory programs the old-fashioned way through new legislation or even new regulations.<sup>10</sup> The issue is also now far more vexing, insofar as the ubiquity of law and endemic budgetary crises make some degree of government inaction both inevitable and desirable. Most agree that the President should have the authority to decline to enforce the law in certain situations where equity or resource constraints prevent full enforcement of the law.<sup>11</sup> But instances of policy-oriented nonenforcement—i.e., the purposive use of presidential nonenforcement to accomplish policy changes that would not be possible through the normal channels of legislation—are more controversial. Some now argue that this kind of exercise of executive discretion is not the kind of thing the Constitution permits or the kind of thing we ought to encourage as a matter of good governance.<sup>12</sup>

This Article challenges those writing and practicing in the area of presidential inaction to ask and answer a difficult question that inevitably follows: What role can and should courts assume in addressing potentially

Department of Homeland Security's nonenforcement of certain immigration laws); *see also* Timothy Stoltzfus Jost & Simon Lazarus, *Obama's ACA Delays—Breaking the Law or Making It Work?*, 370 NEW ENG. J. MED. 1970 (2014) (discussing the Obama Administration's postponement of implementation of certain provisions of the Affordable Care Act); Bradley E. Markano, *Enabling State Deregulation of Marijuana Through Executive Branch Nonenforcement*, 90 N.Y.U. L. REV. 289, 292-96 (2015) (explaining the Obama Administration's decisions regarding nonenforcement of marijuana laws).

<sup>7</sup> *See* Delahunty & Yoo, *supra* note 4, at 803 (describing the Founders' intent to eliminate, or at least limit, the President's discretionary authority through the Take Care Clause); Price, *supra* note 4, at 731 (outlining the origins of the Take Care Clause, which suggest that early American thinking revealed no executive authority to decline to enforce federal statutes).

<sup>8</sup> *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1101 (2013) (proposing to reform presidential enforcement through heightened coordination and disclosure).

<sup>9</sup> *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1237-50 (2014) (examining the implications of presidential inaction, particularly a bias in favor of small government).

<sup>10</sup> *See* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1828-30 (2015) (discussing the ways that gridlock in the legislative process leads to work-around practices in Congress and agencies).

<sup>11</sup> *See* Delahunty & Yoo, *supra* note 4, at 785 (arguing that the President's strict duty to enforce the law "is 'defeasible,' and its nonperformance can be excused or justified in appropriate circumstances").

<sup>12</sup> *See id.* at 784 ("We argue that the Constitution's Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases."); *see also* Love & Garg, *supra* note 9, at 1203 (suggesting that engaging in unchecked inaction "results in a bias toward smaller government that our conventional concept of checks and balances does not tolerate and cannot counter").

unconstitutional presidential inaction? While there are of course some constitutional problems that have been entrusted to the oversight of only the political process,<sup>13</sup> ordinarily, where there is a constitutional problem, courts play at least some role in addressing it.<sup>14</sup> However, those who have identified policy-oriented presidential inaction as a problem have yet to offer any workable judicial rule or standard to address that problem. Some have articulated constitutional rules that could, in principle, be applied by the courts,<sup>15</sup> but, in practice, would wreak such havoc on the judiciary that even their proponents recognize that they are unlikely to be seriously implemented.<sup>16</sup> Other scholars have urged political process reforms that would serve to manage presidential power in these areas but steer far away from any judicial remedy.<sup>17</sup>

There are two major problems with constitutional review of a President's compliance with the Take Care Clause, both of which are implicit in scholars' reluctance to assign a role to the courts. First, such review would invite an overwhelming number of complaints and would be subject to such difficult line-drawing problems that courts would, in effect, be forced to make their review either exceedingly lenient or exceedingly stringent simply to curb the demand for review. Neither situation would be ideal, since Presidents inevitably need to make highly contextual choices about priorities and resource allocation, and they clearly can abuse that discretion at times. A rigid rule would be either overinclusive or underinclusive, and a flexible standard would be impossible to administer, given the prevalence of nonenforcement decisions in the modern administrative state. Second, even if courts were able to surmount these institutional capacity hurdles and find a suitable constitutional rule or standard, they would still be unlikely to actually affect executive nonenforcement discretion in any meaningful way. Presidents are not typically constrained by courts or Congress in separation-of-powers disputes because, in the particulars of administration, they possess far greater expertise, nimbleness, and even accountability than the other branches. Since Congress and the courts are aware of their own limitations in this regard, they are inherently hesitant to intervene in anything remotely resembling core executive tasks, such as decisions about when to enforce the law.<sup>18</sup>

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<sup>13</sup> See generally Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363 (2011) (discussing and applying political process theory).

<sup>14</sup> See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

<sup>15</sup> See *infra* Section I.A.

<sup>16</sup> See *infra* Section I.A.

<sup>17</sup> See *infra* Section I.B.

<sup>18</sup> See Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 255 (2003) ("Even in the face of modern translation difficulties, and despite the factual and

Given these barriers to developing an appropriate judicial response on the constitutional level, we would do well to avoid reinventing the wheel. In fact, we can avoid it. As a practical matter, challenges to the exercise of nonenforcement discretion are ordinarily posed as challenges to agency inaction. The President may involve himself more in some agency decisions than others, but ultimately, he can act only through agencies, which are in turn subject to suit under the Administrative Procedure Act (APA).<sup>19</sup> Thus, even disputes about nonenforcement going to the heart of the President's agenda are typically posed as, or are easily translatable into, an administrative law problem rather than a constitutional law problem.<sup>20</sup> As it turns out—and as I will demonstrate in this Article—administrative law has not turned a blind eye to the problems identified in this new wave of scholarship. Rather, it has developed an elaborate, often quite nuanced, and ultimately effective approach to dealing with the institutional problems associated with judicial policing of executive nonenforcement. Courts, in reviewing agency inaction under the APA, in effect “translate”<sup>21</sup> constitutional values in particular cases through a form of review that leaves them both far less vulnerable to an unmanageable caseload and far more capable of competing with Presidents in the most important cases. Jurisdictional safety valves—such as the requirement of final agency action and doctrines of prudential standing—as well as complexities of administrative law doctrine allow courts to be selective in filtering out routine nonenforcement cases in ways not possible if they were

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procedural limitations in the case itself, *Marbury's* core message remains clear and powerful: pursuant to constitutional or statutory commands, the executive has the obligation to act within the law, and the courts have the duty to enforce the law. Yet, although the general principle that the president is obligated to follow congressional commands has not seriously been called into question, the courts have, nonetheless, not always fulfilled their duty to enforce that obligation.”); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 983 (1997) (arguing that the “President as lawmaker” is dangerous “precisely because he is omniscient, remote from effective check by courts or even Congress”).

<sup>19</sup> See Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2012) (providing standards for the promulgation and enforcement of regulations); *id.* § 702 (conferring a private right of action to enforce federal rights against agencies).

<sup>20</sup> Love and Garg appear to argue that, although administrative law scholars have long engaged the question of “presidential policymaking through inaction,” none have ever dealt with the “constitutional dimensions of the problem.” Love & Garg, *supra* note 9, at 1210. This is hair-splitting: in fact, the problems are virtually identical, and to the extent that there are unique “constitutional dimensions” to the policy problem, it is not apparent what they are. When it comes to enforcement of the constitutional norm, however, important differences *do* arise, and the choice to treat the problem as constitutional or statutory requires serious attention. See *infra* Part III.

<sup>21</sup> Cf. ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 84 (2010) (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)) (introducing the idea of “translation” in noting that procedural statutes like the APA can “translate” the principles and values underlying separation of powers into a world where agencies have increased authority).

applying a freestanding constitutional analysis under the Take Care Clause.<sup>22</sup> Allowing courts to selectively review presidential nonenforcement discretion in turn enables them to carry more authority when they do intervene.<sup>23</sup> In short, an administrative law approach to the root problem of nonenforcement is far better poised to actually make a difference.

This is not to say that an administrative law approach to the constitutional problem is perfect. Much more work remains to hone the doctrine and bring it into accord with the nascent constitutional values implicated in this debate.<sup>24</sup> But it is a start, and one that I argue carves out an attractive and institutionally feasible method for courts seeking to navigate the middle ground between the extremes of separation-of-powers formalism and open-ended functional balancing. Recognizing how APA review of agency inaction works to optimally reduce presidential nonenforcement discretion speaks to the important ongoing debate about what to do with policy-oriented presidential inaction. We need not settle on untested political process reforms—such as encouraging presidential coordination and disclosure of nonenforcement decisions, or nudging Congress to write more specific statutes<sup>25</sup>—which are unlikely to take hold or to constrain the exercise of nonenforcement discretion.<sup>26</sup>

This Article proceeds in four parts. Part I reviews the burgeoning debate around purposive presidential inaction, recounting the formal and functional reasons that constitutional separation-of-powers scholars have come to doubt the constitutionality and desirability of the practice. Part II articulates the

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<sup>22</sup> See *infra* subsection III.B.2.

<sup>23</sup> See *infra* Part IV.

<sup>24</sup> See Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1662 (2004) (attempting to “place administrative law back inside the universe of basic constitutional design and purpose” and noting that the “issue of agency inaction” in fact “can be reconceived as consistent with other constitutional doctrines”). One unresolved problem that deserves attention in this respect is the ongoing debate over whether naked political reasons for agency action are sufficient to survive arbitrary and capricious review. See generally Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2 (2009) (arguing for a relaxation of arbitrary and capricious review under the APA to accept political reasons as legitimate justifications for agency decisions). This Article does not deal with this issue. However, after committing the APA approach to the problem of nonenforcement, it will be necessary to sort out these kinds of open questions about the appropriate time for court intervention.

<sup>25</sup> See Andrias, *supra* note 8, at 1083-94 (proposing executive coordination reforms on the grounds of efficiency and democratic accountability); Love & Garg, *supra* note 9, at 1244-49 (proposing multiple means by which Congress could work around presidential inaction, including by passing more specific laws).

<sup>26</sup> Congress itself may not be up to the challenge and may have no interest in ensuring that the enacting Congress’s intent is enforced. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250-52 (2001) (discussing how the current Congress may have an interest in promoting “lawlessness” in agencies, necessitating some role for the courts in controlling political influence on the implementation of law in agencies).

problem with this growing consensus: there has been too little attention paid to the role that courts might have to play in addressing problematic uses of presidential inaction. Most importantly, efforts to invigorate the Take Care Clause have been too inattentive to the strains on judicial capacity that would be posed by such a development. Part III offers an argument that the administrative law of agency inaction is better suited to take on the difficult questions surrounding nonenforcement. Such review could do the work that blunter constitutional instruments and the political process cannot do alone, all while insulating courts from strains on their institutional capacity. Finally, Part IV reviews three important recent federal court decisions, each demonstrating how courts are conducting APA review to translate constitutional separation-of-powers values through a review framework that better serves the courts in their efforts to police presidential inaction.

#### I. THE DEBATE OVER PRESIDENTIAL NONENFORCEMENT DISCRETION

By all accounts, recent Presidents have made extensive use of nonenforcement discretion to further their policy visions. President Obama's decisions to defer removal action for certain undocumented immigrants,<sup>27</sup> not to enforce rulemaking and compliance deadlines under the Affordable Care Act,<sup>28</sup> and not to enforce federal marijuana control laws in states where marijuana is legalized<sup>29</sup> all brought the practice to unprecedented public exposure, with Republicans in Congress accusing the President of acting above the law.<sup>30</sup> In fact, though, President George W. Bush's nonenforcement

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<sup>27</sup> See Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents 3 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/3JYG-RAET>] ("I am now expanding . . . case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities . . .").

<sup>28</sup> See Memorandum from Steven Larsen, Dir., Office of Consumer Info. & Ins. Oversight, U.S. Dep't of Health & Human Servs., Insurance Standards Guidance Series—Information 1 (Dec. 9, 2010), <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/guidance-limited-benefit-2nd-supp-bulletin-120910.pdf> [<https://perma.cc/B69F-7FM6>] (discussing the requirements for "waiver[s] for a limited benefit plan or 'mini-med' plan of the restrictions on the imposition of annual limits on the dollar value of essential health benefits").

<sup>29</sup> See Memorandum from James M. Cole, Deputy Attorney Gen., to U.S. Attorneys, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013), <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/AF5H-UAGP>] (focusing marijuana-based enforcement on certain policy priorities).

<sup>30</sup> See generally Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63 (2015) (critiquing President Obama's use of discretionary authority).



of certain environmental programs—most famously, the “Clear Skies program”—amounts to the same basic strategic maneuver for deregulatory purposes, as did intended deregulatory programs in antitrust and environmental law during the Reagan Administration.<sup>31</sup> As political scientists have long understood and legal scholars have begun to recognize, Presidents of all ideological stripes have enormous incentives to accomplish something while they are in office.<sup>32</sup> And, in an age of divided government, polarization, and the inevitable gridlock that these conditions foretell, it is far easier for Presidents to use nonenforcement discretion than it is to push new initiatives through the veto-gated legislative process.<sup>33</sup>

But just because the tactic has long been employed by Presidents<sup>34</sup> does not mean that nonenforcement is constitutional or that it amounts to good governance. The high-profile instances of purposive presidential inaction during the Obama Administration have stoked an important debate among constitutional separation-of-powers scholars, and that debate has produced a rare consensus across formal and functional approaches<sup>35</sup> that purposive nonenforcement is problematic, if not illegal.

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31 For discussion of the Reagan-era programs, see JOEL A. MINTZ, ENFORCEMENT AT THE EPA: HIGH STAKES AND HARD CHOICES chs. 4-5 (2012) and William E. Kovacic, *Reagan's Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 66-67 (1991), which discuss the Administration's adherence to a merger policy in which the government did not challenge conglomerate or vertical transactions. For discussion of the George W. Bush programs on deregulation, see generally Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010), which examines deregulation through nonenforcement during the George W. Bush Administration and argues that the practice diminishes the government's accountability, and Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 44 n.147 (2008), which highlights the Bush Administration's Clear Skies initiative as an example of a President instructing an agency not to enforce certain laws.

32 See, e.g., Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850, 854 (1999) (highlighting the growth and importance of presidential unilateral actions motivated by Presidents' desires to have power and establish legacies as strong and effective leaders).

33 See Love & Garg, *supra* note 9, at 1217 (suggesting that it is easier for a President to achieve a goal through nonenforcement, which does not require the help of Congress or the courts).

34 See Cheh, *supra* note 18, at 253-55 (drawing thematic connections to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where President Jefferson refused to perform the “ministerial” act of completing an appointment commanded by the legislature for more or less political reasons).

35 See *infra* Sections I.A–B. For a discussion of the competing traditions of functionalism and formalism, see generally M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000), which discusses the competing traditions and claims that the debate of formalism versus functionalism is a distraction. For a helpful breakdown of how some scholarship on the Take Care Clause and presidential nonenforcement discretion is more formalist and some is more functionalist, see Mitchell J. Widener, *The Presentment Clause Meets the Suspension Power: The Affordable Care Act's Long and Winding Road to Implementation*, 24 B.U. PUB. INT. L.J. 109, 123-27 (2015), which reviews various scholars' solutions delineating the proper circumstances for when a President should exercise discretion, which often fall along formalist–functionalist lines.

*A. Formalist Critiques*

The formalist argument against purposive presidential inaction stems from the plain text of the Take Care Clause as well as the history of its drafting and early interpretation. As Professors Delahunty and Yoo argue, the clause is “naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, ‘without failure’ and ‘exactly.’”<sup>36</sup> To be sure, the words “faithfully executed” do imply a modicum of discretion insofar as discretion is needed to further the “[c]ause’s core purpose of ensuring congressional supremacy.”<sup>37</sup> But scholars now consider the clause to establish a presumption that Presidents will dutifully follow existing law, not make *new* law.<sup>38</sup> This textual argument is strengthened by consideration of the history of the clause. While this Article is not the place for a detailed exegesis, it is now well understood that the Take Care Clause was crafted by the Framers to explicitly reject the pre-Glorious Revolution English tradition of executive suspending and dispensing of the law.<sup>39</sup>

This textualist and historical interpretation counsels for very serious limitations on presidential nonenforcement discretion, but by itself it does not end the debate about the specific form of limitations. Thus, while Delahunty and Yoo argue for a flat rule that all “deliberate deviation[s]” from a baseline duty to enforce all laws are unconstitutional,<sup>40</sup> others have been more measured in their response, acknowledging that the modern administrative state often necessitates nonenforcement of the law. For instance, Professor Price argues that the text and history of the clause require dual constitutional presumptions: first, a presumption that “executive officials lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons”; and second, a countervailing presumption that the exercise of particularized

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<sup>36</sup> Delahunty & Yoo, *supra* note 4, at 799.

<sup>37</sup> Price, *supra* note 4, at 698.

<sup>38</sup> *See id.* at 688 (noting that the “take care duty implies a principle of legislative supremacy in lawmaking,” as “the President’s duty is to ensure execution of Congress’s laws, not to make up the law on his own”).

<sup>39</sup> *See id.* at 691 (“In the seventeenth century . . . as intense religious and political controversies during England’s civil wars unraveled traditions of deference to the monarch, royal suspensions and dispensations became a source of acute conflict between Parliament and the Crown.”); *see also* The Attorney Gen.’s Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55, 57-58 (1980) (stating that the seventeenth century dispute between Parliament and the kings supports the proposition that the Framers did not mean to allow the Executive to disregard statutes); LOUIS FISHER, THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER 9-11 (Stephen M. Sheppard, ed., 2014) (discussing the Take Care Clause and the limits on presidential power); Delahunty & Yoo, *supra* note 4, at 808 (discussing the Framers’ knowledge of “England’s constitutional moment in 1689” and their understanding that “the Constitution’s grant of executive power did not include dispensation”).

<sup>40</sup> Delahunty & Yoo, *supra* note 4, at 785.

discretion in individual cases is constitutional.<sup>41</sup> Similarly, the White House Office of Legal Counsel (OLC), in its opinion on the legality of the Administration's deferred action programs on immigration, offered its own principled interpretation of the boundaries of lawfulness. To the OLC, deferred action for parents of U.S. citizens and legal permanent residents was lawful because it was within the Department of Homeland Security's expertise and was consistent with "congressional policy" to support "law-abiding parents of lawfully present children who have substantial ties to the community."<sup>42</sup> But for parents of child beneficiaries of the Deferred Action for Childhood Arrivals program, the OLC concluded that congressional policy in favor of "family unity" did not extend to "uniting persons who lack lawful status (or prospective lawful status) in the United States with their families."<sup>43</sup>

The OLC's approach amounts to a purposivist or intentionalist standard under which separation-of-powers problems are potentially presented when the President's nonenforcement undermines the relevant statute's purpose, as when President Obama's deferred action program allegedly departed from the policy behind the nation's immigration statutes (i.e., preventing the separation of people legally entitled to be in the United States from their families abroad). The OLC's approach appears to track Professors Manning and Goldsmith's concept of the "completion power," which involves an implied, or inherent, power in the office of the President to carry into execution "unfinished statutory scheme[s]," but "does not permit the President to act *contra legem*."<sup>44</sup>

### B. *Functionalist Critiques*

Scholars have also approached the problem from a functionalist perspective and drawn similar conclusions that the practice should be curtailed or policed (though their prescriptions often differ substantially). Many scholars accept the premise offered by Professors Posner and Vermeule that we live in an era that demands some departure from the liberal legalist fiction of a constrained executive agent doing the bidding of the lawmaking

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<sup>41</sup> Price, *supra* note 4, at 704. The U.S. Court of Appeals for the Fifth Circuit recently seemed to adopt something close to this principle, though not on the constitutional level, finding that the Obama Administration's deferred action program on immigration was reviewable under the APA where it amounted to "the affirmative act of conferring 'lawful presence' on a class of unlawfully present aliens." *Texas v. United States*, 787 F.3d 733, 757 (5th Cir. 2015).

<sup>42</sup> The Dep't of Homeland Sec.'s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the U.S. and to Defer Removal of Others, 38 Op. O.L.C., at 31 (Nov. 19, 2014), <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/XC9G-6HR2>] [hereinafter DACA Authority].

<sup>43</sup> *Id.* at 32.

<sup>44</sup> Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2302, 2309 (2006); see also FISHER, *supra* note 39, at 68-73 (drawing distinctions between implied and inherent powers).

legislature,<sup>45</sup> but nevertheless maintain that nonenforcement discretion upsets a pragmatic or functional balance in our modern separation-of-powers system. For instance, Jeffrey Love and Arpit Garg contend that “interbranch competition” is structurally undermined by the ease with which a President seeking to underenforce the law can implement his policy preferences, compared with a President that must positively enact new statutory authority to take action beyond what is authorized in the legal status quo.<sup>46</sup> Recognizing that if Presidents “could ignore the mandate to enforce, [they] would be able to nullify statutes, an outcome wholly inconsistent with the separation of powers and the Take Care Clause,” Professor Andrias nevertheless insists that some departure from this formality is practically necessary, because of both “longstanding conceptions of presidential power and the practical reality of executive power.”<sup>47</sup> As she notes, “[P]residential involvement in the enforcement of statutes involves a considerable degree of law-shaping, if not lawmaking: Political value judgments are inevitable given conflicting enforcement missions, broad delegations, and scarce resources.”<sup>48</sup> For Andrias, the challenge then becomes finding ways to balance these competing pulls—something that she asserts can be accomplished by building up the coordinating institutions surrounding presidential enforcement control, thereby contributing to the public visibility of decisions to enforce and not enforce and promoting political process controls on this executive discretion.<sup>49</sup>

## II. THE PROBLEM WITH JUDICIAL OVERSIGHT OF NONENFORCEMENT DISCRETION

The varied approaches and perspectives briefly catalogued mask two points of considerable consensus. First, most scholars engaged in the contemporary debate over presidential nonenforcement discretion are sensitive to the legal and practical problems associated with the practice. To be sure, there could be other silent observers that see the practice as benign or even laudable, but there is indeed some degree of consensus among the vocal that something must be done to curtail the ability of Presidents to use this tactic.<sup>50</sup> Perhaps it should come as no surprise, then, that litigants have

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<sup>45</sup> POSNER & VERMEULE, *supra* note 21, at 113-14.

<sup>46</sup> See Love & Garg, *supra* note 9, at 1206 (arguing that checks and balances should limit presidential policymaking through inaction).

<sup>47</sup> Andrias, *supra* note 8, at 1114. Future Presidents could, of course, reverse course and begin enforcing the law, and indeed there may be opportunities for third-party enforcement or civil liability, all of which should temper any sense that statutes can be “nullified” by unilateral presidential action.

<sup>48</sup> *Id.* at 1114-15.

<sup>49</sup> See *id.* at 1115 (“Institutionalizing presidential enforcement would . . . make it easier for Congress, the bureaucracy, and the public to evaluate and respond to presidential action.”).

<sup>50</sup> See *supra* Sections I.A–B (discussing the breadth of criticism of presidential nonenforcement).

begun to test the constitutional waters.<sup>51</sup> But that litigation also points to the second item of considerable consensus among scholars: that whatever limitations exist on the practice of presidential nonenforcement discretion, they are, and ought to be, “nonjudicial” in nature. That is, even for those who are willing to articulate rules or standards for constitutional adjudication of a Take Care Clause claim, those rules or standards are aspirational rather than actionable. Delahunty, Yoo, and Price remain fairly quiet about the specific mechanics of judicial review in their respective articles.<sup>52</sup> Others engage the question to some extent but ultimately dismiss a role for courts in vindicating the Take Care Clause. Andrias assumes that courts could not play a major role in policing presidential discretion because courts following *Heckler v. Chaney* “typically stay out of controversies surrounding executive programmatic decisions, including nonenforcement decisions.”<sup>53</sup> It is this second item of consensus—i.e., that courts do not, and will likely not, assume a role in policing presidential inaction—that this Article challenges.

Why is it that scholars who all see presidential nonenforcement as problematic and worthy of attention are nevertheless unwilling to assign a meaningful constitutional role to the branch of government most traditionally associated with resolving separation-of-powers disputes? This question is especially pressing when scholars are willing to articulate constitutional limits; after all, what could possibly justify courts in refraining from enforcing constitutional norms that are at issue in cases properly before them? Although the literature remains relatively silent on the reasons why the courts cannot play a role in policing presidential inaction, I suggest that there are two major reasons.

First, some of the hesitancy to assign a role to the courts results from an implicit understanding of the limits of judicial capacity. Courts have finite capacity to hear and decide cases, and they are therefore likely to craft legal doctrine in ways that protect them against excessive litigation. These incentives to craft legal doctrine with an eye to the workload it creates are particularly acute in areas of the law that Professor Andrew Coan calls “hybrid” domains,

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<sup>51</sup> See, e.g., *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex.) (discussing, but ultimately deferring judgment on, the plaintiffs’ Take Care Clause claim), *aff’d*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>52</sup> Delahunty & Yoo, *supra* note 4; Price, *supra* note 4.

<sup>53</sup> See Andrias, *supra* note 8, at 1119. *Heckler’s* presumption is so sacrosanct to Professor Andrias that she goes to great lengths to assure readers that her proposals to increase the transparency and publicity of presidential nonenforcement decisions will not result in greater levels of judicial review. *See id.* at 1119–23. Love and Garg are even less sanguine about any potential role for courts. They do not even acknowledge the possibility of a judicially implementable constitutional rule or standard. *See Love & Garg, supra* note 9, at 1249–50 (offering instead a canon of statutory interpretation that would indirectly reinforce constitutional norms in statutory cases). Further, they outright dismiss the APA approach, claiming that *Heckler v. Chaney* and its progeny effectively “narrowed the scope of APA review to the point that judicial review of agency inaction is virtually nonexistent.” *Id.* at 1226.

which are combinations of “high-volume” and “high-stakes” domains.<sup>54</sup> These are legal domains that concern problems that arise so frequently and that have such importance to the government that the appellate courts (and particularly the Supreme Court) feel compelled to review almost every claim. In such domains, once a court becomes involved, its only workable doctrinal choice is to adopt hard-edged rules that deter litigation and facilitate easy resolution.

Policy-oriented presidential inaction is clearly a hybrid domain.<sup>55</sup> There are literally hundreds, if not thousands, of nonenforcement decisions of one kind or another made by executive officials and line agents every single day.<sup>56</sup> If each of these nonenforcement decisions is potentially a constitutional violation, then the number of potential cases that could be brought in federal court is staggering. One escape from this precarious situation is simply to take the issue out of the courts’ hands in favor of process-based remedies, as some scholars have urged.<sup>57</sup> Indeed, preserving a role for the courts in the face of this institutional reality immediately creates problems. Professors Delahunty and Yoo ultimately argue that almost every departure from perfect enforcement is a constitutional violation,<sup>58</sup> and it is not difficult to see why they might want to adopt this extreme stance. Such a hard-edged rule ensures that, were courts to attempt to implement it, they would not have to make difficult, resource-exhausting judgments on a case-by-case basis. Yet, just as assuredly, it means that the courts will never adopt it: such a blunt rule is hopelessly over- and under-inclusive in dealing with a public administration and legal problem that oozes complexity.

Professor Price’s dueling presumptions run into slightly different problems—those related to judicial capacity.<sup>59</sup> They resemble a standard, and as such, they face the problem of judicial capacity head on. Courts would have

<sup>54</sup> Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 440-42 (2012).

<sup>55</sup> Indeed, nonenforcement discretion fits a pattern when it comes to judicial constraints on executive power, for as Coan and Nicholas Bullard suggest, the stakes are high enough in this area that many categories of potential claims are hybrid, or at least high-volume, domains. Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 775-76 (2016).

<sup>56</sup> See generally EUGENE BARDACH & ROBERT A. KAGAN, GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS (2002) (discussing the different styles of enforcement in regulatory law and the opportunity to exercise substantial discretion in day-to-day work). For instance, the OLC estimated that there are “approximately 11.3 million undocumented aliens in the country” but only enough resources to “remove fewer than 400,000 such aliens each year.” DACA Authority, *supra* note 42, at 1.

<sup>57</sup> See Andrias, *supra* note 8, at 1121-22 (proposing an institutionalization process to channel presidential power); Love & Garg, *supra* note 9, at 1232 (outlining the processes that can provide oversight and contain executive discretion).

<sup>58</sup> See Delahunty & Yoo, *supra* note 4, at 784-85 (arguing that there is no general presidential nonenforcement power and any deviation from the Take Care Clause is “presumptively forbidden”).

<sup>59</sup> See *supra* note 41 and accompanying text. The rebuttable presumptions are, again, that ad hoc nonenforcement decisions are presumptively constitutional even where they are policy-based, but *prospective* nonenforcement decisions are presumptively unconstitutional. Price, *supra* note 4, at 704.

to entertain many defenses to the tune that even though a particular nonenforcement decision fell into the presumptively unconstitutional prospective variety, the presumption was rebuttable in that case for whatever reason, and vice versa for claims regarding nonenforcement actions that were presumptively constitutional. This would not be a problem if there were other features of the doctrine that could effectively insulate courts as they went about applying this standard; as it is, however, those insulating features do not exist,<sup>60</sup> and courts applying Price's presumptions would be defenseless against an onslaught of cases that would exhaust the entire capacity of the judiciary. The result likely would be that courts would quickly abandon any pretense of reviewing nonenforcement cases of all kinds, as only a rule of deference could provide the certainty that could avert a caseload tsunami.<sup>61</sup> Again, this probably explains why Price fails to consider in any depth the probable mechanics of judicial implementation of his proposal.

That is not to say that Price is wrong to articulate the fuzzy constitutional line he does. In fact, his intuition that presidential responsibility to "take Care that the Laws be faithfully executed" constrains Presidents primarily when they make prospective policy decisions about whole swaths of cases and less when they make particularized decisions for resource or equity reasons seems far more reasonable than Delahunty and Yoo's more extreme position that all deviations from perfect enforcement are unconstitutional. Price's attempt to remind more rigid formalists of the virtues and inevitability of nonenforcement in the modern administrative state is admirable. But Price's choice to capture this complexity with a standard means that his constitutional test could never, as a practical matter, be implemented with any rigor by the federal courts—something he basically acknowledges by citing no modern cases in favor of the standard he articulates.<sup>62</sup> There simply would be too many cases that would require nuanced applications of the standard.

Second, we might be skeptical of courts' ability to keep pace with executive decisionmaking under any circumstances. Whatever constitutional rule or standard courts would apply would ultimately require them to tread on very sensitive ground with very little sense of the lay of the land. As Posner and Vermeule argue, courts are at an inherent disadvantage compared to the executive because they are backward-looking.<sup>63</sup> Courts usually hear cases long

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60 As discussed below, they would potentially exist to the extent that the claims were attached to an APA claim, but not if they were brought as a freestanding constitutional claim. See *infra* Section III.B.

61 See Coan, *supra* note 54, at 446 (arguing that in "high-stakes, high-volume, and hybrid domains," one tool the court could use to limit litigation is a categorical rule of deference).

62 See Price, *supra* note 4, at 747 (noting that "[f]or their part, courts have characterized the task of deciding whether or not to prosecute as a fundamentally executive function").

63 See POSNER & VERMEULE, *supra* note 21, at 52 ("A basic feature of judicial review . . . is that courts rely upon the initiative of private parties to bring suits . . . . This means that there is always a time lag . . .").

after the purported inaction occurred, at which point it is very difficult for them to second-guess what the executive branch has done.<sup>64</sup> These difficulties would apply to the substantive policy judgments that the executive branch made, as well as to threshold legal questions such as whether the nonenforcement was really a prospective policy decision applying to a class of cases or just ad hoc nonenforcement. Moreover, if a case is decided at the constitutional level, the intrusiveness and binding nature of that decision would provide further reasons for deference, as courts would not want to prospectively constrain executive officials. Given these difficulties, courts would likely be extremely deferential even if they were to find a doctrinal form that solved their other problems.

Perhaps these practical considerations constraining courts in exercising constitutional oversight of nonenforcement discretion do not really amount to a “problem.” After all, as leading theorists now understand, just because the President is not constrained by the forms of legal liberalism does not mean that he is a rogue actor. He still must compete for popular support and will generally appeal to the median voter.<sup>65</sup> Indeed, the President’s role as the only nationally elected government official makes him the best possible official to organize and implement a coherent policy agenda that reflects larger democratic sentiment.<sup>66</sup> But to accept that a powerful President is an inevitable and desirable part of our modern public law framework is not to say that the other branches should willingly abdicate checking the President where they can. If there is a way for courts to discipline presidential nonenforcement discretion without overwhelming their capacity, courts and scholars should embrace that method.

### III. THE SOLUTION: JUDICIAL APPLICATION OF THE APA

There is a better way for courts to vindicate the values underlying the Take Care Clause without entering a separation-of-powers war of attrition that they are likely to lose, and that way is already operating right under our noses. In short, courts already engage in far more effective review of purposive executive inaction under the administrative law of agency inaction than they ever could under a free-floating constitutional rule or standard.

In this Part, I take a close look at the structure of the administrative law of agency inaction under the APA. While Presidents are not technically constrained

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<sup>64</sup> *Id.*

<sup>65</sup> *See id.* at 115 (noting that “[p]residents strive to maintain the popularity” and arguing that this results in constraints on the Executive beyond the separation of powers).

<sup>66</sup> *See* Kagan, *supra* note 26, at 2331-39 (discussing the President’s ability to consider the general public in light of his democratic election).



by the APA,<sup>67</sup> virtually every presidential initiative, policy, or decision eventually manifests itself in agency action that *is* constrained by the APA.<sup>68</sup> It is at that point that courts can play an important functional role in “translat[ing]” separation-of-powers principles and values into meaningful constraints.<sup>69</sup> Like Price’s dueling presumptions—but to an even greater degree—the arbitrariness review courts conduct under the APA supplies an attractive standard that provides courts with the flexibility they need to make inherently difficult judgments about why some inaction is problematic and some is not. Unlike Price’s approach, and, indeed, unlike any freestanding constitutional separation-of-powers claim, this contextualized arbitrariness standard is protected from the judicial capacity problem by several layers of defenses.

APA review operates with greater functionality because the complexity, uncertainty, and limited precedential value of review limit the incentives to flood the courts with cases and make presidential reprisal less likely, thus giving the courts more powers when they do intervene. This functionality point is critical and is elaborated in much greater detail in subsection III.B.2. All together, these three features give nuance and power to courts as they selectively police purposive presidential inaction.

A. *The Structure of APA Inaction Review and the Limited Domain of Heckler v. Chaney*

Before developing the argument for employing APA review, I must first address caricatures of APA review of agency inaction that suggest that *Heckler v. Chaney* bars most suits based on agency inaction. As mentioned before, several participants in the debate about presidential nonenforcement cite to *Heckler v. Chaney* in dismissing a role for courts.<sup>70</sup>

The APA provides for review of agency action “unlawfully withheld or unreasonably delayed,”<sup>71</sup> and it likewise defines agency action to include a

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<sup>67</sup> See *Dalton v. Specter*, 511 U.S. 462, 476 (1994) (holding that the President is not an agency and thus is not constrained by the APA).

<sup>68</sup> See *infra* Section III.B; see also Kagan, *supra* note 26, at 2350–51 (distinguishing *Franklin v. Massachusetts*, 505 U.S. 788 (1992), on the grounds that the statute in that instance specifically committed the responsibility to the sole discretion of the President rather than to an agency). Of course, I do not mean to suggest that the President’s policy goals will always be the same as his agents’ goals; there will undoubtedly be “slack between the President’s wishes and the behavior of his or her many agents because no front-end guidance can anticipate the precise details and circumstances of every possible violation of the law.” Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 806 (2015).

<sup>69</sup> See POSNER & VERMEULE, *supra* note 21, at 84 (citing Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165 (1993)).

<sup>70</sup> See *supra* note 53 and accompanying text.

<sup>71</sup> 5 U.S.C. § 706(1) (2012).

“failure to act.”<sup>72</sup> This general equivalence of action and inaction<sup>73</sup> is, however, limited by two provisions in the APA: section 701(a)(1) precludes judicial review where Congress specifically precludes judicial review,<sup>74</sup> and section 701(a)(2) precludes judicial review where agency action (or agency inaction) is “committed to agency discretion by law.”<sup>75</sup> As many scholars and jurists have noted, it is somewhat inconsistent that the APA precludes review of decisions “committed to agency discretion by law” but then specifically provides for judicial review of agency actions for “abuse of discretion.”<sup>76</sup> Perhaps because of this inconsistency, judges have developed an elaborate common law of presumptions<sup>77</sup>—first a presumption of reviewability that can be overridden only by clear congressional language precluding review,<sup>78</sup> and then a countervailing presumption of unreviewability in certain distinct classes of cases.<sup>79</sup>

Some accounts lump the entirety of agency inaction cases into this final doctrinal bin,<sup>80</sup> and indeed it is not inaccurate to say that it is more difficult to challenge inaction under the APA than it is to challenge action, partly because of the specter of *Heckler v. Chaney* and partly because courts sometimes avoid interference with agency priority-setting and resource allocation.<sup>81</sup> But the literature on purposive presidential inaction prematurely considers inaction review a dead letter.<sup>82</sup> The reality is more complex.

<sup>72</sup> *Id.* § 551(13).

<sup>73</sup> See Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 461 (2008) (noting that there is “confusion about the proper standard of review and the distinction between agency action and inaction”).

<sup>74</sup> 5 U.S.C. § 701(a)(1) (2012).

<sup>75</sup> *Id.* § 701(a)(2).

<sup>76</sup> *Id.* § 706(2)(A).

<sup>77</sup> See Andrias, *supra* note 8, at 1050 (discussing the “presumption of reviewability that governs agency action”). For an excellent recent treatment of this case law and a critique of the presumption of reviewability, see generally Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285 (2014).

<sup>78</sup> *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967).

<sup>79</sup> *Heckler v. Chaney*, 470 U.S. 821, 837-38 (1985).

<sup>80</sup> See Glen Staszewski, *The Federal Inaction Commission*, 59 EMORY L.J. 369, 381-82 (2009) (arguing that courts rarely act on agency inaction).

<sup>81</sup> See Biber, *supra* note 31, at 16 (discussing “an explicit concern about interfering with how the Executive Branch allocates its resources among various priorities”); see also *Star Wireless, LLC v. FCC*, 522 F.3d 469, 475 (D.C. Cir. 2008) (noting the strong presumption in inaction cases that an “agency need not address all problems at once” and “may solve first those problems it prioritizes”). Love and Garg also argue that, were courts to attempt to scale up their role, they would inevitably confront “prudential concerns” that would “likely prevent review.” Love & Garg, *supra* note 9, at 1226. These prudential concerns include the fact that it is “difficult to define a ‘case’ of inaction that is suitable for review,” that “courts face a series of line-drawing questions that make them particularly deferential to the executive on the merits,” and that “judges are likely wary of granting a remedy that amounts to telling the executive how and when to act.” *Id.* at 1227-28. As will become clear, I largely agree that these are difficult problems to surmount, as much in the APA context as in a hypothetical constitutional context. In subsection III.B.2, I nevertheless argue that the institution of review under the APA has adapted to allow courts to sidestep these problems in a way that they are not able to in any hypothetical constitutional context.

<sup>82</sup> See *supra* Sections I.A–B.

1. Avoiding *Heckler*

Technically, *Heckler* covered only one particular species of inaction claim—nonenforcement claims. In *Heckler*, a prisoner on death row had filed a petition with the U.S. Food and Drug Administration (FDA) requesting that the agency investigate whether the drugs used in lethal injection were “safe and effective,” order manufacturers to include warnings against the off-label uses of these drugs, and take a number of enforcement actions to deter off-label use.<sup>83</sup> The Supreme Court emphasized the unique challenge for courts in monitoring decisions of whether to enforce the law in particular cases.<sup>84</sup>

But these kinds of considerations do not weigh as heavily in other types of inaction claims, including informal agency spending decisions, denials of petitions for rulemaking or enforcement, incomplete rulemakings, agency refusals to adjudicate in the face of congressional command, and refusals to issue rules in response to congressional command.<sup>85</sup> When it comes to cases alleging inaction in the issuance of rules, for instance, courts arguably would have an easier time conducting review, as the determination would then hinge more on compliance with a statute rather than on fact-based considerations about resource allocation.<sup>86</sup> In fact, courts have been more willing to find agency inaction reviewable for arbitrariness when plaintiffs are able to frame the inaction not as ad hoc, discretionary nonenforcement, but as falling into one of these other categories instead.<sup>87</sup> Courts have routinely exercised review over inaction claims outside the context of discretionary enforcement inaction.<sup>88</sup> To be sure, where courts review a failure to promulgate a rule or adjudicate a class of cases, they typically apply a “highly deferential” species of arbitrariness review.<sup>89</sup> It is review nonetheless, and agencies must still provide reasons sounding in the statute in order to support their choice.<sup>90</sup>

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<sup>83</sup> See RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 1606 (5th ed. 2010).

<sup>84</sup> *Id.* at 1607.

<sup>85</sup> See Biber, *supra* note 31, at 28-32 (reviewing the different types of agency actions and the level of deference afforded).

<sup>86</sup> See *id.* at 49-50 (explaining that “statutory supremacy concerns would trump concerns about resource allocation” in judicial review for agency inaction).

<sup>87</sup> See *id.* at 51 (showing that agency actions governed by “detailed statutory requirements” or a “clear duty” receive lower levels of deference than informal decisions).

<sup>88</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 534-35 (2007) (holding that the EPA acted arbitrarily in refusing to act on a rulemaking petition to regulate greenhouse gases); *Brown v. Sec’y of Health & Human Servs.*, 46 F.3d 102, 110 (1st Cir. 1995) (indicating that the refusal to amend an agency rule is reviewable under the arbitrary and capricious standard); *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987) (reviewing the Department of Agriculture’s refusal to initiate rulemaking procedures).

<sup>89</sup> See *Massachusetts v. EPA*, 549 U.S. at 528 (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989)).

<sup>90</sup> See *id.* at 532 (“The alternative basis for EPA’s decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text.”).

Plaintiffs can therefore greatly increase their chances of review by characterizing prospective nonenforcement decisions as affirmative rules or policies, which is often quite easy to do.<sup>91</sup> At some point, patterns of nonenforcement start to resemble rules, particularly when a memorandum, guidance document, or policy statement guides the exercise of nonenforcement discretion and qualifies as final agency action.<sup>92</sup> Therefore, courts can avoid *Heckler's* domain and subject the decision to arbitrariness review, as well as any other kind of review generally available under the APA, including procedural review.

In sum, *Heckler* is a limited precedent. As Professor Biber showed in the most exhaustive effort to date on review of agency inaction, *Heckler v. Chaney* is not “the basis for an exception to judicial review that might swallow all of judicial review of agency decisions not to act. Instead, it is simply the result of the principled application of judicial deference to resource allocation in a relatively limited subset of cases of agency decisionmaking”<sup>93</sup>—i.e., particularized enforcement decisions in a context of statutory silence.

## 2. Overcoming *Heckler*

Even when it comes to cases that clearly fall into the “discretionary nonenforcement decision” category, review is not entirely unavailable. *Heckler* did not announce a hard-line rule, but in fact outlined several situations where the presumption of unreviewability can be rebutted. First, as mentioned before, if a mandate in a statute is couched in nondiscretionary terms, and is paired with “law to apply”<sup>94</sup> that can guide the courts in review, courts will still be able to review nonenforcement decisions.<sup>95</sup> Thus, “when push comes to shove and there is a direct conflict between statutory language (such as a deadline) and an agency claim that its resource allocation priorities are different, courts have consistently chosen clear statutory language over the

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<sup>91</sup> See, e.g., *Texas v. United States*, 787 F.3d 733, 758 (5th Cir. 2015) (holding that under DAPA, an individual is affirmatively given a “change in designation that confers eligibility for federal and state benefits on a class of aliens who would not otherwise qualify,” thus “provid[ing] a focus for judicial review, inasmuch as the agency must have exercised its power in some manner” (internal quotation marks omitted) (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985))).

<sup>92</sup> See *Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013) (acknowledging a real dispute about whether the FDA had made “affirmative acts of approval rather than refusals to take enforcement action,” but deciding the case on other grounds); see also *Texas v. United States*, 787 F.3d at 757-58 (holding that a memorandum on immigration was an affirmative action rather than agency inaction).

<sup>93</sup> Biber, *supra* note 31, at 38; see also Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 160-61 (2014) (emphasizing the primacy of resource allocation concerns in setting the stringency of review of agency inaction under the APA).

<sup>94</sup> See *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 412-13 (1971) (holding that the existence of a statute necessarily implies a “law to apply” and therefore limits agency discretion).

<sup>95</sup> See *PIERCE*, *supra* note 83, at 1607.

agency claims of resource allocation discretion.”<sup>96</sup> For example, in *Dunlop v. Bachowski*, the Supreme Court sanctioned review of the Department of Labor’s refusal to bring a civil action against a union under the Labor–Management Reporting and Disclosure Act.<sup>97</sup> The *Heckler* Court cited *Bachowski* for the proposition that courts could, and should, review even nonenforcement cases when it is clear that Congress intended to constrain agency discretion by using language such as “shall” or “must.”<sup>98</sup>

More importantly, *Heckler v. Chaney* also created an agency nonenforcement discretion limitation that scholars have now begun to call an “anti-abdication principle.”<sup>99</sup> According to the Court in *Heckler*, the facts of that case simply did not involve a situation where the agency “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>100</sup> In cases where the agency has completely disregarded a statutory program through the announcement of enforcement guidelines<sup>101</sup> or

<sup>96</sup> Biber, *supra* note 31, at 38; *see also id.* at 17 (“A cursory examination of lower court case law under § 706(1) makes clear that the analysis of whether an agency must act under § 706(1) often turns on whether the courts have concluded that the case involves important resource allocation issues.”); Sunstein & Vermeule, *supra* note 93, at 162 (discussing the same basic trend in the case law and dubbing it the “anti-circumvention principle”).

<sup>97</sup> *See Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (“In the absence of an express prohibition in the [statute], the Secretary, therefore, bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision.”).

<sup>98</sup> *See Heckler v. Chaney*, 470 U.S. 821, 833–34 (1985) (discussing how in *Dunlop*, the statutory language, including the use of “shall,” removed prosecutorial discretion). For applications of this principle, *see, for example, Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015), which reasons that language in statutes that is “mandatory, not precatory” increases the reviewability of enforcement of that regime. *See also Friends of the Cowlitz v. Fed. Energy Regulatory Comm’n*, 253 F.3d 1161, 1167 (9th Cir. 2001) (noting that a “decision not to enforce may be reviewable if Congress has provided clear legislative direction limiting an agency’s enforcement discretion, and the agency nonetheless engages in a pattern of nonenforcement”), *amended by* 282 F.3d 609 (9th Cir. 2002); *Nat’l Wildlife Fed’n v. U.S. EPA*, 980 F.2d 765, 773–74 (D.C. Cir. 1992) (holding that *Heckler*’s presumption of unreviewability was rebutted where there was “law to apply” that established Congress’s intent to “circumscribe agency enforcement discretion”); *Sierra Club v. Hodel*, 848 F.2d 1068, 1075 (10th Cir. 1988) (holding that the Department of the Interior’s (DOI) decision to allow construction of a road in a wilderness area—despite statutory language providing that the Department “manage [Wilderness Study Areas] ‘in a manner so as not to impair the suitability of such areas for preservation as wilderness’” and requiring the DOI to designate roadless areas in such wilderness areas—was reviewable because the statute was couched as a command and provided judicially manageable standards to permit review (quoting 43 U.S.C. § 1782(c) (2012))), *overruled on other grounds by Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970 (10th Cir. 1992).

<sup>99</sup> *See Sunstein & Vermeule, supra* note 93, at 162–63 (referring to the idea that “agencies may not invoke their ability to allocate limited resources in such a way as to abdicate their statutory responsibilities” as the “anti-abdication principle”).

<sup>100</sup> 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)).

<sup>101</sup> *See Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 169 (2d Cir. 2004) (holding that the NRC’s final decision was not reviewable even though it had failed to take action on a “discrete, perceived problem within its area of statutory responsibility”); *Crowley Caribbean Transp., Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994) (declining to review an agency’s “context-bound non-enforcement

through a pattern or practice of nonenforcement,<sup>102</sup> review will potentially be available despite the potential interference with agency resource allocation. To be sure, judicial application of the “anti-abdication principle” is usually used only in extreme cases, precisely because of these problems of judicial administration.<sup>103</sup> But the principle is a limit on *Heckler*’s domain nonetheless.

The point of reviewing these exceptions and the limits of *Heckler* in subsection III.A.1 is to underscore that dismissive treatments of APA inaction review overstate *Heckler*’s domain and unjustifiably throw up the white flag with respect to judicial constraints on purposive presidential inaction. *Heckler* is not some talismanic citation that forever forecloses review of inaction of any kind.<sup>104</sup> As this discussion shows, courts find ways to review agency inaction, and those ways may provide an avenue for courts to translate constitutional values through the APA. The much more important question is whether courts’ involvement in this posture is likely to be effective and, more precisely, whether such involvement would address the problems that doom constitutional review.

#### B. *The Functionality of APA Inaction Review*

Having cleared a major doctrinal hurdle, and having seen that review is at times available (and precisely when the unilateral deviation from intended enforcement is most extreme and most prospective), we can begin to see that APA review of agency inaction has several features that make it useful in checking excessive or unwarranted instances of purposive presidential inaction. Some of these features are inherent in the administrative process—overall, administrative litigation promotes certain values, such as transparency and dialogue, which tend to raise the costs of purposive presidential inaction. That is to say, such litigation is one way to promote the very values that Andrias, Love, Garg, and others hope

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pronouncement” but noting that review would be available where a “document announcing a particular non-enforcement decision would actually lay out a general policy delineating the boundary between enforcement and non-enforcement and purport to speak to a broad class of parties”).

<sup>102</sup> See *Riverkeeper*, 359 F.3d at 170-71 (finding that the court did not have jurisdiction to review the Nuclear Regulatory Commission’s decision not to enforce certain Atomic Energy Act provisions); *NAACP v. Sec’y of Hous. & Urban Dev.*, 817 F.2d 149, 157-58 (1st Cir. 1987) (granting review where plaintiffs claimed that HUD’s pattern of not administering programs failed to further the goals of the Fair Housing Act); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (en banc) (finding review appropriate when the agency failed to take sufficient action to end segregation in public schools).

<sup>103</sup> See Sunstein & Vermeule, *supra* note 93, at 162 (“Because of the difficulties in administering the principle, it will usually amount to a judicially underenforced constraint, but it remains an important backstop that judges may invoke in extreme cases.”).

<sup>104</sup> See Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 740-57 (1990) (discussing how courts have in fact developed a common law of unreviewability that belies any simple characterization of review as generally available or unavailable).

to instill in the process through other means. Other features are only apparent when put in contrast with constitutional review.

### 1. Inherent Virtues

When a President's decision not to enforce the law leads an administrative agency to make a concrete decision not to enforce the law in a particular case or class of cases, the possibility of judicial review under the APA forces the agency to explain its reasoning. This reason-giving norm is so embedded in agency culture that the threat of litigation hardly has to be realistic to have some effect. Agencies are likely to volunteer reasons for their actions. By itself, this reason-giving culture can enhance the legitimacy of policymaking by encouraging deliberation that may not naturally occur in cases of presidential inaction,<sup>105</sup> which is generally less visible to the public.<sup>106</sup> Agencies can also in effect tie themselves to the mast: indeed, they can bind themselves to reviewability by issuing rules or engaging in a "settled course of adjudication" that essentially promises certain levels of nonenforcement in certain domains of conduct.<sup>107</sup> Any reason that agencies (and in turn, the President) offer for nonenforcement would have to address any prior commitments or previous policies. This constraint may help address the asymmetry between the institutional checks on a proregulatory President versus the checks on a deregulatory President. In effect, a President who comes to office hoping to deregulate would face more difficulty to the extent agencies bind themselves with rules or guidance documents that effectively promise certain levels or kinds of enforcement. This built-up structure of discretion-reducing rules works only to the extent that courts are willing to hold agencies to their own rules and policies, and, in fact, courts do step in frequently in these kinds of cases.<sup>108</sup>

Moreover, it is critical to note that agencies are capable of sending signals through their reason-giving in ways that expose purely political maneuvers

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<sup>105</sup> See Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1426 (2013) ("The deliberative promise of the administrative state stems from the fact that agency decisionmaking can be inclusive, knowledgeable, reasoned, and transformative.").

<sup>106</sup> See Andrias, *supra* note 8, at 1093 (discussing the lack of transparency in presidential enforcement).

<sup>107</sup> See, e.g., *INS v. Yang*, 519 U.S. 26, 32 (1996) ("Though the agency's discretion is unfettered at the outset, if it announces and follows—by rule or by settled course of adjudication—a general policy by which its exercise of discretion will be governed, an irrational departure from that policy (as opposed to an avowed alteration of it) could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion' within the meaning of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." (alteration in original)).

<sup>108</sup> See, e.g., *Smriko v. Ashcroft*, 387 F.3d 279, 291, 297 (3d Cir. 2004) (reviewing and vacating action by the Board of Immigration Appeals (BIA) where a single BIA member "clearly failed to follow . . . regulations").

by a President.<sup>109</sup> Because courts may tolerate thin reasoning but will balk at purely political reasoning under existing administrative law doctrine,<sup>110</sup> an agency that feels it is being strong-armed to abandon its mission can itself sound the alarm for courts by embedding record evidence that political considerations were determinative or by failing to build an adequate record to support the (in)action under arbitrariness review. In effect, agencies' ability to signal to courts the cases most worthy of consideration for inaction review makes agencies an important intermediary actor and a check on purposive presidential inaction. The administration may be able to dictate nonenforcement from on high, but its imperfect ability to control agencies in their reason-giving activities, caused by all the standard principal-agent challenges, will make it more difficult for a President to push through the most extreme abdications of statutory programs. Of course, these functional checks embedded in the administrative process work only if courts feel free to review inaction claims—but as we have seen, they will often avoid or overcome *Heckler*.<sup>111</sup>

Another indirect inherent virtue of the possibility of judicial review under the APA is that it creates incentives for Congress to assume responsibility for specifying the level of enforcement it desires. Under existing case law, it is clear that mandatory language in statutes will ordinarily carry the day in court even when resource allocation concerns are an issue.<sup>112</sup> Although Congress may not be entirely aware of how clear this line of cases is,<sup>113</sup> and even though

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<sup>109</sup> See generally Daniel E. Walters, *Litigation-Fostered Bureaucratic Autonomy: Administrative Law Against Political Control*, 28 J.L. & POL. 129 (2013) (arguing that career staff in agencies may strategically disclose weaknesses in the positions that are imposed on them by political officials, thereby enabling outside litigants to challenge agency action more effectively); cf. Matthew C. Stephenson, *A Costly Signaling Theory of "Hard Look" Judicial Review*, 58 ADMIN. L. REV. 753, 755 (2006) (arguing that the depth of the explanation offered by the agency in litigation is a signal that informs the court how important the policy is to the agency).

<sup>110</sup> See Watts, *supra* note 24, at 6-7 (discussing the ongoing debate in administrative law about whether courts should consider naked political reasons to be sufficient to support agency action).

<sup>111</sup> See *supra* Section III.A. The effectiveness of these checks also depends on an important and somewhat unsettled question about whether review of inaction claims for arbitrariness (when it is available) extends only to the stated reasons provided by the agency for declining to act, or whether it also allows courts to examine the factual predicates underlying the inaction and determine for themselves whether the agency is shirking its duties. If APA inaction review extends only to the reasons agencies give, courts would have difficulty reading the subtext, and would therefore be less effective in targeting cases.

<sup>112</sup> See Sunstein & Vermeule, *supra* note 93, at 195 (“[A]gencies must obey a more general anti-circumvention principle. Although it is neither necessary nor sufficient, the word ‘shall’ is a good indicator that agencies are constrained in their ability to defer decisions, certainly for lengthy periods of time. In other cases, the statutory scheme will best be read to contain an implicit, but necessary and unavoidable, command that agencies must make a determination one way or another . . .”).

<sup>113</sup> See, e.g., ROBERT A. KATZMANN, *JUDGING STATUTES* 97 (2014) (discussing a survey of legislators which concluded that members of the legislature were unaware of judicial opinions concerning technical aspects of statutes, but were aware of “decisions on broad, policy-oriented



Congress may ultimately still prefer to avoid mandatory language for political reasons, the nearly guaranteed judicial review when Congress uses mandatory language, such as “shall enforce” and the like, provides incentives for Congress to be specific in legislation.<sup>114</sup> In the end, it seems that APA inaction review could very well augment the political process controls that scholars such as Andrias, Love, and Garg advocate for, using newer, untested institutions and processes.<sup>115</sup> Thus, even if political process controls are the best way to constrain purposive presidential inaction, there is still a good case to be made that courts can reinforce these controls through the use of the APA.

Finally, because courts invalidating agency action or inaction will often simply remand to the agency for further consideration,<sup>116</sup> challenges based on procedural violations or the arbitrary and capricious standard will often be less intrusive to the executive branch than an invalidation of the same behavior under a constitutional rule or standard. Agencies whose actions or inactions are remanded can often return to the drawing board and re-emerge having made the same substantive policy choices, albeit under different justifications, evidence, and reasoning. This is not the case with constitutional review, which casts much more of a pallor over an entire policy area when the courts vacate the agency’s action.

The arbitrariness approach to the problem of nonenforcement of the law is powerful because it is a flexible standard that gives courts, agencies, Congress, and even the President the ability to work out context-specific solutions to what is, at root, a thorny problem of public administration.

## 2. Comparative Virtues

My claim is not merely that review under the APA is preferable on its own substantive merits to any other proposal currently on the table under the Take Care Clause, but also that APA review has the built-in features necessary

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issues of statutory interpretation”); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 940-41 (2013) (conducting a survey of congressional staffers and finding a variance in awareness and understanding of the different canons of statutory interpretation employed by courts).

<sup>114</sup> See *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975) (finding that when there is no express statutory prohibition of judicial review, there is a strong presumption that Congress did not intend to prohibit judicial review of an agency action).

<sup>115</sup> See *supra* Section I.B.

<sup>116</sup> See, e.g., Kristina Daugirdas, *Evaluating Remand Without Vacatur: A New Judicial Remedy for Defective Agency Rulemakings*, 80 N.Y.U. L. REV. 278, 297 (2005) (surveying and assessing the D.C. Circuit’s application of the remand without vacatur remedy); Ronald M. Levin, “Vacation” at Sea: *Judicial Remedies and Equitable Discretion in Administrative Law*, 53 DUKE L.J. 291, 298-99 (2003) (discussing why many courts have elected to remand unlawful agency rules for further consideration without vacating that rule in the interim).

to make such a flexible standard possible in the face of the judicial capacity problem. That is, it is the only *realistic* approach to the constitutional problem here. When compared with a freestanding constitutional cause of action,<sup>117</sup> a cause of action brought under the APA gives reviewing courts several important “outs” that help preserve both institutional capacity and capital. With respect to institutional capacity, my argument centers on the existence of jurisdictional and doctrinal safety valves that enable courts to quickly and easily filter out cases that do not raise substantial claims. With respect to institutional capital, my argument relies on the legitimizing effects of reliance on these “passive virtues” in a delicate separation-of-powers arena.<sup>118</sup>

a. *Jurisdictional Safety Valves*

If courts are going to impose any potent constraints on purposive executive inaction, they need to have plenty of safety valves, and the framework for litigation under the APA provides them in bulk. For instance,

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<sup>117</sup> In many cases, the APA would be the vehicle for any constitutional claim because the APA provides a general cause of action for review of federal questions arising from agency action or inaction. 5 U.S.C. § 702 (2012). Yet that is not always the case, especially in the context of the separation of powers. In a number of separation-of-powers cases, the cause of action for the constitutional claim did not come from the APA, but rather was derived from a right to relief based in the equitable power of courts to remedy violations of the “structural Constitution.” See, e.g., Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 495-96 (2014) (“The Court has suggested (if not held) that regulated parties have ‘implied private right[s] of action directly under the Constitution . . . under the Appointments Clause or separation-of-powers principles’ . . . .”); Aziz Z. Huq, *Standing for the Structural Constitution*, 99 VA. L. REV. 1435, 1443-45 (2013) (highlighting cases where individual litigants brought equitable separation-of-powers claims on the grounds that legislation violated the constitutional structure). For instance, in the recent Public Company Accounting Oversight Board (PCAOB) case, the Supreme Court, in a footnote, dismissed the government’s contention that there was no “implied private right of action directly under the Constitution to challenge governmental action under the Appointments Clause or separation-of-powers principles.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 491 n.2 (2010). In the recess appointments case, *Noel Canning v. NLRB*, the D.C. Circuit found it had jurisdiction over an action to vindicate the structural constitution where any statutory review was waived, and the Supreme Court tacitly endorsed that approach. 705 F.3d 490, 497 (D.C. Cir. 2013), *aff’d*, 134 S. Ct. 2550 (2014). The court relied on the fact that the questions at issue “go to the very power of the Board to act and implicate fundamental separation of powers concerns.” *Id.* Finally, some rare cases may also be pled as *Bivens* actions for damages stemming from constitutional violations, *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), and those cases would likewise not entail these additional jurisdictional limitations. All of this is to say that any constitutional standard against nonenforcement could, in theory, be brought as a freestanding constitutional cause of action rather than tagged onto an APA claim. It follows that none of the specific benefits identified below would attach to such cases.

<sup>118</sup> See Sharon B. Jacobs, *The Administrative State’s Passive Virtues*, 66 ADMIN. L. REV. 565, 567 (2014) (describing “passive virtues” as tools used by courts to dispose of cases before reaching and deciding on the merits). Of course, Professor Jacobs borrows the term “passive virtues” from Alexander Bickel. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 111 (1986).

a potential litigant needs to not only make a prima facie case that judicial review is not precluded under section 701(a)(1) or section 701(a)(2) of the APA,<sup>119</sup> but also must show that the action (or inaction) represents a “final” agency action.<sup>120</sup> Because this determination often turns on how a court characterizes the stability of any nonenforcement decision, it is in practice easy for courts to decide that an agency action is sufficiently provisional to avoid jurisdiction. As a practical matter, it is far more difficult to establish that an inaction is final than that an action is final, as agencies can simply argue that they are saying “not now” rather than “not ever.”<sup>121</sup> Thus, the requirement of final agency action is an extremely useful filter, notwithstanding the fact that the APA formally equates agency action and inaction.<sup>122</sup> Another important safety valve that applies in the administrative law context is prudential standing.<sup>123</sup> Establishing that a general member of the public suffering from some nonenforcement of the law against a third party is within the “zone of interests” intended to be protected by the statute is a substantial burden because “increasing the regulatory burden on others” is not sufficient.<sup>124</sup> Courts can easily avoid reviewing most cases by using any of these safety valves, which preserves their institutional capacity to handle the most important inaction cases, not to mention all of the other matters that federal courts must attend to.

In an area where there are very legitimate concerns about judicial review for the strain it can impose on agencies as they make important resource allocation decisions, a kind of judicial review that allows courts to pick and choose their battles is really the only kind of judicial review that could work. Structural constitutional litigation, in contrast, does not require anything like a “final” agency action and relaxes the requirement that plaintiffs need to be the intended beneficiaries of a statutory program. Provided a plaintiff could

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<sup>119</sup> See *supra* Section III.A.

<sup>120</sup> See, e.g., *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 238-41 (1980) (elaborating on a flexible, “pragmatic” approach to determining whether agency action is final); *Belle Co. v. U.S. Army Corps of Eng’rs*, 761 F.3d 383, 389-90 (5th Cir. 2014) (finding that finality of agency action requires the “consummation of the agency’s decisionmaking process” and the action to be one with “legal consequences”), *vacated*, 136 S. Ct. 2427 (2016) (mem.). The suit must also satisfy the closely related issue of whether the controversy is “ripe” for judgment. See *Sierra Club v. Yeutter*, 911 F.2d 1405, 1417-19 (10th Cir. 1990) (using the two-pronged test—fitness for judicial resolution and hardship to parties—to determine if an issue was ripe for adjudication).

<sup>121</sup> See generally Sunstein & Vermeule, *supra* note 93 (discussing the legality of agency deferrals and the potential consequences).

<sup>122</sup> See *supra* notes 71–73 and accompanying text.

<sup>123</sup> See *Clarke v. Sec. Indus. Ass’n*, 479 U.S. 388, 395-96 (1987) (requiring that, for the plaintiff to have standing, the “interest sought to be protected by the complainant” fall “within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question” (internal quotation marks omitted) (quoting *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970))).

<sup>124</sup> *Delta Constr. Co. v. EPA*, 783 F.3d 1291, 1300 (D.C. Cir. 2015).

establish constitutional standing and could clear relatively low federal question jurisdiction hurdles, federal courts would inevitably be drawn into the merits in cases alleging even the most insignificant nonenforcement decisions. Courts would have difficulty maintaining any kind of stringency of review with so few defenses at their disposal.<sup>125</sup>

b. *Doctrinal Safety Valves*

In addition to the jurisdictional safety valves, the doctrine of APA review of agency inaction itself contains built-in mechanisms that allow courts to selectively apply more or less stringent arbitrariness review, depending on how the factual context is characterized.

i. *The Artificial Action/Inaction Distinction*

Although Section III.A took issue with those who dismiss the potency of APA inaction review, there is clearly an important difference in the stringency of review between cases involving inaction and cases involving action. Despite the fact that this distinction is somewhat metaphysical and in fact runs up against the language of the APA,<sup>126</sup> the diverging treatments of these two doctrinal categories afford courts a useful tool. How a case is framed can make all of the difference. If courts want to increase the stringency of review, they may be able to characterize the inaction at issue as stemming from a conscious policy choice that functions more as an action than as an instance of inaction.

To some extent, Professor Price's dueling presumptions<sup>127</sup> can do the same work as the inaction doctrine under the APA: a court can pivot between characterizing an instance of inaction as a "prospective" decision that looks more like a policy or rule of general application and characterizing it as a one-off enforcement decision based on contextual factors such as resource constraints or equity. It can thereby selectively apply more stringent review when warranted and less stringent review when appropriate. The problem with Price's approach is that his category of "prospective" decisions is still too large. Too many cases could plausibly fit into his presumption against the constitutionality of prospective decisions. In contrast, the distinction between action and inaction in the APA context is conceptualized more as a continuum, giving the courts even more flexibility. Price's approach is not so much wrong as it is too rigid.

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<sup>125</sup> Perhaps courts would develop a *Heckler*-esque framework in the constitutional setting. Setting aside the fact that courts would have no clear authority to develop an elaborate constitutional common law of reviewability, it still would beg the question of why the courts would want to reverse engineer constitutional review to get what they already have under the APA.

<sup>126</sup> See *supra* Section III.A.

<sup>127</sup> See *supra* note 41 and accompanying text.

## ii. The Flexibility of Arbitrariness Review

Perhaps the best arrow in the judiciary's quiver is the sliding scale of deference, which oscillates between extreme deference and "hard look" review depending on the circumstances. Once procedural hurdles are cleared and cases of inaction become reviewable, the substantive standards governing review provide for flexibility in the stringency of review based on the importance of resource allocation in that class of decisions.<sup>128</sup> Legal doctrine under the APA indicates that one-off enforcement decisions (the kind that are a dime a dozen in the administrative state) are presumptively unreviewable because they implicate delicate resource allocation decisions, but as the agency inaction at issue becomes more generally applicable (and therefore more important), the deference afforded in practice declines to reflect the relatively lower burden on resource allocation that would likely be imposed.<sup>129</sup>

Of course, variation in the stringency of arbitrariness review is not necessarily unique to the inaction context. Empirical scholarship shows that arbitrariness review is at least partly driven by extralegal factors, such as the partisanship of the judge.<sup>130</sup> But the relative importance of resource allocation in the context of agency inaction introduces another variable that, in practice, allows courts to exercise exceedingly lenient review in the vast majority of cases, but to ramp up that review in precisely those cases where the gravest constitutional concerns are at play (i.e., prospective nonenforcement decisions). Indeed, the case law is consistent with courts stepping in and heightening the stringency of review in the most important cases.<sup>131</sup> The Supreme Court rarely entertains inaction cases (even those where the lower court exercised review), and when it does enter the fray, as in *Massachusetts v. EPA* or in *Mach Mining v. EEOC*, it typically sides against agencies' claims of categorical deference.<sup>132</sup>

Professor Vermeule argues that jurisprudential structures called "grey holes"<sup>133</sup> are pervasive in administrative law. Grey holes are doctrines that

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<sup>128</sup> See Biber, *supra* note 31, at 51 tbl.1 (illustrating the sliding scale of judicial deference given to different types of agency action depending on the agency's resource allocation).

<sup>129</sup> See *Massachusetts v. EPA*, 549 U.S. 497, 527, 534 (2007) (acknowledging that an agency has broad discretion in allocating resources, but concluding that in certain situations the courts can still find certain agency inaction arbitrary and capricious).

<sup>130</sup> See Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 767-68 (2008) (discussing the results of a statistical analysis of voting patterns in arbitrariness cases and finding pervasive partisan effects).

<sup>131</sup> See *infra* Part IV.

<sup>132</sup> See *infra* Part IV.

<sup>133</sup> See Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1096 (2009) ("Grey holes . . . arise when 'there are some legal constraints on executive action . . . but the constraints are so insubstantial that they pretty well permit government to do as it pleases.'") (quoting

appear to provide legal standards for the judicial resolution of cases, but in practice break down in important cases.<sup>134</sup> Typically, these grey holes augment the power of the President in emergency contexts in which the courts lack the capacity to engage the President.<sup>135</sup> Here we have what might be called a “reverse grey hole”—one that diminishes the authority of the sovereign (the President) in the “exceptional” case. The presumption of unreviewability sets the default rule,<sup>136</sup> but the increasingly stringent review as cases become more prospective, more important, and less likely to seriously interfere with delicate resource allocation decisions allows courts to involve themselves in the merits of the most important inaction cases<sup>137</sup>—precisely the ones that, because of their salience and policy importance, are most likely to raise constitutional concerns about the separation of powers. Indeed, in the wake of *Massachusetts v. EPA*, some commentators noted the fact that the Court simultaneously claimed to apply a highly deferential standard of review but actually conducted an extraordinarily probing form of review.<sup>138</sup> These commentators typically dismissed the importance of the case, chalking the result up to the policy salience of the case.<sup>139</sup> But that is precisely why we should not dismiss cases like *Massachusetts v. EPA*: it is the fact that such stringent review is exceptional that gives the courts the power to influence the balance of powers.

#### IV. DEMONSTRATING THE POWER OF THE APA APPROACH

So far, I have shown that, despite considerable anxiety about what policy-oriented presidential inaction means for the separation of powers and the rule of law, scholars have looked away from the courts for a remedy. This reluctance

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DAVID DYZENHAUS, *THE CONSTITUTION OF LAW: LEGALITY IN A TIME OF EMERGENCY* 42 (2006)).

<sup>134</sup> See *id.* (“Grey holes thus present ‘the facade or form of the rule of law rather than any substantive protections.’” (quoting DYZENHAUS, *supra* note 133, at 3)).

<sup>135</sup> See *id.* at 1118 (“[Q]uite ordinary administrative law doctrines, such as ‘arbitrary and capricious’ review of agency policy choices and factual findings, function as grey holes during times of war and real or perceived emergency.”); see also POSNER & VERMEULE, *supra* note 21, at 96-101 (giving an overview of the effect of “grey holes” on judicial review).

<sup>136</sup> See Biber, *supra* note 31, at 10 (noting the *Heckler* decision’s role in creating a potential exception to the presumption of reviewability for agency inaction).

<sup>137</sup> See *id.* at 52 (establishing the premise that agency inaction is reviewable and judicial scrutiny adjusts with agency resource allocation).

<sup>138</sup> See, e.g., Kathryn A. Watts & Amy J. Wildermuth, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 NW. U. L. REV. 1029, 1040-42 (2008) (detailing the Supreme Court’s rigorous review in *Massachusetts v. EPA* of the EPA’s policy reasons for not regulating greenhouse gases and noting the dissonance with precedent of a more deferential review).

<sup>139</sup> See generally Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51 (arguing that the decision in *Massachusetts v. EPA* is illustrative of a broader theme of politicization of administrative expertise and the Court’s attempt to monitor that trend).

to assign the judiciary a role stems, I argue, from a generally correct intuition that the courts are institutionally ill-equipped to serve as a meaningful check on the President because of the nature and characteristics of the judicial branch.<sup>140</sup> But I have just shown in the preceding Part that the administrative law of agency inaction has features that make it an exception to this basic rule. As such, judicial review under the APA can and does provide the meaningful assurance against presidential overreach that has so far been missing from the largely theoretical debates on the issue. In sum, I self-consciously make a sort of Goldilocks argument: APA inaction review is well positioned to address purposive presidential inaction because its jurisdictional and doctrinal safety valves allow courts to avoid becoming too involved in most cases of individual inaction, freeing up the courts to implement a flexible style of review in precisely those cases that involve the greatest overreach or abdication by the executive branch—i.e., where inaction is being used in a sweeping or formalized manner to achieve larger policy aims that depart from statutory requirements. In other words, the “ideal” judicial enforcement is presumptively lax but at times capable of showing teeth. APA review provides that “just right” amount of oversight.

In order to show how APA review is “just right,” it is perhaps helpful to examine a few illustrative cases where the courts have asserted themselves in measured ways. The cases I discuss in this Part show courts not only wading deep into potential interbranch conflicts over presidential inaction, but also triggering a relatively muted response and little contest from the White House. One could attempt to explain away these cases by asserting that Presidents Bush and Obama did not really care about the outcomes in these cases, but that explanation would directly conflict with the evidence. These cases touch upon what were—and still are—hot-button, salient policy questions. By all indications, the President simply appears to have been constrained in each case. One could likewise attempt to explain away these cases by essentially arguing that they are somewhat exceptional. Indeed, they are. That is precisely what gave the cases their power.

#### A. *Massachusetts v. EPA*

One of the most dramatic instances of judicial involvement in purposive presidential inaction came in a challenge to the EPA’s refusal to regulate motor vehicle emissions of carbon dioxide as an air pollutant under the Clean Air Act. In 2007, the Supreme Court held that the EPA’s rejection of a

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<sup>140</sup> See POSNER & VERMEULE, *supra* note 21, at 52-53 (looking at features of the courts, like having to wait for a case or controversy, that make it hard for them to regulate the President); see also Coan, *supra* note 54 (taking an intense look at how structural organization creates constraints on the development of substantive doctrine).

petition for rulemaking asking the agency to promulgate an emissions rule was arbitrary and contrary to law.<sup>141</sup> In doing so, the Court rejected the EPA's (and presumably the Bush Administration's) more pragmatic reasons for not granting the petition.<sup>142</sup> Instead, it insisted that if the agency were to decline to act, "its reasons for action or inaction must conform to the authorizing statute."<sup>143</sup> That is to say, the EPA would have to make a scientific judgment about whether carbon dioxide emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."<sup>144</sup>

The decision received a great deal of attention in the media, primarily for its implications for the policy debates over the United States' response to the threat of global climate change, and it has paved the way for an extensive effort by the EPA—with the active support of President Obama—to address climate change under the Clean Air Act. What is surprising, though, is (1) how infrequently the media and political response to the decision has been framed as a possible judicial affront to presidential responsibilities, and (2) how muted President Bush's response was to an apparent limitation on his authority.

On the first point, the Supreme Court seemed to anticipate that many would criticize the Court for overstepping its institutional role, stating, "To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design."<sup>145</sup> Either that simple nod to Congress was entirely convincing or there simply was no real concern among relevant political actors or the media about the obvious separation-of-powers concerns at issue in the case, because there were few complaints couched in those terms. The opinion was a major policy loss for the President. Early in his presidency, George W. Bush had built a significant amount of his policy agenda around appeasing energy and automobile industries and assuring them that he was in no rush to address climate change. One would think, then, that the President, not being constrained by the threat of judicial review, would resist the Supreme Court's directions in *Massachusetts v. EPA*. But that is not at all what happened. Almost immediately, Bush issued Executive Order 13,432 calling on agencies to cooperate to regulate greenhouse gas emissions from mobile sources,<sup>146</sup> and then began preparing formal judgments that not only provided a reasoned decision based on statutory

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<sup>141</sup> *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

<sup>142</sup> The EPA had argued that it was declining to act because other agencies were already effectively tackling the risks of carbon emissions, because an agency rule could interfere with the President's ability to negotiate climate agreements with other nations, and because an approach targeting motor vehicle emissions would produce a "piecemeal approach to addressing the climate change issue." *Massachusetts v. EPA*, 549 U.S. at 551 (Scalia, J., dissenting).

<sup>143</sup> *Id.* at 533 (majority opinion).

<sup>144</sup> 42 U.S.C. § 7521(a)(1) (2012).

<sup>145</sup> *Massachusetts v. EPA*, 549 U.S. at 533.

<sup>146</sup> Exec. Order No. 13,432, 72 Fed. Reg. 27717 (May 16, 2007).



language (all that the Court's decision required), but also came to the conclusion that greenhouse gas emissions endangered public welfare.<sup>147</sup> Although much of the real progress on climate change came after the Obama Administration took over in 2009, there is no other way to read the evidence than to suggest that the Bush Administration basically, and almost immediately, accepted defeat at the hands of the Supreme Court.

### B. *Mach Mining v. EEOC*

In a recent case involving the U.S. Equal Employment Opportunity Commission (EEOC) and its duty to attempt conciliation before suing employers, the Supreme Court again rebuked a presidential administration for its approach to enforcement of statutory programs.<sup>148</sup> At issue in the case was the EEOC's alleged refusal to negotiate in good faith with an employer before formally bringing an employment discrimination suit. Under Title VII of the Civil Rights Act, the EEOC must attempt to resolve complaints through conciliation before proceeding to sue,<sup>149</sup> which requires the agency to follow an elaborate program of steps.<sup>150</sup> However, in recent years, the Obama Administration had come under some fire for allegedly coordinating an informal policy not to attempt conciliation.<sup>151</sup> In *Mach Mining*, the EEOC attempted to defend its decisions not to enforce the conciliation framework by arguing that the

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<sup>147</sup> See Darren Samuelsohn & Robin Bravender, *EPA Releases Bush-Era Endangerment Document*, N.Y. TIMES (Oct. 13, 2009), <http://www.nytimes.com/gwire/2009/10/13/13greenwire-epa-releases-bush-era-endangerment-document-47439.html> [<https://perma.cc/2LS6-9YB6>] (reporting on a "long-sequestered document" that showed the Bush Administration had concluded in December 2007 that greenhouse gases endangered public welfare). Even if, as some have argued, the Bush Administration used regulatory review processes in the Office of Information and Regulatory Affairs to covertly derail the climate change initiatives it was "officially" working on, see, e.g., Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 336-38 (2014), the career staff at the EPA were certainly empowered to lay the groundwork for progress in anticipation of a different administration.

<sup>148</sup> See *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015).

<sup>149</sup> 42 U.S.C. § 2000e-5(b) (2012).

<sup>150</sup> *Mach Mining*, 135 S. Ct. at 1652 ("[T]he EEOC, to meet the statutory condition, must tell the employer about the claim . . . and must provide the employer with an opportunity to discuss the matter in an effort to achieve voluntary compliance.").

<sup>151</sup> See S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 113TH CONG., EEOC: AN AGENCY ON THE WRONG TRACK? LITIGATION FAILURES, MISFOCUSED PRIORITIES, AND LACK OF TRANSPARENCY RAISE CONCERNS ABOUT IMPORTANT ANTI-DISCRIMINATION AGENCY 8-9 (2014), <http://www.help.senate.gov/imo/media/doc/FINAL%20EEOC%20Report%20with%20Appendix.pdf> [<https://perma.cc/897M-BE8X>] (noting a decrease in successful conciliations and "a series of embarrassing losses" in court to highlight "questionable decisions" made by the agency); see also U.S. CHAMBER OF COMMERCE, A REVIEW OF ENFORCEMENT AND LITIGATION STRATEGY DURING THE OBAMA ADMINISTRATION—A MISUSE OF AUTHORITY 18 (2014), <https://www.uschamber.com/sites/default/files/documents/files/EEOC%20Enforcement%20Paper%20June%202014.pdf> [<https://perma.cc/AZ9X-V85J>] (commenting on the EEOC's "abusive" enforcement tactics and calling for "adherence to its own statutory conciliation requirement").

APA precluded judicial review of enforcement decisions where there is no law to apply to guide the courts.<sup>152</sup> The Seventh Circuit agreed—breaking ranks with several other circuits—but the Supreme Court reversed its decision.<sup>153</sup> Justice Kagan, writing for a unanimous Court, held that not only was the agency’s inaction reviewable,<sup>154</sup> but the two letters to the defendant (one offering the possibility of conciliation processes and another stating that the “conciliation efforts . . . required by law have occurred and have been unsuccessful”<sup>155</sup>) were insufficient to justify the agency’s decisionmaking.<sup>156</sup> On the first holding, the Court hardly made a passing analysis of the government’s contention that *Heckler* precluded review, and did not even have to resort to its anti-abdication exception.<sup>157</sup> Instead, the Court found ample “law to apply” in the guidance and mandatory tone of the Civil Rights Act, even though the practice of conciliation goes to the very heart of what *Heckler* termed “prosecutorial discretion.”<sup>158</sup> And while the standard of review appears to be fairly deferential, generally requiring only a sworn affidavit from the agency saying that they attempted to conciliate,<sup>159</sup> the Court rejected sweeping notions that there is simply no role for the courts to play in supervising enforcement strategies at the EEOC.<sup>160</sup>

*Mach Mining* is more difficult to interpret than the rather dramatic decision in *Massachusetts v. EPA*, particularly because the standard of review the Court adopted in *Mach Mining* is far from stringent and will likely be half-heartedly applied by many lower courts. But the fact that the Court so easily and emphatically rejected the Obama Administration’s claim that failure to conciliate was an unreviewable form of enforcement discretion

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<sup>152</sup> See Brief for the Respondent at 35-38, *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645 (2015) (No. 13-1019).

<sup>153</sup> *Mach Mining*, 135 S. Ct. at 1650-51, 1656.

<sup>154</sup> See *id.* at 1652 (“Yes, the statute provides the EEOC with wide latitude over the conciliation process, and that feature becomes significant when we turn to defining the proper scope of judicial review. But no, Congress has not left *everything* to the Commission.” (citation omitted)).

<sup>155</sup> *Id.* at 1650.

<sup>156</sup> See *id.* at 1653 (“[T]o treat the [EEOC’s] letters as sufficient . . . is simply to accept the EEOC’s say-so that it complied with the law. . . . [T]he point of judicial review is instead to *verify* the EEOC’s say-so—that is, to determine that the EEOC actually, and not just purportedly, tried to conciliate a discrimination charge.”).

<sup>157</sup> *Id.* at 1652.

<sup>158</sup> *Id.*; see also *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (recognizing that an agency’s refusal to institute proceedings shares the characteristics of a prosecutor’s decision not to indict).

<sup>159</sup> See Ben James, *High Court Ruling Won’t End Fights over EEOC Conciliation*, LAW360 (Apr. 29, 2015, 7:53 PM), <https://www.law360.com/articles/649578/high-court-ruling-won-t-end-fights-over-eEOC-conciliation> [<https://perma.cc/TLP6-D55D>] (discussing how *Mach Mining* set a “low bar” for satisfying the conciliation requirement). This would not be sufficient, however, where the defendant furnishes independent and credible evidence that suggests that the EEOC did not in fact do so.

<sup>160</sup> See *Mach Mining*, 135 S. Ct. at 1653 (“Nothing overcomes [the presumption favoring judicial review of administrative action] with respect to the EEOC’s duty to attempt conciliation of employment discrimination claims.”).

under *Heckler* is a case in point about how the Supreme Court can, and often does, step in and effectively mark territory in cases that go to the heart of how the executive branch operates. Moreover, just as in *Massachusetts v. EPA*, it is remarkable how muted the response to this case has been from both the President and the media. It remains to be seen whether the EEOC's practices will actually change in response to the decision, but it is already observable that the President has decided not to openly criticize the Supreme Court's assertion of authority on this issue. Further, I am aware of no commentary that has cast this dispute as bearing on important constitutional values of the separation of powers. All of this is very difficult to square with accounts that portray courts as either (a) irrelevant to or positively barred from entering inaction disputes through the APA or (b) incapable of doing so in a way that would not open the floodgates of litigation. Indeed, the Court seemed fully conscious of the potential for its decision to open the floodgates, but trudged forward nonetheless, perhaps aware that the APA's review framework provides ample safety valves should courts find themselves in a quagmire.

### C. Texas v. United States

To a great extent, it has been the controversy over President Obama's executive (in)action on immigration that has inspired the recent surge in attention to the possible constitutional limits on the President's nonenforcement discretion. It is also a case in point for how judges faced with unavoidable inaction problems bear enormous pressure to channel disputes through the APA framework (and away from Take Care Clause claims), even if they do feel there is a role to be played by the judiciary.

In 2012, the Department of Homeland Security (DHS) developed a program—the Deferred Action for Childhood Arrivals (DACA) program—to allow young people born in other countries but raised in the United States to apply for “deferred action status and employment authorizations.”<sup>161</sup> In 2014, DHS issued a memorandum indicating that it would expand deferred action to individuals who (1) have a son or daughter who is a lawful permanent resident, (2) have resided in the United States continuously since before January 1, 2010, and (3) are not an “enforcement priority.”<sup>162</sup> This memorandum, now known as the Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) memorandum, also reserved a place for ad hoc discretion on the part of DHS, noting that an individual could be denied an application for deferred action if there were “other factors” that made deferred action “inappropriate.”<sup>163</sup> A

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<sup>161</sup> *Texas v. United States*, 86 F. Supp. 3d 591, 606 (S.D. Tex.), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>162</sup> *Id.* at 611.

<sup>163</sup> *Id.*

group of twenty-six states, concerned about what they saw as persistent underenforcement of immigration laws, filed suit alleging that DHS had violated the APA and the Take Care Clause in issuing the DAPA memorandum.<sup>164</sup>

While the district court paid homage to the well-worn principle that the “Government’s enforcement priorities and . . . the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to make,”<sup>165</sup> it claimed that this principle did not resolve the case because “prosecutorial discretion . . . is not the true focus of the States’ legal attack.”<sup>166</sup> The court ultimately framed the disputed DAPA memorandum not as *inaction*, but as a new action or policy (or, more pejoratively, executive “legislation”).<sup>167</sup> It was able to in effect avoid *Heckler* by drawing a distinction between action and inaction:

While the Court recognizes (as discussed above) that the DHS possesses considerable discretion in carrying out its duties under the [Immigration and Nationality Act], the facts of this case do not implicate the concerns considered by *Heckler* such that this Court finds itself without the ability to review Defendants’ actions. First, the Court finds an important distinction in two terms that are commonly used interchangeably when discussing *Heckler*’s presumption of unreviewability: “non-enforcement” and “inaction.” While agency “non-enforcement” might imply “inaction” in most circumstances, the Court finds that, in this case, to the extent that the DAPA Directive can be characterized as “non-enforcement,” it is actually affirmative *action* rather than inaction.<sup>168</sup>

The district court doubted that *Heckler* “anticipated that such ‘non-enforcement’ decisions would include the affirmative act of bestowing multiple, otherwise unobtainable benefits upon an individual.”<sup>169</sup>

The district court arguably twisted *Heckler* here,<sup>170</sup> but even so, that illustrates the point: *Heckler* is much more twistable than it has been widely

<sup>164</sup> *Id.* at 607.

<sup>165</sup> *Id.* at 644.

<sup>166</sup> *Id.* at 645.

<sup>167</sup> *See id.* at 646 (“It is the contention of the States that in enacting DAPA, the DHS has not only abandoned its duty to enforce the laws as Congress has written them, but it has also enacted ‘legislation’ contrary to the Constitution and the separation of powers therein.”).

<sup>168</sup> *Id.* at 654.

<sup>169</sup> *Id.* at 655-56. The opinion goes on to say that even were the presumption of unreviewability applicable, it would be rebutted either by clear statutory commands that provide “law to apply” or because an announced policy granting affirmative legal status would fall within the anti-abdication exception in *Heckler*. *Id.* at 662.

<sup>170</sup> Judge Stephen A. Higginson, writing in dissent in the Fifth Circuit panel’s affirmance of the district court’s denial of a stay, points this out quite elegantly. *See Texas v. United States*, 787 F.3d 733, 771-72 (5th Cir. 2015) (Higginson, J., dissenting) (arguing that the majority’s opinion “rests on sublimer intelligences than existing law allows”).

portrayed to be.<sup>171</sup> One can perhaps characterize nearly any series of decisions that result in underenforcement of the law as *either* inaction or action, thereby applying or avoiding *Heckler's* presumption of unreviewability as a court deems needed. Nothing would prevent this very same court from characterizing another policy in a future case as a mere series of prosecutorial decisions, or as mere guidelines for field officers. Indeed, that is what the courts usually do. What is different about the *Texas* case is the importance of the issue to larger policy debates and its potential threat to constitutional separation-of-powers values. Ultimately, the judge in *Texas* was able to rely on APA review as the basis for (a) finding the case reviewable and (b) issuing an opinion checking the President's assertion of power—all while avoiding a constitutional showdown. Because all of the parties apparently conceded that the DAPA memorandum was a “rule,” the judge simply held that the rule was procedurally invalid because it had not gone through the APA section 553 notice-and-comment rulemaking processes.<sup>172</sup>

The appellate aftermath of the district court's decision in *Texas* is somewhat difficult to interpret, but it is largely consistent with courts' recognition of the comparative virtues of APA review. With hardly a mention of the Take Care Clause question,<sup>173</sup> the Fifth Circuit upheld the preliminary injunction on the grounds that the DAPA memorandum was “much more than nonenforcement” and would “affirmatively confer ‘lawful presence’ and associated benefits on a class of unlawfully present aliens.”<sup>174</sup> Because the memorandum was more than a policy statement or interpretive rule,<sup>175</sup> the court held that the states were likely to succeed on the merits of their procedural APA claim. After the Obama Administration successfully petitioned for certiorari,<sup>176</sup> popular coverage of the case emphasized the novelty and importance of the Take Care Clause question, which both lower courts had teased but avoided.<sup>177</sup> Yet there were early hints that the Supreme Court would not reach the Take Care Clause issue. Overall, the briefing—particularly that of the respondent, the State of Texas—focused on the relatively

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<sup>171</sup> See *supra* Section III.A.

<sup>172</sup> *Texas v. United States*, 86 F. Supp. 3d at 671.

<sup>173</sup> *Texas v. United States*, 809 F.3d 134, 146 n.3 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>174</sup> *Id.* at 166.

<sup>175</sup> *Id.* at 170–71, 176 (citing 5 U.S.C. § 553(b)(A)).

<sup>176</sup> *United States v. Texas*, 136 S. Ct. 906 (2016) (mem.); see also Lyle Denniston, *U.S. Appeals on Immigration Policy*, SCOTUSBLOG (Nov. 20, 2015, 10:13 AM), <http://www.scotusblog.com/2015/11/u-s-appeals-on-immigration-policy/> [<https://perma.cc/92J9-HUSJ>] (discussing the appeal of *Texas v. United States*).

<sup>177</sup> See Peter M. Shane, *The U.S. Supreme Court's Big Immigration Case Wasn't About Presidential Power*, ATLANTIC (June 28, 2016), <http://www.theatlantic.com/politics/archive/2016/06/us-v-texas-wasnt-really-about-presidential-power/489047/> [<https://perma.cc/F4C6-84WF>].

mundane questions of administrative law rather than unhinged constitutional analysis.<sup>178</sup> And the Take Care Clause did not make even a passing appearance in oral argument before the Court.<sup>179</sup> The Supreme Court's one-sentence per curiam opinion affirming the judgment by an equally divided court<sup>180</sup> may give the appearance that the Take Care Clause issue is still alive, but it bears mentioning that no court to have considered the issue has yet given any indication of doing more than mentioning the underlying constitutional concerns.<sup>181</sup> There is no reason to think that will change on remand to the district court, and by the time the case returns to the Supreme Court (if it does), the high political controversy over immigration and executive power may well have passed.

None of this should be surprising. Once courts have found *Heckler* inapplicable or have rebutted the presumption of unreviewability in some way, they can ultimately stop presidential inaction in its tracks by using the full panoply of administrative law protections rather than by questioning the constitutional merits of the inaction. This ability to draw on seemingly minor procedural deficiencies to stop agency inaction is a powerful tool and gives the courts substantial leverage, particularly because it is difficult for Presidents to argue against such procedural deficiencies in court. The Fifth Circuit's opinion upholding the preliminary injunction reveals much about the covert power of the APA approach: the court noted that "DAPA was enjoined because the states seek an opportunity to be heard through notice and comment, not to have the judiciary formulate or rewrite immigration policy."<sup>182</sup> But that is precisely what the courts have done (for better or worse), and it is difficult to see how they could have done it any other way.

#### D. Discussion

These three cases are not intended to definitively answer the question of whether courts can successfully marshal the tools available to them under the APA to police purposive presidential inaction. Because the cases focus on instances where the courts limited the asserted executive authority to underenforce the law, they can say nothing about how often courts use the safety valves identified in Section III.B, nor anything about how much institutional capacity and capital is reaped when courts exercise the passive virtues. But this much is clear: they show the fruits of that aggregate behavior by revealing unexpected, often subtle, exercises of judicial power. In other words,

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<sup>178</sup> Brief in Opposition, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

<sup>179</sup> Transcript of Oral Argument, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

<sup>180</sup> *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

<sup>181</sup> Shane, *supra* note 177.

<sup>182</sup> *Texas v. United States*, 809 F.3d 169-70 (5th Cir. 2015), *aff'd by an equally divided court*, *United States v. Texas*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

they are sufficient to suggest that the courts derive actual authority in this domain of cases, especially in high-profile cases where executive overreach is most obvious and where other approaches to the problem seem the most intractable.

Perhaps the best illustration of exactly what the APA framework does for the courts in this interbranch terrain comes in a thought experiment involving any of these cases. Would it even be imaginable that the Court could have addressed the Bush Administration's inaction on climate change using separation-of-powers principles alone? Can we even fathom the level of hostility and pushback that would have occurred were a district court in Texas to rest its decision on the Take Care Clause claims in *Texas v. United States*? How would this kind of review actually play out, in terms of both legal formalities and constitutional politics?

The complexity and uncertainty surrounding the administrative law of agency inaction insulates the courts and softens the edge of the knife without entirely sacrificing a role for the judiciary. It is a tool that will probably not fully satisfy formalist critics of the practice of presidential inaction, but one that should be recognized by functionalist scholars.

#### CONCLUSION

I have started with the premise that there are legitimate reasons to be worried about the constitutional and rule-of-law implications of purposive presidential inaction. I have argued that, rather than abdicating entirely, courts can and do use the administrative law of agency inaction to translate constitutional separation-of-powers concerns into a doctrinal framework that poses fewer threats to the capacity of courts and is more effective when courts do decide to intervene. Knowing that courts can and in fact do intervene should appease both formalist and functionalist critics of purposive presidential inaction, and perhaps it will obviate the need to develop unproven political process controls on the exercise of executive discretion. There is nothing wrong with the aspirational constitutional debate taking place around the Take Care Clause. Indeed, that debate will likely continue to inform the development of APA review of agency inaction. Sometimes, though, the simplest and best solution is the one you already know and use. Certainly the federal courts, which are focused on persuasively resolving disputes and preserving their own institutional vitality and prestige, will continue along the APA path as long as they can before diving into the constitutional thicket.