# ENFORCING (BUT NOT DEFENDING) 'UNCONSTITUTIONAL' LAWS

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*WHEN should the executive decline to defend in court a federal law it has determined to be unconstitutional, yet still enforce that same statute against third parties? The question is prompted by the Obama administration's decision to enforce, but not defend in federal court, Section 3 of the Defense of Marriage Act ("DOMA"). But the DOMA Section 3 decision is not the first time the executive has bifurcated the enforcement of a statute from its defense before the bench. The practice of enforcement-litigation gaps dates back at least to World War II. Commentators tend to judge the practice by focusing on the merits of each enforcement-litigation gap but remain inattentive to its systemic effects. This Article sidesteps debate on specific cases, such as the DOMA Section 3 decision. It instead develops a default rule as a guide for executive branch practice. To that end, it analyzes the question whether a conscientious executive branch lawyer should view enforcement-litigation gaps as presumptively acceptable (and hence available for use) or presumptively disfavored (such that an especially compelling argument must be made to justify its use in each case). As a threshold matter, conventional wisdom views enforcement-litigation gaps as a kind of "departmentalism," and either condemns or endorses the practice on that basis. But the Constitution does not categorically allow or prohibit independent executive branch judgment on matters of fundamental law. Working within this zone of executive branch discretion, this Article*

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*analyzes enforcement-litigation gaps in terms of their effect on constitutional values such as legality, accountability, and public confidence in the Constitution. This analysis suggests that the desirability of enforcement-litigation gaps turns on what sort of constitutional question is at stake. The practice is presumptively justified when the executive defends an Article II value, but rests on weaker ground when the constitutional rights of individual third parties are in play. The government therefore ought to be presumptively willing to use the practice with respect to structural issues, and presumptively unwilling to use it in individual rights cases.*

## INTRODUCTION

When if ever, should the executive branch decline to defend in court a federal law it believes to be unconstitutional, but then enforce that same statute? Consider three examples:

First, Section 3 of the federal Defense of Marriage Act ("DOMA Section 3") bars the executive from recognizing a same-sex marriage, such as those available in several U.S. states and the District of Columbia.[1] In late 2010, two lawsuits were filed in federal district courts in the Second Circuit challenging DOMA Section 3's application to same-sex spouses.[2] In response, Attorney

[1] 1 U.S.C. § 7 (2006) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife.").

[2] See Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (D. Conn. filed Nov. 9, 2010); Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. filed Nov. 9, 2010). In June 2012, Judge Jones of the Southern District of New York invalidated DOMA Section 3. See Windsor v. United States, 833 F. Supp. 2d 394 (S.D.N.Y. 2012). In earlier challenges to the same statute, the Justice Department defended the provision. See Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010) (holding that DOMA § 3 violates the Equal Protection Clause); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 235, 248–49 (D. Mass. 2010) (holding that DOMA § 3 violates the Tenth Amendment and the Spending Clause). In a carefully circumscribed ruling, the First Circuit affirmed both judgments in a rul-

General Eric Holder concluded that DOMA Section 3 conflicted with the equality guarantee of the Fifth Amendment.[3] He directed the Department of Justice not to defend the law in the Second Circuit suits. But, Holder explained, the administration would continue enforcing DOMA Section 3 not only against the plaintiffs in the Second Circuit cases but against all same-sex spouses of federal employees and any others who might have benefited from federal recognition of their same-sex marriage.[4]

Second, under now-expired provisions of immigration law, either house of Congress had power to issue a one-house resolution directing the Attorney General to deny discretionary immigration benefits to enumerated noncitizens.[5] In 1975, the Chairman of the Judiciary Subcommittee on Immigration, Citizenship, and International Law steered to passage such a resolution commanding the executive to deny benefits to six named aliens who previously had been granted discretionary immigration relief. The immigration service complied. When the noncitizens sought judicial review of the agency action, however, the Justice Department filed a brief in their support and, contra the agency, argued that the so-called "legislative veto" used by the House was unconstitutional.[6]

Third, in 1943, Congress enacted a law naming three specific federal employees as threats to national security. The law directed the President to end their paid employment. Despite protesting the measure, President Truman directed that the men no longer be paid after the termination date set by Congress. At the same time, he permitted them to continue working at their federal positions. When the three men filed an action for wrongful termination seeking back pay, the Solicitor General sided with the employees. He

ing likely to secure high court review. See Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012).

[3] See Letter from Eric H. Holder, Jr., U.S. Attorney Gen., to the Hon. John A. Boehner, Speaker of the House (Feb. 23, 2011) [hereinafter Holder Letter], available at http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[4] Id.

[5] 8 U.S.C. § 1254(c)(2) (1982) (repealed 1986) (authorizing either the Senate or the House of Representative to overrule an order suspending the removal of an alien).

[6] INS v. Chadha, 462 U.S. 919, 930–31 (1983); Brief for Petitioner at 10–11, *Chadha*, 462 U.S. 919 (Nos. 80-1832, 80-2170, 80-2171).

argued that the law was both a violation of the Separation of Powers and an unconstitutional bill of attainder.[7]

In each of these cases, the executive branch took a bifurcated approach to statutes it deemed constitutionally suspect. Although Department of Justice lawyers declined to defend the law in court, other federal officials enforced the law against third parties.[8] Call this the "*enforcement-litigation gap*." One can arise if two conditions are met: (1) the government can change the status quo by executing a law without ex ante judicial authorization, and (2) affected parties cannot seek expeditious judicial intervention to preserve the status quo. These conditions hold in many cases. An obvious exception is the criminal law, where the executive cannot impose a sentence without seeking judicial authorization. Outside the criminal context, however, the executive branch can often act unilaterally to change facts on the ground, whereas affected parties are unable to respond quickly. The executive can therefore move first and then decline to defend at its leisure.

While enforcement-litigation gaps are easy to define, they are resistant to simplistic normative evaluation. To be sure, the Obama administration's DOMA Section 3 decision sparked vigorous debate about enforcement-litigation gaps. Attorney General Holder's announcement triggered both powerful endorsements[9] and categorical denunciations.[10] In the ensuing debate, most responses took

[7] United States v. Lovett, 328 U.S. 303, 304–06 (1946) (describing executive response to § 304 of the Urgent Deficiency Appropriation Act of 1943).

[8] In every case of an "enforcement-litigation gap" that I have been able to identify, the decision that the law raised constitutional red flags and therefore would not be defended by government lawyers appears to have been made by the Department of Justice or the White House. This is unsurprising, since legal deliberation is coordinated and directed by the Attorney General within the executive branch. See Exec. Order No. 12,146, 3 C.F.R. 409, 411 (1979) (providing for coordinated judicial review of constitutional questions within the executive). See generally Trevor W. Morrison, Stare Decisis in the Office of Legal Counsel, 110 Colum. L. Rev. 1448, 1470–88 (2010) [hereinafter Morrison, Stare Decisis] (discussing the role of precedent within the Office of Legal Counsel).

[9] See, e.g., Walter Dellinger, The DOMA Decision, The New Republic (Mar. 1, 2011), http://www.tnr.com/article/politics/84353/gay-marriage-obama-gingrich-doma (characterizing the President's decision as "honest, transparent, and respectful of the rule of law").

[10] See, e.g., 157 Cong. Rec. H1642 (daily ed. Mar. 9, 2011) (statement of Rep. Fleming) ("It appears to me that President Obama sees no need for the other two branches . . . ."); Tony Mauro, DOMA Defense, Nat'l L.J., Apr. 4, 2011, at 17 (quot-

the DOMA Section 3 decision to be sui generis. They thus conflated the question whether enforcement-litigation gaps in general are justified with the specific merits of the Equal Protection question raised by same-sex marriage.

This is unfortunate. Enforcement-litigation gaps date back at least to World War II; they are hardly an Obama innovation. The fact that the practice has been used only infrequently in the past is not especially instructive. It may well be desirable to use the practice more vigorously in the future across a wider range of issues. The mere fact of the DOMA Section 3 decision being seen as politically advantageous may be sufficient to elicit such larger usage, particularly if the presidential election cycle brings to office a candidate with transformative aspirations. Given the range of issues on which enforcement-litigation gaps have been employed, and the possibility of its larger use in the future, it is surely desirable to disentangle the general practice from the specific merits of the legal controversy du jour. It is desirable to know, that is, whether a conscientious executive branch lawyer should begin with a positive presumption that an enforcement-litigation gap is acceptable or a negative presumption that it is undesirable absent some special justification.

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ing Sen. Jeff Sessions statement about the decision not to defend DOMA § 3 that "[t]his one really hit me hard"); Ron Paul Condemns Obama's Decision to Abandon DOMA, The Iowa Republican (Feb. 24, 2011), http://theiowarepublican.com/home/2011/02/24/ron-paul-condemns-obama's-decision-to-abandon-doma/ (recounting Congressman Ron Paul's public statement in response to the administration's decision not to defend DOMA, "Today's announcement that the Obama Administration will abandon its obligation to enforce DOMA is truly disappointing and shows a profound lack of respect for the Constitution and the Rule of Law"); Nina Totenberg, Solicitor General Nominee Grilled on Marriage Act (Nat'l Pub. Radio Mar. 31, 2011), http://www.npr.org/2011/03/31/134996395/solicitor-general-nominee-grilled-on-marriage-act (reporting that at Donald Verilli's Senate confirmation hearing for Solicitor General, Verilli stated in response to a question from Senator Orrin Hatch that he would defend the statute from a constitutional challenge unless instructed by his superiors not to do so, to which the Senator replied, "That is not a good answer"); accord Paul Bedard, Newt Gingrich: Obama Could be Impeached Over Gay Marriage Reversal, U.S. News & World Report (Feb. 25, 2011), http://www.usnews.com/news/blogs/washington-whispers/2011/02/25/newt-gingrich-obama-could-be-impeached-over-gay-marriage-reversal. For academic criticism, see, for example, Adam Winkler, Why Obama Is Wrong on DOMA, Huffington Post (Feb. 24, 2011, 12:01 PM), http://www.huffingtonpost.com/adam-winkler/why-obama-is-wrong-on-dom_b_827676.html, arguing that nondefense of DOMA "sets a terrible precedent."

This Article undertakes that inquiry. It asks how that conscientious lawyer in the executive, striving to maximize constitutional ends, should approach the possibility of distinguishing enforcement from litigation of a constitutionally suspect law. Standing back from the merits of any particular case, I adopt what might be termed a rough "rule utilitarian" stance and ask about "the [constitutional] goodness and badness of the consequences of a rule that everyone should perform the action in like circumstances."[11] Should the conscientious Justice Department lawyer, that is, view the practice as presumptively acceptable or presumptively disfavored in light of its expected effect upon constitutional values?

I conclude that all-or-nothing judgments about enforcement-litigation gaps are misguided. Careful specification of the consequences of enforcement-litigation gaps demonstrates that the appropriate executive branch default posture toward the practice should shift depending on the underlying *category* of constitutional question the executive claims to defend. Specifically, enforcement-litigation gaps should be presumptively permissive when the executive defends an Article II value and presumptively disfavored when any other kind of value, including an individual rights question, is at stake.

My approach is avowedly consequentialist, albeit in terms of downstream effects that are salient under the terms of the Constitution. It is therefore vulnerable to a threshold objection: Should not the executive's litigation strategies be deduced first and foremost through normative-constitutional first principles respecting the allocation of power to resolve constitutional ambiguities that operate in a nonconsequential manner? Viewed through that lens, enforcement-litigation gaps might be glossed as a species of "departmentalism": political branch efforts to effectuate independent constitutional judgments.[12]

[11] J.J.C. Smart, An Outline of a System of Utilitarian Ethics, *in* Utilitarianism: For & Against 3, 9 (1973).

[12] See Daniel J. Meltzer, Executive Defense of Congressional Acts, 61 Duke L.J. 1183, 1187 (2012) ("The question of the executive's proper role in enforcing and defending statutes implicates the broader debate about the proper role of the executive branch in making constitutional determinations and the relationship of the executive's constitutional interpretations to those of the courts."). In the Founding era, the executive, legislature, and judiciary created in the Constitution's first three Articles were called "departments." Steven G. Calabresi & Kevin H. Rhodes, The Structural Con-

There is currently sharp division in the scholarship on departmentalism. On the one hand are scholars who worry about the seemingly inexorable growth of executive power in light of perceived deleterious effects on the polity and on individual liberties.[13] They claim that the president has *no* authority to second-guess the constitutionality of duly enacted statutes and instead must stand fully behind all duly enacted laws.[14] This position conduces to the view that enforcement-litigation gaps are always impermissible. Unsurprisingly, this is a motif embroidered by critics of the Obama administration's position on DOMA Section 3.[15] By contrast, other scholars defend a strong, independent presidential authority to make constitutional judgments without respect to other branches' views, a position often staked out on originalist turf.[16] These presi-

stitution: Unitary Executive, Plural Judiciary, 105 Harv. L. Rev. 1153, 1156 n.6 (1992). See generally Laurence H. Tribe, 1 American Constitutional Law 266 (3d ed. 2000) (arguing that the executive need not give full effect to a judicial decree that violates the Constitution). Departmentalist tendencies can also be discerned in Congress. See John C. Yoo, Lawyers in Congress, 61 Law & Contemp. Probs., Spring 1998, at 1, 5 (defending Congress's power to make constitutional determinations).

[13] The locus classicus of this argument is Arthur M. Schlesinger, Jr., The Imperial Presidency (2004).

[14] See, e.g., Raoul Berger, Executive Privilege: A Constitutional Myth 306 (1974) ("It is a startling notion that the President, who by the terms of Article II, § 3, 'shall take care that the laws be executed,' may refuse to execute a law on the ground that it is unconstitutional. To wring from a duty faithfully to execute the laws a power to defy them would appear to be a feat of splendid illogic." (citation omitted)); Christopher N. May, Presidential Defiance of "Unconstitutional" Laws: Revisiting the Royal Prerogative, 21 Hastings Const. L.Q. 865, 867, 881 (1994). There is a separate debate as to whether the President must veto laws he perceives to be unconstitutional. Compare William Baude, Signing Unconstitutional Laws, 86 Ind. L.J. 303, 304 (2011) (no obligation to veto such laws), with Saikrishna Bangalore Prakash, Why the President Must Veto Unconstitutional Bills, 16 Wm. & Mary Bill Rts. J. 81, 81 (2007) (obligation to veto).

[15] See, e.g., Press Release, U.S. House of Representatives Committee on the Judiciary, Smith: DOJ Has a Responsibility to Defend DOMA (Feb. 23, 2011), http://judiciary.house.gov/news/2011/feb/110223DOMA.html (publicizing House Judiciary Committee Chairman Lamar Smith's criticism of the administration's decision not to defend DOMA: "It is not the role of the courts to redefine that institution and impose it on American society. The people alone—through their elected representatives—have that role and responsibility. And the President and his Administration are duty bound to defend those laws in court").

[16] See, e.g., Saikrishna Bangalore Prakash, The Executive's Duty to Disregard Unconstitutional Laws, 96 Geo. L.J. 1613, 1616 (2008) [hereinafter Prakash, The Executive's Duty] (identifying a duty to disregard laws the President believes are unconstitutional); accord John Harrison, The Constitutional Origins and Implications of

dentially minded scholars might argue that the president is called on to make judgments about how best to implement competing constitutional values all the time, and should have unfettered discretion as to how to operationalize such judgments. So, they might reason, enforcement-litigation gaps are always permissible. Alternatively they might conclude that once a President decides a law is unconstitutional, he or she has a duty neither to enforce nor defend.[17]

In practice, neither of these absolute positions derived from constitutional first principles is plausible. Rather than hewing to absolute rules, the political branches historically have carved a middle path, sometimes but not always acting in a strongly departmentalist

Judicial Review, 84 Va. L. Rev. 333, 370 (1998) ("[I]f 'laws' includes all acts of Congress, then the Take Care Clause imposes on the President an impossible obligation when a statute is logically inconsistent with the Constitution."); Gary Lawson & Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L. Rev. 1267, 1280 (1996); Michael Stokes Paulsen, The Most Dangerous Branch: Executive Power to Say What the Law Is, 83 Geo. L.J. 217, 221 (1994); see also Frank H. Easterbrook, Presidential Review, 40 Case W. Res. L. Rev. 905, 919–20 (1990) [hereinafter Easterbrook, Presidential Review]; Michael J. Gerhardt, Non-Judicial Precedent, 61 Vand. L. Rev. 713, 714 (2008) (defining and exploring the concept of "non-judicial precedents as any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority"); Saikrishna Prakash & John C. Yoo, Against Interpretive Supremacy, 103 Mich. L. Rev. 1539, 1564–66 (2005) (arguing for increased executive branch role in interpreting the Constitution). The power of presidential review described in this work does not necessarily extend to the refusal to comply with Supreme Court instructions or to follow its precedent. Compare Prakash, The Executive's Duty, supra, at 1621 ("[E]ven after the issuance of a final judgment based on the conclusion that a law is unconstitutional, the Executive Branch may continue to enforce that law against others."), with Michael Stokes Paulsen, The *Merryman* Power and the Dilemma of Autonomous Executive Branch Interpretation, 15 Cardozo L. Rev. 81, 83 (1993) [hereinafter Paulsen, *Merryman* Power] (discussing, without disapproving, President Lincoln's refusal to be bound by Chief Justice Taney's ruling in *Ex Parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861)). The question of compliance with Supreme Court opinions raises issues that are distinct and separate from the questions addressed here. Enforcement-litigation gaps do not involve conflicts between the branches. Nor do they call for a determination of the collateral estoppel effect of judgments on the government. Cf. Larry Alexander & Frederick Schauer, On Extrajudicial Constitutional Interpretation, 110 Harv. L. Rev. 1359, 1361 (1997) (arguing that the Court's interpretations have "normative force" as correct readings of the Constitution).

[17] See, e.g., Neal Devins & Saikrishna Prakash, The Indefensible Duty to Defend, 112 Colum. L. Rev. 507, 509 (2012) ("Given President Obama's belief that the DOMA is unconstitutional, he should neither enforce it nor defend it." (footnote omitted)).

spirit. There are sound political-economy reasons for this. The Constitution creates political institutions that predictably share constitutional interpretation authority among both political branches and with the federal courts. It also fosters incentives for Presidents to defer to other branches' views on constitutional meaning. Some "weak" form of departmentalism is therefore immanent in the constitutional design.[18] On the other hand, the strongest claims for independent executive branch judgment inexorably clash with the basic incentives of political actors. These predictably conduce to interbranch delegation and deference on constitutional matters, making weak departmentalism almost inevitable. Exemplifying the ensuing weak-form departmentalism are a range of "constitutional constructions" that have been evolved by the political branches over time to "resolve textual indeterminacies and . . . address constitutional subject matter" in the absence of clear direction from the original text.[19] These mechanisms range from mundane statutory gap-filling by federal agencies[20] to presidential signing statements.[21] Enforcement-litigation gaps are simply another "constitutional construction." Unlike signing statements or *Chevron* deference, they have not been carefully analyzed in terms of how they affect core constitutional values, such as democratic accountability and the rule of law.[22] Hence the

[18] For surveys of weak departmentalism, see generally Dawn E. Johnsen, Faithfully Executing the Laws: Internal Legal Constraints on Executive Power, 54 UCLA L. Rev. 1559, 1601 (2007) [hereinafter Johnsen, Faithfully Executing the Laws]; Trevor W. Morrison, Constitutional Avoidance in the Executive Branch, 106 Colum. L. Rev. 1189, 1240–58 (2006); Randolph D. Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel, 52 Admin. L. Rev. 1303, 1306–30 (2000); Cornelia T.L. Pillard, The Unfulfilled Promise of the Constitution in Executive Hands, 103 Mich. L. Rev. 676, 687–702 (2005).

[19] Keith E. Whittington, Constitutional Construction: Divided Powers and Constitutional Meaning 9 (1999).

[20] See Chevron U.S.A., Inc. v. Natural Res. Def. Counsel, Inc., 467 U.S. 837, 843–44 (1984). Because *Chevron* distributes the labor of statutory interpretation between the courts and federal administrative agencies based on quasi-constitutional principles of democratic accountability and institutional competence, it is fairly labeled a decision with constitutional undertones. And it has surely had more influence on the balance of interbranch powers than almost any other decision formally concerning the separation of powers.

[21] Curtis A. Bradley & Eric A. Posner, Presidential Signing Statements and Executive Power, 23 Const. Comment. 307 (2006).

[22] Weak-form departmentalism has only recently come under the scholarly lens. See, e.g., David Barron, Constitutionalism in the Shadow of Doctrine: The President's

need now for a consequentialist analysis in light of the full spectrum of constitutional values.

To that end, I develop an answer to the quasi-rule-utilitarian question whether more routinized use of enforcement-litigation gaps is desirable or not in terms of the harms and benefits it produces. This question requires a tallying of the negative and positive side effects of enforcement-litigation gaps independent of the merits of the specific statute implicated in a case. In my view, there are four such side effects, which can be classed into two sets. On the one hand, more frequent use of enforcement-litigation gaps would have two important costs. First, it would have deleterious expressive effects by imposing demoralization costs. Second, it would damage the mechanisms of political and constitutional accountability upon which democratic governance relies.

If enforcement-litigation gaps had only these undesirable consequences, they surely could not be defended as a routine instrument for conscientious executive branch practice. But, on the other hand, more robust use of the practice also would find two positive justifications. First, the increased use of enforcement-litigation gaps would facilitate judicial settlement of hard constitutional questions. Second, it would also provide a mechanism for the ex-

Non-Enforcement Power, 63 Law & Contemp. Probs., Winter/Spring 2000, at 61, 64 (arguing against limiting presidential review so as to enable "judicia[l] authority to declare the meaning of the Constitution"); Frank B. Cross, Institutions and the Enforcement of the Bill of Rights, 85 Cornell L. Rev. 1529, 1586–89 (2000) (criticizing departmentalism and instead proposing a "preference for rights" approach, under which the rule set by the branch that protects the most liberty would serve as the governing rule for all branches); Dawn E. Johnsen, Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?, 67 Law & Contemp. Probs., Summer 2004, at 105, 123 (arguing that the scope of presidential review authority should depend on respect for "the constitutional functions and powers of all three branches" and the "interpretive quality" of presidential decisions); Dawn E. Johnsen, Presidential Non-Enforcement of Constitutionally Objectionable Statutes, 63 Law & Contemp. Probs., Winter/Spring 2000, at 7, 13 [hereinafter Johnsen, Presidential Non-Enforcement] (advocating multifactor balancing test to ascertain when non-enforcement is appropriate); David A. Strauss, Presidential Interpretation of the Constitution, 15 Cardozo L. Rev. 113, 115–16 (1993) (arguing that the executive should give Supreme Court authority the same weight that the Court itself would give it, but leaving open the possibility of rejecting the Court's view in extraordinary situations for a moderate form of departmentalism under which presidential power to interpret independently the Constitution is tied to whether prior courts have ruled on the issues that the President desires to decide).

ecutive to disapprove of a law without engaging in the historically disfavored practice of "dispensing" with its application.[23]

Such gains from the use of enforcement-litigation gaps, however, are distributed unevenly across different kinds of constitutional cases. In one category of cases, the gains are substantial. In another, they are meager. Given this asymmetrical distribution, it is plausible to distinguish categorically between two classes of cases in which enforcement-litigation gaps might be deployed based on the magnitude of the expected benefit, net of costs, from the practice. Specifically, I conclude that the executive branch is most likely to be justified in bifurcating enforcement from litigation decisions when the underlying constitutional concern is structural and relates to Article II of the Constitution. By contrast, the executive has the least justification for distinguishing enforcement from litigation positions when the constitutional value at play is an individual constitutional entitlement. The valence of any presumption respecting enforcement-litigation gaps should therefore turn on the species of underlying constitutional question at stake.[24]

This conclusion must be hedged in two important ways. First, it does not address the background question whether the executive should stand behind a given federal law at all but takes current practice as a given. Presently, there is a general presumption that the Department of Justice will enforce and defend federal laws. That presumption admits in practice of a handful of exceptions, largely connected to the defense of Article II values.[25] I take this general norm as a given for the purposes of this Article. Accordingly, it is my working assumption that the executive has a general practice of both enforcing and defending a law except in some small class of cases in which it does neither based on criteria already developed and routinely applied by the Department of Justice.

Second, I do not focus here on the historical question whether any particular enforcement-litigation gap is warranted. My principal brief in this Article is not to defend or to critique the Obama

[23] See infra text accompanying notes 281–309 (exploring concerns with a dispensing power).

[24] What about federalism values? For reasons explained infra, they fall into the second class, where the benefits of enforcement-litigation gaps do not accrue.

[25] See infra text accompanying notes 171–175.

Administration's approach to DOMA Section 3 except insofar as doing so casts light on what the appropriate executive branch norm should be. My aim instead is forward-looking and normative. I am interested here in enforcement-litigation gaps *as a general practice*. The Article's analysis is crafted to yield generalized guidance about whether more frequent use of the practice would be justified, and, if so, under what conditions. This in turn allows for the elaboration of a default presumption—call it an executive branch "best practice"[26]—respecting enforcement-litigation gaps. That presumption is defeasible and does not preclude the possibility that the unique equities of a given case might warrant a different course of action.

The argument proceeds in three Parts. Part I motivates the inquiry by clarifying the conditions in which an enforcement-litigation gap is possible. It also situates the practice in historical context by locating the DOMA Section 3 decision among examples that reach back to World War II. Part II briefly explains why I reject an answer from constitutional first principles that ranks enforcement-litigation gaps as a species of departmentalism and hence finds them necessarily desirable or objectionable. Part III, which is the heart of the Article, considers at length the positive and negative consequences of a general practice of enforcement-litigation gaps. It both works through these costs and benefits and also considers how they are distributed across different kinds of constitutional cases. A brief conclusion returns to the decision by Attorney General Holder to enforce but not defend DOMA Section 3 to show by way of example how this framework for analysis might work on the ground.

## I. THE HISTORY AND PRACTICE OF ENFORCEMENT-LITIGATION GAPS

This Part explains the conditions under which an enforcement-litigation gap can arise. It then contextualizes the practice historically by recounting its use since World War II, and explains what

[26] Morrison, Stare Decisis, supra note 8, at 1456–57. For an example of an effort to codify such practices for one element of the Department of Justice, see Memorandum from David J. Barron, Acting Assistant Attorney Gen., Office of Legal Counsel, to Attorneys of the Office (Jul. 16, 2010), available at http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf [hereinafter OLC Best Practices Memo].

happens in litigation after the executive steps aside. To clarify my object of study, I also distinguish similar, although not identical, executive branch practices that also involve a bifurcated approach to the law. These steps are necessary to frame a proper analysis because current debate has, perhaps understandably, been centered on the DOMA Section 3 decision. A wider, historically sensitive view suggests that enforcement-litigation gaps not only have had many other uses, but also could well be more frequently employed in the future. Analysis of the practice that turns myopically on the DOMA Section 3 case thus will fail to capture a full range of its advantages and costs. It will further fail to illuminate whether the executive should ramp up, or dramatically dial down, the rate at which enforcement-litigation gaps are employed.

### *A. Defining Enforcement-Litigation Gaps*

The executive has an option to divorce its decision as to whether or not to enforce a law from its decision about what position to take in court if, and only if, two conditions are met. First, the executive must be able to change the status quo based on a federal law without seeking ex ante authorization from the judiciary. It is elementary civics that Congress is constitutionally barred from putting the laws into operation itself, so the executive will often be the first mover implementing a federal statute.[27] It will be the President (or a subordinate) who decides initially whether to grant or withhold a benefit, to hire or fire a person, or to execute a statutorily assigned task—often without seeking judicial blessing. An obvious exception is the criminal law. The executive cannot impose criminal penalties without seeking ex ante judicial authorization. Therefore, it is not usually possible for the executive to enforce a criminal statute without at least in theory having to defend it in court.[28]

Second, an enforcement-litigation gap is only possible when the affected parties cannot seek immediate judicial intervention to preserve the status quo. To see this point, imagine a world in which

[27] See Bowsher v. Synar, 478 U.S. 714, 726 (1986) (invalidating federal statute on the ground that it vested Congress with impermissible control over an official with power to execute the laws).

[28] The reason for the caveat is the dominance of plea bargaining in both the federal and state systems.

individuals or entities affected by an executive enforcement decision could instantly and costlessly obtain injunctive relief settling the constitutionality of the government's action. In this world, affected parties could in effect collapse the distinction between enforcement and litigation by forcing the executive to litigate every enforcement decision. By contrast, we are more familiar with situations in which affected parties are unable to seek prompt judicial determination of a constitutional question due to four distinct reasons: transaction costs of judicial intervention, collective action problems, the unavailability of expeditious injunctive relief, and the simple fact that litigation takes time.

Consider each of these in turn. First, the transaction costs of seeking judicial redress will often be greater than the benefit of doing so. This will be so, for example, in many cases where the government denies an employment-related benefit such as health insurance. Second, even where a class of persons or entities is harmed by an enforcement action, collective action problems and an absence of effective aggregating mechanisms may clutter the pathway to the courthouse. Although some historical examples of the practice involve enforcement against a small number of regulated parties, the most recent example of an enforcement-litigation gap, the DOMA Section 3 decision, concerns a large class who are all individually affected but in different and disparate ways. It is costly for them to coordinate, share information, and converge upon a common goal of a judicial challenge.[29] Third, even when litigation is an option—obviously a possibility in some high-profile cases such as those involving DOMA Section 3—timely threshold relief may still be unavailable. Plaintiffs seeking preliminary injunctive relief must show far more than a "possibility" of unlawful harm.[30] Where enforcement involves collecting monies from individuals, federal courts have long lacked jurisdiction to step in before the fact, as opposed to reviewing their legality after the fact.[31]

[29] See generally Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 34 (1965).

[30] Winter v. Natural Res. Def. Council, Inc., 5 U.S. 7, 20–21 (2008).

[31] See 26 U.S.C. § 7421(a) (2006) (providing, in relevant part, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed"); Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974) ("The Court has interpreted the principal purpose of this language to be the protection of the

Finally, even when an affected party does file suit, the process of moving litigation through the judicial hierarchy can take weeks or months even when the matter moves quickly. In that interim, the executive can enforce the law without having to defend it. The two conditions for employment of an enforcement-litigation gap are, in short, met in many domains of civil law.

### *B. The Historical Context of Enforcement-Litigation Gaps*

Enforcement-litigation gaps are not daily occurrences. But they are more frequent than the scanty scholarship suggests. This section catalogues the history of enforcement-litigation gaps. It begins with the first available example of the practice, which was in the early 1940s.[32]

Government's need to assess and collect taxes as expeditiously as possible with a minimum of preenforcement judicial interference, and to require that the legal right to the disputed funds be determined in suit for a refund.") (internal quotation marks omitted); accord Oliver Field, The Recovery of Illegal and Unconstitutional Taxes, 45 Harv. L. Rev. 501, 502 (1932). This rule applies in the declaratory judgment context too. See 28 U.S.C. § 2201(a) (2006).

[32] No earlier examples of enforcement-litigation gaps have been identified. In addition to the cases listed in the main text, there is a 1979 challenge to a provision of the Civilian Marksmanship Program Act, 10 U.S.C. § 4308(a)(5) (1988), which required the Secretary of the Army to sell surplus arms at cost, but only to members of the National Rifle Association. Gavett v. Alexander, 477 F. Supp. 1035, 1038 (D.D.C. 1979) (describing challenge filed by gun control advocates). The Department of Justice filed a brief challenging plaintiffs' standing to bring suit and arguing for dismissal, but declining to defend the law because the latter did "not bear a rational relationship to any legitimate governmental interest and is therefore unconstitutional." Id. at 1040, 1043–44 & n.19. Judge Greene of the District Court of the District of Columbia reached the merits of the case and struck down the law. Id. at 1049. I also do not include instances in which the government has defended a law in district court, but declined to appeal an adverse ruling. Drew S. Days III, The Solicitor General and the American Legal Ideal, 49 SMU L. Rev. 73, 80–81 (1995) [hereinafter Days, Solicitor General] (collecting two such cases); see also Drew S. Days III, When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence, 3 J. App. Prac. & Process 509, 514–17 (2001) (describing refusal to defend or enforce a 1984 child pornography possession statute before the Supreme Court, in favor of confessing that a court of appeals had erred). Nor do I include cases such as *Bob Jones University v. United States*, 461 U.S. 574 (1983), where the Department of Justice abandoned its defense of an agency position mid-stream in litigation. The *Bob Jones University* litigation is unusual because the Supreme Court disregarded the government's change of heart and appointed an amicus curiae to argue for the position the government had abandoned. See Bob Jones Univ. v. United States, 456 U.S. 922 (1982) (mem.) (appointing William Coleman to argue that the Internal

*1. Fighting Communist Subversives*

In the midst of World War II, Congress enacted the Urgent Deficiency Appropriations Act of 1943.[33] Section 304 of the statute singled out three federal employees by name—Robert Morss Lovett, Goodwin Watson, and William Dodd, Jr.—and directed that they be denied any "salary, or other compensation for personal services" after November 15, 1943.[34] Section 304 was enacted despite considerable resistance within Congress. The Senate rejected the provision four times as unconstitutional before finally acquiescing under pressure from the House.[35] Notwithstanding this congressional action, and the failure of the President to reappoint the three employees, the agencies kept all of them at work on their jobs for varying periods after November 15, 1943, even though their compensation was discontinued as of that date.[36] Having so enforced Section 304, the government declined to defend the law in federal court when Lovett, Watson, and Dodd sued for back pay. To the contrary, the Solicitor General filed a brief arguing that the Court of Claims judgments against the United States should be upheld.[37] The government's brief made two arguments. First, it contended that Section 304 "represents a fundamental breach in the principle of the separation of powers" because its exercise of a legislative removal authority intruded into the President's necessary "power to control the subordinate officers through whom the executive function is administered."[38] Second, it contended more succinctly that Section 304 fell afoul of Article I's prohibition on bills

Revenue Code allowed the government to deny charitable status to a religious university that had racially discriminated).

[33] 57 Stat. 431, 450 (1943).

[34] United States v. Lovett, 328 U.S. 303, 305 n.1 (1946) (citation omitted).

[35] Note, Executive Discretion and the Congressional Defense of Statutes, 92 Yale L.J. 970, 983 n.43 (1983).

[36] *Lovett*, 328 U.S. at 305.

[37] Brief for Petitioner at 2–3, *Lovett*, 328 U.S. 303 (Nos. 809, 810, 811), *reprinted in* 44 Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law 41, 53–54 (Philip Kurland & Gerhard Casper eds., 1975) [hereinafter Lovett brief]. The Special Counsel for the Congress of the United States filed a brief in support of § 304. See Brief for the Congress of the United States as Amicus Curiae Supporting Petitioner at 24–26, *Lovett*, 328 U.S. 303 (Nos. 809, 810, 811), *reprinted in* Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law, supra, at 297, 329–331.

[38] Lovett brief, supra note 37, at 66.

of attainder.[39] The Court decided the case solely on the second argument in favor of the federal employees.

*United States v. Lovett* is not the only case in which a Solicitor General wished to decline to pursue a congressional anti-communist mission in written briefs to the Supreme Court.[40] In 1954, President Eisenhower's Solicitor General Simon Sobeloff refused to defend in court the propriety of an administrative determination that a federal employee was unfit for government service when that finding was based on the reports of confidential informants whose identities were not disclosed to the employee. When Sobeloff refused to sign the government's brief or argue its merits, another government lawyer, (later Chief Justice) Warren Burger, stepped in to handle the case.[41] It was through Burger's intervention that another enforcement-litigation gap was avoided.

### *2. The Legislative Veto*

The second important example of an enforcement-litigation gap arose from a legal challenge to the "legislative veto," a statutory device in use since the 1920s that enabled one or both houses of Congress to disapprove of an administrative agency's action.[42] Presidents had consistently argued that these vetoes were violations of the Constitution's separation of powers,[43] but had alter-

[39] Id. at 57–72.

[40] The government has both enforced and defended other anti-communist statutory provisions later invalidated as bills of attainder. See United States v. Brown, 381 U.S. 437, 438, 440 (1965) (invalidating § 504 of the Labor-Management Reporting and Disclosure Act as a bill of attainder after its criminal enforcement). In other cases, the Justice Department enforced and defended anti-communist laws. See, e.g., American Commc'ns Ass'n v. Douds, 339 U.S. 382, 384, 413–14 (1950).

[41] See Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law 10–12 (1987).

[42] Congress first enacted a legislative veto in 1932, and subsequently passed around three hundred laws with such a provision between 1932 and 1975. See James Abourezk, The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives, 52 Ind. L.J. 323, 324 (1977).

[43] See Appropriations Limitations for Rules Vetoed by Congress, 4B Op. O.L.C. 731 (1980) (finding a legislative veto to be unconstitutional); Special Message to the Congress upon Signing the Department of Defense Appropriation Act, Pub. Papers of Dwight D. Eisenhower 688, 688–89 (July 13, 1955) (same). Presidents have also accepted other legislative vetoes without complaint, apparently concluding that they came packaged with sufficiently desirable authorities to assuage any constitutional

nated between compliance and defiance. In the mine run of cases, Presidents raised a constitutional defense yet indicated they would comply with legislative vetoes out of a sense of interbranch comity.[44] In 1980, however, Attorney General Benjamin Civiletti "authorized" Secretary of Education Shirley Hufstedler to implement regulations that had been disapproved by concurrent congressional resolution.[45] Justifying Hufstedler's noncompliance, Civiletti invoked both the "impair[ment of] the Executive's constitutional role" and the risk of "foreclos[ing] effective judicial challenge" of the legislative veto.[46]

Noncompliance with the legislative veto, however, apparently did not induce a judicial challenge of the Hufstedler regulations. The executive had to resort to enforcing but not defending a legislative veto provision in order to tee up a judicial challenge to the practice. A year after the Civiletti decision, the opportunity arose. The House had ordered the Immigration and Naturalization Service ("INS") to deport a group of noncitizens despite the Attorney General's conclusion that their removal should be stayed. Unlike the Department of Education, "the INS concluded that it had no power to rule on the constitutionality of that [congressional] order and accordingly proceeded to implement it."[47] Before the federal bench, both the INS and its Justice Department lawyers declined to defend the legislative veto in *INS v. Chadha*, allowing legal counsel for Congress to speak on behalf of that mechanism.[48]

*Chadha* is not the only case in which the executive has declined to defend a federal law out of concern about legislative overreaching onto Article II turf. The executive took a similar litigation path respecting the so-called "reporting provisions" of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Balanced Budget Act"), which granted the Comptroller General authority to

qualms. Louis Fisher, Constitutional Conflicts Between Congress and the President 145–46 (4th ed. 1997) (listing examples).

[44] Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, The Unitary Executive in the Modern Era: 1945–2004, 90 Iowa L. Rev. 601, 685 n.561 (2005).

[45] Constitutionality of Congress's Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 29 (1980).

[46] Id.

[47] INS v. Chadha, 462 U.S. 919, 930 (1983).

[48] Id. at 931 n.6.

mandate spending reductions once a budget had been enacted.[49] When the reporting provisions were challenged in a declaratory judgment action filed by Rep. Mike Synar, the Solicitor General took the position that the relevant part of the statute violated the separation of powers[50] and left the law's defense to the U.S. Senate.[51] Because Rep. Synar filed his case immediately upon the Balanced Budget Act's being signed into law, however, there was no opportunity for the executive to comply (or not comply) with its command.[52]

*3. Targeting HIV-Positive Members of the Armed Services*

The third example of an enforcement-litigation gap comes from a legislative effort to exclude persons with the human immunodeficiency lentivirus ("HIV") from the four armed services. In February 1996, both Houses of Congress passed the National Defense Authorization Act for Fiscal Year 1996. Section 567 of that bill, added by Rep. Robert Dornan, directed then-President Bill Clinton to discharge HIV-positive individuals serving in the nation's armed forces without regard to whether they were medically able to serve.[53] In his signing statement, President Clinton stated that the Dornan Amendment "violate[d] equal protection" but he nonetheless deemed it necessary to sign the bill because of the "great importance" of its $265 billion appropriation for military needs.[54] Initially, the Clinton administration limited itself to explaining its constitutional position on the Equal Protection Clause

[49] Pub. L. No. 99-177, § 251, 99 Stat. 1037, 1063–72 (1985).

[50] Brief for the United States at 13–17, Bowsher v. Synar, 478 U.S. 714 (1986) (Nos. 85-1377, 85-1378, 85-1379). At least Justice White seemed irked by this decision. See *Bowsher*, 478 U.S. at 761 n.2 (White, J., dissenting).

[51] See Brief of Appellant, U.S. Senate, *Bowsher*, 478 U.S. 714 (Nos. 85-1377, 85-1378, 85-1379).

[52] See *Bowsher*, 478 U.S. at 719.

[53] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328–29 (1996), *repealed by* Act of Apr. 26, 1996, Pub. L. No. 104-134, tit. II, § 2707(a)(1), 110 Stat. 1321, 1321–30 (codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)); Phillip J. Cooper, By Order of the President: The Use and Abuse of Executive Direct Action 217 (2002) (describing the relevant enactment history).

[54] Statement on Signing the National Defense Authorization Act for Fiscal Year 1996, 1 Pub. Papers 226, 226–27 (Feb. 10, 1996).

and urging Congress to undo the law before it had to be enforced.[55] But after final passage of the Dornan Amendment, the Clinton administration announced that the executive would enforce but not defend the statute, and that the House and Senate could "if they wish, present to the courts their argument that the provision should be sustained."[56] Repeal of the law before it came into force obviated the need for any such congressional representation.

*4. Targeting Same-Sex Marriages*

Section 3 of the 1996 Defense of Marriage Act defines "marriage" for the purpose of all federal law to exclude lawful unions between same-sex partners that are currently recognized in several states, the District of Columbia, and many other countries.[57] The Obama administration initially defended DOMA Section 3 in federal court.[58] Its efforts were not wholly availing. In 2010, a district court in Massachusetts held that DOMA Section 3 was constitutionally flawed.[59] In 2012, that judgment was upheld on appeal to the First Circuit Court of Appeals.[60]

In February 2011, Attorney General Eric Holder changed tack when faced with a decision about how to respond to two lawsuits

[55] The White House Office of Communications, Quinn and Dellinger Briefing on HIV Provision, Feb. 9, 1996, 1996 WL 54453 at *1–6 (White House) [hereinafter Quinn-Dellinger Briefing].

[56] Johnsen, Presidential Non-Enforcement, supra note 22, at 58 (citation and quotation marks omitted).

[57] Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified in relevant part at 1 U.S.C. § 7 (2006)). At the time of this writing, same-sex licenses are granted by Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, and Washington, D.C., while Washington and Maryland have each passed laws allowing the issuance of same-sex marriage licenses.

[58] See, e.g., Dragovich v. U.S. Dep't of the Treasury, 764 F. Supp. 2d 1178, 1179, 1192 (N.D. Cal. 2011) (denying federal defendants' motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 376–77 (D. Mass. 2010) (invalidating DOMA § 3); Massachusetts v. U.S. Dep't. of Health & Human Servs., 698 F. Supp. 2d 234, 235–36 (D. Mass. 2010) (same).

[59] See *Gill*, 699 F. Supp. 2d at 376–77; *U.S. Dep't of Health & Human Servs.*, 698 F. Supp. 2d at 235–36. In 2012, a district court in California followed suit and held DOMA § 3 unconstitutional on equal protection grounds. See Golinski v. U.S. Office of Pers. Mgmt., 824 F. Supp. 2d 968, 995 (N.D. Cal. 2012).

[60] See Massachusetts v. U.S. Dep't of Health and Human Servs., 682 F.3d 1 (1st Cir. 2012).

filed in district courts that fell within the purview of the U.S. Court of Appeals for the Second Circuit. The Second Circuit had not spoken previously to the validity of DOMA Section 3 or more generally to the degree of equal protection scrutiny that sexual orientation classifications trigger. In the first suit, the surviving widow of a same-sex marriage sued to recover $350,000 in federal estate taxes she would not have had to pay had her marriage been recognized under federal law.[61] The second suit presented a suite of challenges by Connecticut same-sex spouses to various disabilities and disadvantages imposed as a consequence of DOMA Section 3.[62] Three months after the complaints were filed, Attorney General Holder announced that the Justice Department would not defend DOMA Section 3 in either suit because the administration had concluded that the latter provision conflicted with the equal protection guarantee of the Fifth Amendment's Due Process Clause.[63] Holder then explained that while the Justice Department could defend DOMA Section 3 in circuits that used a rational basis framework, it could not defend the law under the elevated standard he had determined should apply:[64]

> [U]nder heightened scrutiny, the United States cannot defend Section 3 by advancing hypothetical rationales, independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review. Instead, the United States can defend Section 3 only by invoking Congress' actual justifications for the law.

[61] Complaint at ¶¶ 6–8, 53–63, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010), available at http://law.scu.edu/blog/samesextax/file/Windsor%20complaint.pdf.

[62] Complaint at ¶¶ 4–10, Pedersen v. Office of Pers. Mgmt., No. 3:10-cv-1750 (D. Conn. Nov. 9, 2010), available at http://www.scribd.com/towleroad/d/41729563-Pedersen-v-OPM-Complaint.

[63] Holder Letter, supra note 3.

[64] Id. The Holder letter claims that the change in litigation practice was motivated by the fact that the Second Circuit had no binding precedent respecting the standard of review relevant to DOMA § 3, whereas the circuits in which earlier cases had been filed had already adjudged the relevant legal standard to be rational basis review. This is unconvincing. The fact that circuit precedent suggests a low standard of constitutional review does not prevent the government from explaining to the court that a higher standard of review is warranted based on information in the government's possession, or indeed from seeking to have legal precedent reconsidered on the basis of the government's confession of error.

> . . . [T]he legislative record underlying DOMA's passage contains discussion and debate that undermines any defense under heightened scrutiny.[65]

In light of this conclusion, the President "instructed the Department not to defend the statute" in the two suits filed in New York and Connecticut federal district courts.[66] The Attorney General also explained that "Section 3 will continue to be enforced by the Executive Branch."[67] That is, the Holder letter envisaged an enforcement-litigation gap. But DOMA Section 3 would not go undefended in court. Nine days later, House Speaker John Boehner announced that legal counsel for the House of Representatives would step in to defend DOMA Section 3.[68]

The decision to continue enforcement of DOMA Section 3 had immediate, irremediable, and ongoing consequences for individuals notionally protected by the Fifth Amendment. The General Accounting Office has previously identified 1,138 provisions affected by DOMA Section 3.[69] On the day after the Holder announcement, for example, the same-sex spouse of a federal employee would still lack access to health insurance otherwise available to a similarly situated opposite-sex spouse.[70] The lack of ongoing health coverage could influence decisions about prophylactic and emergency care. The same-sex partner could of course purchase insurance in the market (if such coverage is available) while awaiting a final judgment in challenges to DOMA Section 3.

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[65] Id.

[66] Id.

[67] Id. But in other cases challenging applications of DOMA, the Government continued to rely on procedural grounds to rebut plaintiff's claims. See, e.g., Def. Resp. to Order to Show Cause of Feb. 23, 2011 at 2, Golinski v. U.S. Office of Personnel Mgmt., No. 3:10-cv-00257-JSW (N.D. Cal. filed Feb, 28, 2011) (on file with author) (contending that the constitutionality of DOMA was not implicated by a challenge to the denial of benefits to the same-sex spouse of a staff attorney for the Ninth Circuit because the remedy sought in that case "is not enforceable through mandamus").

[68] Press Release, Congressman John Boehner, Regarding the Defense of Marriage Act (Mar. 4, 2011), available at http://johnboehner.house.gov/News/DocumentSingle.aspx?DocumentID=227399.

[69] U.S. General Accounting Office, Defense of Marriage Act: Update to Prior Report (Jan. 23, 2004), available at http://www.gao.gov/products/GAO-04-353R.

[70] See, e.g., Def. Resp. to Order to Show Cause of Feb. 23, 2011 at 2, *Golinski*, No. C 4:10-00257-JSW (on file with author) (explaining that the government intended to continue the denial of such benefits).

While mitigating the harm from lacking insurance, she would nonetheless be injured because she could not subsequently recoup the costs of such coverage if the courts vindicated her equality interest. Beyond these tangible and fiscal costs, the federal government also continues to fail to acknowledge private relationships understood by some to be core to a person's identity and self-worth. For many, that failure will seem more significant than any financial harms.

Continued enforcement of DOMA Section 3 also had irreparable consequences in the context of immigration regulation.[71] In the immediate wake of its change of heart, the Obama administration stayed some pending decisions related to immigration-related filings based on same-sex marriages.[72] This created uncertainty for affected noncitizens. In many cases, it imposed the costs of such delay and uncertainty upon applicants outside the United States and their U.S. citizen spouses. Stays of immigration proceeding for individuals outside the United States, for example, may well exacerbate ongoing exposure to homophobic violence.[73] By contrast, in two deportation cases, where the government stayed proceedings for immigrants already inside the United States, individuals benefited. Those stays delayed adjudication of immigrants' eligibility to remain in the United States, and hence afforded the immigrants de facto temporary relief.[74] The Obama administration also subsequently suggested it would exercise its discretion to forego deportation of same-sex spouses as part of a general policy of focusing enforcement resources on the most dangerous immigrants.[75]

[71] This assumes valid same-sex marriages could be a statutory basis for immigration benefits in the absence of DOMA, although there is some (dated) precedent to the contrary. See Adams v. Howerton, 673 F.2d 1036, 1040–41 (9th Cir. 1982) (holding that immigration law's reference to "spouses" did not include same-sex partners).

[72] Julia Preston, Confusion Over Policy on Married Gay Immigrants, N.Y. Times, Mar. 30, 2011, at A14.

[73] For a particularly striking example, see Josh Kron, Pulling Out All the Stops to Push an Anti-Gay Bill, N.Y. Times, Apr. 14, 2011, at A12.

[74] The Obama administration's position on this question has been erratic. See Julia Preston, Justice Department to Continue Policy Against Same-Sex Marriage, N.Y. Times, May 9, 2011, at A15 (noting that two deportation proceedings had been stayed, but that "deportations could continue in other immigration cases involving married gay couples").

[75] Julia Preston, U.S. Issues New Deportation Policy's First Reprieves, N.Y. Times, Aug. 23, 2011, at A15. It appears the relief same-sex couples receive under this policy is not a consequence of executive disregard of DOMA § 3.

A dispersed and varied group of persons is thus directly burdened by continued enforcement of DOMA Section 3.[76] It is unlikely all will challenge the law's continued enforcement. In one domain—DOMA Section 3's application to personal income tax filings—equality rights campaigners have attempted to mount a campaign nudging individuals toward noncompliance.[77] This might be understood as an effort to multiply the cases in which the government is forced to mount a litigation defense to the point where any executive branch distinction between enforcement and litigation defense collapses. But there is no indication the effort has succeeded. Perhaps litigation-related costs for individuals to defend against additional tax assessments outweigh any financial or expressive gains from noncompliance. It is more likely that in the lion's share of cases, DOMA Section 3 will be enforced but never litigated.

In explaining the executive's decision to enforce but not defend, Attorney General Holder could have made three other arguments that turned on the unique particulars of DOMA Section 3 and not on any general view of enforcement-litigation gaps. These arguments are worth setting out, although each of them fails for distinctive reasons.

First, Holder might have argued that sudden nonenforcement of a thousand-plus provisions affected by DOMA Section 3 would have imposed unacceptable transition costs. But the government has dealt successfully with similar transition problems in addressing gender-related equal protection rules that the Court began elaborating in the 1970s. In any case, it is also hard to see why the transition costs would be less if the same result were to be imposed by judicial fiat.

[76] See, e.g., Dorothy Samuels, Charlie Morgan's Battle, N.Y. Times, Dec. 30, 2011, at A22 (describing case of a married army officer whose same-sex partner "is denied health coverage worth well in excess of $10,000 a year [and] cannot get a base pass that would let her . . . escort their 4½-year-old daughter to medical appointments on base").

[77] Under the slogan "Refuse to Lie," the campaign urged taxpayers in 2011 to report their same-sex marriage on their federal tax forms. See IRS Tells Married Couples to File as Single, available at http://refusetolie.org/ (last visited July 19, 2012). The campaign website cautions, however, that married gay couples who underpay taxes by filing jointly rather than separately are at risk of penalties for doing so.

Second, Holder might have argued that since the relevant Equal Protection law was unsettled, it was appropriate to defer to other branches' judgments on informational and comity-related grounds. Uncertainty about the constitutional rule, as I explore further in Part III, cannot always justify bifurcation of enforcement and litigation defense. It suffices here to observe that such uncertainty is ubiquitous. Many legal rules are unsettled and yet must be enforced by a state actor. Uncertainty on the ground is also endogenous to the executive's legal positions. That is, the Equal Protection argument Holder elaborated may not have been even credible as a litigation position until a government lawyer (rather than, say, an academic) had made it. It is mere bootstrapping to use that kind of endogenously generated uncertainty to justify resort to an enforcement-litigation gap. And the principle of interbranch comity alone cannot explain why some laws should not be enforced, but others remain in effect but undefended. The executive must decide when to stand behind a law, and mere uncertainty cannot be sufficient to dissuade it from doing so if the government is to continue operating.

Finally, Holder might have observed that Article I of the Constitution prohibits the drawing of funds except "in Consequence of Appropriations made by Law."[78] Congress has reinforced this rule through the Anti-Deficiency Act, which imposes criminal penalties of up to two years' imprisonment and $5,000 in fines upon federal officials engaging in the knowing expenditure of funds absent a legislative appropriation.[79] Holder might have argued that a decision to cast DOMA Section 3 aside and extend benefits to same-sex spouses of a federal employee in *some* cases would have violated the Appropriations Clause and the Anti-Deficiency Act. In one of the two cases that prompted the enforcement-litigation gap, for example, plaintiffs sought additional benefits payment based on their marriage to federal employees, which could conceivably implicate an appropriations issue.[80]

But even when plaintiffs seek payment of new benefits, the possibility of a conflict between nonenforcement of DOMA Section 3

[78] U.S. Const. art. I, § 9, cl. 7.
[79] 31 U.S.C. §§ 1341(a), 1350 (2006).
[80] I am grateful to Mark Tushnet for pressing this point.

and either the Appropriations Clause or the Anti-Deficiency Act is vanishingly small. Since at least the New Deal, appropriations legislation typically has been drawn up in terms of agency-specific lump-sums that range from the millions to the hundreds of millions of dollars.[81] Congress long ago abandoned any effort to manage administrative agencies' budgets at the level of individual employees. Agencies hence have considerable fiscal discretion absent Congress's use of an earmark. Recent empirical work suggests the White House also exercises considerable post-legislative control of fiscal flows.[82] Tellingly, the Office of Management and Budget ("OMB") instructs agency heads that they avoid liability under the Anti-Deficiency Act provided they do not disburse funds (a) before an appropriation is made; (b) in excess of annual appropriations for an agency; or (c) in the absence of any cash remaining in the appropriation account.[83] Within the bounds of a currently funded annual appropriation account, by contrast, an agency exercises broad discretion. Provided aggregate appropriations do not rise beyond stipulated agency budgets, there is typically no reason for Congress to object to nonenforcement of DOMA Section 3 on appropriations-related grounds.[84] Any concern about compliance with the Appropriations Clause is more theoretical than real given current budgeting structures and the broad discretion wielded by the OMB and line agencies.

[81] See Kate Stith, Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings, 76 Calif. L. Rev. 593, 611 (1988) (noting that "appropriations legislation has generally contained less line-item detail than it did in the preceding 150 years [and] appropriations acts fund each broadly defined federal program or activity in one lump sum, termed a budget 'account'"). The use of lump-sum appropriations remains the norm in current and pending appropriations measures. See, e.g., An Act Making Appropriations for the Department of Defense and the Other Departments and Agencies of the Government for the Fiscal Year Ending September 30, 2011, and for Other Purposes, H.R. 1, 112th Cong. (1st Sess. 2011), available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr1eh/pdf/BILLS-112hr1eh.pdf.

[82] See Christopher R. Berry, Barry C. Burden & William G. Howell, The President and the Distribution of Federal Spending, 104 Am. Pol. Sci. Rev. 783, 786 (2010).

[83] Office of Mgmt. & Budget, Executive Office of the President, OMB Circular A-11, § 15—Basic Budget Laws, at 3, available at http://www.whitehouse.gov/sites/default/files/omb/assets/a11_current_year/s15.pdf.

[84] Section 304 of the Urgent Deficiency Appropriations Act of 1943, by contrast, would have presented the conflict acutely. See 57 Stat. 431, 450 (1943).

*5. Summary*

Even if enforcement-litigation gaps are not seen frequently, they are not as rare as past scholarly inattention might make them seem. Their practical effects are also varied and unpredictable. In *Lovett* and some DOMA Section 3 contexts, the administration withholds funds it would otherwise disburse. DOMA Section 3, like the legislative veto, can also lead to the denial (or grant) of a nonfinancial immigration benefit. In yet other cases, including the Dornan Amendment, enforcement without litigation defense can lead to the discharge of federal employees. The possible consequences falling out of enforcement-litigation gaps are thus heterogeneous. As a result, it is hazardous to draw general inferences based on the downstream effects of one example, such as the DOMA Section 3 decision.

### *C. The Defense of Federal Laws After Enforcement-Litigation Gaps*

The fact of an enforcement-litigation gap does not entail that a federal law will go undefended. Federal statutes allow either House of Congress to step in to defend a law.[85] With some frequency, Congress does exercise its option to defend federal statutes.[86] In the case of DOMA Section 3, for example, the House of Representatives stepped forward to defend the statute, acting

[85] There are two parts to this proposition. First, the "United States" is permitted to "intervene for presentation of evidence . . . and for arguments on the question of constitutionality" if a federal law is challenged on constitutional grounds. 28 U.S.C. § 2403(a) (2006). Second, both the House and the Senate may, under current law, field legal representation to that end. See 2 U.S.C. §§ 288c(a), 288e(a) (2006) (authorizing Office of Senate Legal Counsel to intervene in suits in which the constitutional powers and responsibilities of Congress are placed in issue); R. II.8, Rules of the House of Representatives, 112th Cong. (2011), at 3, available at http://rules.house.gov/Media/file/PDF_112_1/legislativetext/112th%20Rules%20Pamphlet.pdf (establishing "an Office of General Counsel for the purpose of providing legal assistance and representation to the House"). There are examples of congressional representation at all levels of the federal judicial hierarchy. See, e.g., Raines v. Byrd, 521 U.S. 811, 818, n.2 (1997); Japan Whaling Ass'n v. Am. Cetacean Soc'y, 478 U.S. 221, 223 (1986); In re Grand Jury Subpoenas, 571 F.3d 1200, 1203 (D.C. Cir. 2009) (Kavanaugh, J., concurring); In re Search of the Rayburn House Office Bldg., 432 F. Supp. 2d 100, 104–05 (D.D.C. 2006), rev'd sub nom, United States v. Rayburn House Office Bldg., 497 F.3d 654 (D.C. Cir. 2007).

[86] See, e.g., 2 U.S.C. § 288h (2006) (requiring the Senate Legal Counsel to "defend vigorously" the constitutionality of all federal legislation).

through its Bipartisan Legal Advisory Group and hiring private counsel.[87] This is hardly anomalous. One recent empirical study finds that members of Congress participated as amici in an average of seven percent of those cases litigated in the Rehnquist Court that resulted in full opinions.[88]

It is not clear what would happen if neither House stepped forward to defend a federal statute because, for example, intralegislative disputes or capacity constraints precluded Congress from furnishing substitute representation. A federal court might dismiss the case on Article III grounds.[89] While this would leave plaintiffs in the odd situation of alleging an otherwise justiciable rights violation but deprived of a day in court by a defendant's inaction, it would not be wholly unprecedented. In a 1980 challenge to a law that prohibited publicly funded radio stations from editorializing, where the Federal Communications Commission ("FCC") "represented that it would seek to impose only the most minimal sanction" but otherwise "will not enforce the statute," the district court dismissed the case as unripe, leaving plaintiffs without a remedy at least at that moment in time.[90] Alternatively, a court seeking to

[87] See Unopposed Motion of the Bipartisan Legal Advisory Group of the U.S. House of Representatives to Intervene for a Limited Purpose, Windsor v. United States, No. 1:10-cv-8435 (S.D.N.Y. Nov. 9, 2010), available at http://sblog.s3.amazonaws.com/wp-content/uploads/2011/04/House-intervene-mtn-Windsor-4-18-11.pdf; Jennifer Steinhauer, House Republicans Step in to Defend Marriage Act and Dodge a Party Debate, N.Y. Times, Mar. 5, 2011, at A16. Some Senators lodged individualized objections, see Letter from Sen. Kirsten Gillibrand to Rep. John Boehner, Speaker of the House of Representatives (Mar. 2, 2011), available at http://gillibrand.senate.gov/newsroom/press/release/gillibrand-to-house-gop-dont-spend-taxpayer-money-defending-unconstitutional-doma-law.

[88] Judithanne Scourfield McLauchlan, Congressional Participation as Amicus Curiae Before the U.S. Supreme Court 34 (2005). One recent commentator takes the position that this reflects a suboptimal level of congressional participation in constitutional litigation. See Amanda Frost, Congress in Court, 59 UCLA L. Rev. 914, 919 (2012) (proposing that "Congress take a more active role in federal litigation, both to provide the courts with the legislative perspective on interpretive questions and to counter executive influence").

[89] To establish Article III jurisdiction, "the opposing party . . . must have an ongoing interest in the dispute, so that the case features 'the concrete adverseness which sharpens the presentation of issues.'" Camreta v. Greene, 131 S. Ct. 2020, 2023–24 (2011) (quoting City of L.A. v. Lyons, 461 U.S. 95, 101 (1983)).

[90] League of Women Voters v. FCC, 489 F. Supp. 517, 519–21 (C.D. Cal. 1980) (noting that the executive declined to defend section of Corporation for Public Broadcasting Act restricting editorializing and political endorsement of public broadcast licensees).

avoid that outcome might in effect grant a default judgment to plaintiffs and issue an order with no collateral estoppel effect.[91] Or the absence of other counsel to defend a law may suggest that the Justice Department is under a greater obligation to present arguments in favor of a law's constitutionality to the federal courts, even if, in so doing, it signals its concern that these arguments are ultimately inadequate.[92]

The procedural issues presented by this scenario, while important, remain unexplored to this day.[93] And it is arguable that they are unlikely to ever arise frequently enough to merit scholarly attention. If both political branches agree that a law is not worth de-

[91] Cf. United States v. Mendoza, 464 U.S. 154, 162 (1984) (holding that nonmutual offensive collateral estoppel "simply does not apply against the government").

[92] For an example from a case concerning the compensation of federal judges, see Brief for the United States at 28, Miles v. Graham, 268 U.S. 501 (1925) (No. 53) ("The Solicitor General takes no satisfaction in presenting this argument for the consideration of the court. . . . As able counsel have and will argue the invalidity of the tax, it is fair to Congress—and, indeed, it is fair to this court—that the other view of constitutional power should be fully and fairly presented, and this I have endeavored to do.").

[93] A variant of the problem arose respecting the litigation challenging California's Proposition 8 on same-sex marriage. The question there is once the state had declined to defend the state rule on appeal from a district court judgment invalidating Proposition 8, whether an official proponent of the voter-approved initiative, which had intervener status at the district court level, has standing to appeal the district court's decision when the state officials decline to do so. Cf. Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997) (parties must have necessary stake not only at the inception of litigation, but throughout its course). The Ninth Circuit held that in order to have standing, the proponents had to have either particularized interests or the state-law authority to defend the constitutionality of the initiative. See Perry v. Schwarzenegger, 628 F.3d 1191, 1195 (9th Cir. 2011). On January 4, 2011, the Ninth Circuit certified a question to the California Supreme Court, asking whether under California law, the proponent would have either particularized interest or authority to defend the constitutionality of the initiative under state law. See id. at 1193 (order certifying a question to the Supreme Court of California) (asking the California Supreme Court to determine "[w]hether under Article II, Section 8 of the California Constitution, or otherwise under California law, the official proponents of an initiative measure possess either a particularized interest in the initiative's validity or the authority to assert the State's interest in the initiative's validity, which would enable them to defend the constitutionality of the initiative upon its adoption or appeal a judgment invalidating the initiative, when the public officials charged with that duty refuse to do so"). The California Supreme Court upheld the intervenors' legal interest in the suit. See Perry v. Brown, 265 P.3d 1002, 1005–06 (Cal. 2011). On February 7, 2012, the Ninth Circuit confirmed that ballot proponents had standing to challenge the law, and ruled on the merits of the challenge. Perry v. Brown, 671 F.3d 1052, 1074–75, 1096 (9th Cir. 2012).

fending, there may be good reason its constitutionality is never hashed out in court.

### *D. Other Bifurcated Approaches to Constitutional Interpretation in the Executive*

Enforcement-litigation gaps can be distinguished from two other ways in which inconsistencies between deeds and legal words might arise within the executive branch: agency nonacquiescence and interagency disputes. These are both examples of "administrative constitutionalism": legal practices developed within agencies and departments to execute specific statutory mandates within constitutional constraints.[94] As this Section explains, neither presents the same legal or practical issues as enforcement-litigation gaps.

First, "agency nonacquiescence" entails "selective refusal of administrative agencies to conduct their internal proceedings consistently with adverse rulings of the courts of appeals."[95] The practice takes three forms: a refusal to follow circuit precedent *not* applicable in the circuit in which the agency action will be reviewed; a refusal to follow circuit precedent that *is* applicable in the circuit in which the agency action will be reviewed; and a refusal to follow circuit precedent in circumstances where the agency has a choice of venues that *both* do and do not apply the relevant precedent.[96] The second case is perhaps the most interesting since it presents the clearest example of a tension between judicial instructions and executive practice.[97] While this second case presents a clear bifurcation between law as understood by the courts and executive practice, it does not involve a split within the executive branch's own practice.

Second, the executive is comprised of multiple departments and agencies. Sometimes different elements take different positions on

[94] William N. Eskridge, Jr. & John Ferejohn, A Republic of Statutes: The New American Constitution 32–33 (2010).

[95] Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 681 (1989).

[96] Id. at 683.

[97] Id. at 749–50 (arguing that with intracircuit nonacquiescence, "[a] litigant's ability to obtain the benefit of the case law of the reviewing court of appeals will depend on whether he has sufficient resources to pursue an appeal to the federal courts"). Agencies are not subject to nonmutual offensive collateral estoppel. United States v. Mendoza, 464 U.S. 154, 159–63 (1984).

a constitutional question. Disputes may arise for example between the Department of Justice, which takes positions favored by the Attorney General and the President, and a line agency responsible for implementing a statute.[98] The result is interagency contestation about the constitutionality of a law or proposed regulatory action. Policy differences arise because subject-matter-specific agencies often have preferences that diverge from those of elected officials. In cultivating expertise necessary for their roles, for instance, the agency's staff may develop commitments to their agency's mission.[99] In some cases, this variance in preferences has a constitutional dimension and plays out in federal court.[100] One part of the federal government will file a brief at odds with the position taken by another.[101] The result is not quite an enforcement-litigation gap, since there is a lawyer for the agency appearing in court and defending the policy being implemented on the ground. But there is bifurcation in the sense that at least one element of the federal government is publicly taking the position that what another element of the government is doing, or seeks to do, violates the Constitution.

Three recent examples of intragovernmental disputes in the Supreme Court are the landmark campaign finance case *Buckley v. Valeo*,[102] the affirmative action case *Metro Broadcasting, Inc. v. FCC*,[103] and the challenge to the independent counsel position in *Morrison v. Olson*.[104] In *Buckley*, the Attorney General filed two briefs. One largely supported the Federal Election Commission's

[98] Intrabranch disputes of this kind are not rendered nonjusticiable simply because the President has some residuum of ultimate control over both adverse parties. See United States v. ICC, 337 U.S. 426, 430–31 (1949).

[99] See Sean Gailmard & John W. Patty, Slackers and Zealots: Civil Service, Policy Discretion, and Bureaucratic Expertise, 51 Am. J. Pol. Sci. 873, 874, 886 (2007). Agencies will also attract those with preferences aligned with the agencies' mission.

[100] See, e.g., Sophia Z. Lee, Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present, 96 Va. L. Rev. 799, 811–18 (2010) (describing how FCC lawyers aggressively read the "state action" doctrine to pursue substantive policy goals).

[101] This possibility is sharply presented when Congress has granted an agency authority to determine its own litigation positions. Michael Herz, United States v. United States: When can the Federal Government Sue Itself?, 32 Wm. & Mary L. Rev. 893, 947 (1991).

[102] 424 U.S. 1 (1976) (per curiam).

[103] 497 U.S. 547 (1990).

[104] 487 U.S. 654 (1988).

("FEC") defense of the 1971 Federal Election Campaign Act.[105] The other challenged the enforcement and rule-making powers of the FEC on separation of powers grounds.[106] In *Metro Broadcasting*, while the FCC filed a brief defending the statutory preference for minority-controlled firms in the context of a distress sale policy, the Solicitor General lodged a brief arguing that the FCC's action "violates the equal protection component of the Fifth Amendment."[107] And in *Morrison v. Olson*, independent counsel defended the Ethics in Government Act,[108] while the Justice Department filed a brief in support of the law's challenger.[109] These are not the only times internal dissent has bubbled over into manifest disagreement in court filings. In the challenge to racial segregation in the District of Columbia's schools, the Department of Justice took

[105] Pub. L. No. 92-225, 86 Stat. 3 (1972) (codified as amended at 2 U.S.C. §§ 431–55 (2006)).

[106] Compare Brief for the Attorney General and the Federal Election Commission at 1 n.1, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), with Brief for the Attorney General at 116–19, *Buckley*, 424 U.S. 1 (Nos. 75-436, 75-437), *reprinted in* 84 Landmark Briefs and Arguments of the Supreme Court of the United States 514–17 (Philip B. Kurland & Gerhard Casper eds., 2001). Consider, by contrast, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), where the Department of the Interior had told the Tennessee Valley Authority ("TVA") that the TVA construction project would violate the Endangered Species Act of 1973 if completed. When the TVA pressed ahead, private citizens challenged the decision under the Endangered Species Act. Before the Supreme Court, the Solicitor General represented the TVA, and took a position at odds with the Department of the Interior's construction of the Endangered Species Act. See Brief for the Petitioner at 54, *TVA*, 437 U.S. 153 (1978) (No. 76-1701) (including an appendix of the views of the Secretary of the Interior). Note that this is a case of an intrabranch dispute about the meaning of a statute, not about a constitutional question.

[107] Brief for the United States as Amicus Curiae Supporting Petitioner at 8, *Metro Broad.*, 497 U.S. 547 (1990) (No. 89-453); cf. Brief for FCC at 21−38, Astroline Commc'ns Co. v. Shurberg Broad. of Hartford, Inc., 497 U.S. 547 (1990) (in a consolidated case, defending use of racial preferences in FCC's distress sale policy).

[108] Pub. L. No. 95-521, 92 Stat. 1824 (1978) (codified as amended in scattered sections of 2 U.S.C., 5 U.S.C., and 28 U.S.C.)

[109] Compare Brief for Appellant at 13–14, *Morrison*, 487 U.S. 654 (1988) (No. 87-1279), with Brief for the United States as Amicus Curiae Supporting Appellees at 16−29, *Morrison*, 487 U.S. 654 (No. 87-1279); see also Letter from William French Smith, Attorney Gen., U.S. Dep't of Justice, to Michael Davidson, Senate Legal Counsel, U.S. Senate (Apr. 17, 1981), *reprinted in* Special Prosecutor Provisions of Ethics in Government Act of 1978: Hearings Before the Subcomm. on Oversight of Gov't Mgmt. of the Senate Comm. on Governmental Affairs, 97th Cong., 1st Sess. 249−50 (1981) (questioning the constitutionality of the special prosecutor provisions of the Ethics in Government Act).

a different constitutional position from the District's Corporation Counsel. The latter defended school segregation on originalist grounds,[110] while the Justice Department took an uncompromising posture against segregation.[111]

In both interagency disputes and nonacquiescence, at least one federal actor is taking a position in litigation that is consistent with the actions of the federal government. This distinguishes them from enforcement-litigation gaps. Both practices may raise important questions of public law, but those questions are distinct from the focus of this Article.

## II. ENFORCEMENT-LITIGATION GAPS THROUGH A CONSTITUTIONAL LENS

This Part addresses the threshold question whether constitutional first principles concerning the separation of powers generate an appropriate stance toward enforcement-litigation gaps. I examine and reject two possible answers: that there is no executive power of independent constitutional interpretation, and that the executive has plenary authority to interpret the Constitution independent of other branches.

### *A. Defining Departmentalism*

Enforcement-litigation gaps are a form of departmentalism: the exercise of independent constitutional judgment by a political

[110] Brief for Respondents at 6–7, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 8). At the time, the federal government had delegated certain powers to the District's counsel, but also retained broad override authority. See District of Columbia v. John R. Thompson Co., 346 U.S. 100, 104–10 (1953) (describing historical evolution of D.C. governmental powers).

[111] The Solicitor General filed a consolidated brief in *Brown v. Board of Education* and *Bolling v. Sharpe*. See Brief for the United States as Amicus Curiae, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (Nos. 8, 101, 191, 413, 448). On the District of Columbia case, Attorney General James P. McGranery cautioned that the case arose without discovery on the basis of threshold pleadings, making resolution of factual questions about equal protection difficult to resolve. Id. at 14. The Attorney General nevertheless recommended that the Court apply a clear statement rule to the relevant statutes to hold that "Congress *assumed* the existence of a system of segregated schools in the District of Columbia, but did not make it mandatory . . . ." Id. at 15 (emphasis added). The Court would then issue a declaratory judgment to that effect and the District's Board of Education "would then be free" to desegregate. Id. at 16.

branch.[112] Executive branch departmentalism takes many forms. Before a bill reaches the President's desk, lawyers at the Justice Department's Office of Legal Counsel scrutinize its text for constitutional problems.[113] The President may veto a bill on constitutional grounds, or he may sign it into law and promulgate a statement identifying its constitutional infirmities.[114] The President's broad regulatory control over federal prosecutorial decisions also includes power to abandon prosecutions midstream on constitutional grounds.[115] President Jefferson, for example, ordered district attorneys to enter *nolle prosequies* in Sedition Act prosecutions ongoing at the time he entered office.[116] The pardon power can also be applied on constitutional grounds even if a previous criminal trial seemingly resolved those grounds against a defendant.[117] Departmentalism's effect varies from case to case. Sometimes, it means no law is enacted. Other times, exercise of independent constitutional review authority means the executive "decline[s] to enforce a clearly unconstitutional law."[118] On yet other occasions, it is merely hortatory.

[112] See, e.g., Lawson & Moore, supra note 16, at 1270–71 (establishing "a prima facie case for a power of independent presidential review" based on the text of Article II that is sensitive to, but not bound by, other branches' views on the Constitution). Departmentalism can be defined as the "responsibility [of each branch] for determining the constitutionality of actions by other departments affecting its own operation" and the "constitutional right—or perhaps even a duty—[of each branch] to act on its own best interpretation of the Constitution, no matter what the other branches have said." Mark Tushnet, Alternative Forms of Judicial Review, 101 Mich. L. Rev. 2781, 2782 (2003).

[113] See 28 C.F.R. § 0.25(a) (2011) (assigning the Office of Legal Counsel ("OLC") duties of preparing formal and informal opinions and giving legal advice to governmental agencies); see also Mark Tushnet, Essay, Non-Judicial Review, 40 Harv. J. on Legis. 453, 468–79 (2003) (describing practice of "reasonably disinterested" OLC review based on interviews with serving Justice Department staff).

[114] The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 131 (1993) (concluding that a signing statement can be aimed at "informing Congress and the public that the Executive believes that a particular provision would be unconstitutional").

[115] See Saikrishna Prakash, The Chief Prosecutor, 73 Geo. Wash. L. Rev. 521, 527 (2005).

[116] Prakash, The Executive's Duty, supra note 16, at 1665.

[117] On the historical breadth of the pardon power, see Margaret Colgate Love, The Twilight of the Pardon Power, 100 J. Crim. L. & Criminology 1169, 1172–87 (2010).

[118] The Legal Significance of Presidential Signing Statements, supra note 114, at 133. For an early invocation of this authority, see Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 469–70 (1860) (asserting nonenforcement power respecting a purportedly

There is robust debate about whether the executive has independent interpretive authority.[119] That debate is polarized between those who suggest that any exercise of independent constitutional judgment by the executive raises constitutional concerns,[120] and those who argue for broad presidential power to interpret the Constitution more or less independent of other branches' views.[121] Both positions conduce to categorical judgments about enforcement-litigation gaps.

There are two reasons for resisting categorical positions; I pursue only one here. First, such claims often rest on controversial premises about how constitutional meaning is derived. The argument that the executive has a duty to make independent judgments of constitutionality regardless of other branches' views, for example, is most artfully pitched on originalist grounds that are not universally credited.[122] It also makes strong assumptions about the existence of "right" answers in all constitutional cases. Although I find neither the originalist methodology nor the epistemic priors of such arguments wholly convincing, I bracket those issues—not every article, after all, can generate anew a correct theory of constitutional interpretation—and focus instead on the second more modest reason for rejecting any categorical assessments of departmentalism. That is, both an absolute bar and (in the alternative) an absolute permission for executive judgments of constitutionality are in sharp tension with engrained features of our Constitution.

unconstitutional statute). Noncompliance provided the context to *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), although the opinions in neither case address the legal merits of that strategy.

[119] See supra notes 13–17 and accompanying text.

[120] See, e.g., May, supra note 14, at 898 ("[T]he Framers rejected the notion that a President may refuse to honor those laws that he thinks are unconstitutional.").

[121] See, e.g., Devins & Prakash, supra note 17, at 511, 521–37; Prakash, The Executive's Duty, supra note 16, at 1629–31.

[122] See Devins & Prakash, supra note 17, at 521 (basing argument on "the text, structure, and early history of the Constitution"); see also Prakash, The Executive's Duty, supra note 16, at 1615–17. Another puzzling aspect of these pieces' approach, even given their controversial originalist approach, is their apparent unwillingness to deliberate on the possibility that officials may be uncertain as to the direction or force of a constitutional norm in a given case. Such uncertainty, even aside from consequentialist considerations to conduce to the sharing of interpretive power, may well warrant interbranch deference on constitutional matters even on an originalist view of constitutional meaning.

Without discarding much of the federal government's current political economy, neither can be sustained.[123]

### *B. The Inevitability of Weak Departmentalism*

Is it possible to reject categorically any form of executive branch departmentalism? The Ninth Circuit thought so and said so in a 1988 opinion. The court confronted an executive branch challenge to the 1984 Competition in Contracting Act ("CICA") on the ground that the Act granted the congressionally controlled Comptroller General an impermissible role in execution of the laws.[124] Upon the Act's passage into law, then-Attorney General William French Smith and then-Director of OMB David Stockman directed federal agencies not to comply with CICA.[125] In the course of assessing an award of attorney's fees and a finding that the government had acted in bad faith in violating CICA, the Ninth Circuit concluded that "the executive branch exceeded its constitutional authority in suspending the operation of" the law.[126] While the relevant part of the Ninth Circuit's panel opinion was later withdrawn on unrelated grounds,[127] it remains the clearest judicial statement of the position that the executive has no independent constitutional authority to defy federal laws. Following and amplifying the Ninth Circuit position, some elected officials have argued that the refusal to defend DOMA Section 3 in federal court could be a basis for President Obama's impeachment.[128]

The claim that independent constitutional judgment by the executive is impermissible cannot be squared with many widely accepted administrative and legal practices. To begin, it is inconsis-

[123] It is worth noting that strong departmentalist approaches would throw out much of our current institutional architecture—a fact that hints at the revolutionary and transformative aspirations of originalism. See, e.g., Devins & Prakash, supra note 17, at 522 ("Because the Constitution does not anoint an oracular institution with supreme authority over the Constitution's many Delphic phrases, the President may decide whether a law is constitutional, no less than the courts.").

[124] Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended at 31 U.S.C. §§ 3551–56 (2006)); see Lear Siegler, Inc. v. Lehman, 842 F.2d 1102, 1104–05 (9th Cir. 1988), rev'd and remanded, 893 F.2d 205 (9th Cir. 1989) (en banc).

[125] *Lear Siegler*, 842 F.2d at 1120.

[126] Id. at 1125.

[127] *Lear Siegler*, 893 F.2d at 207–08 (holding that Lear Siegler could not receive attorney's fees because it was not the prevailing party).

[128] See sources cited supra note 10.

tent with four "unproblematic" traditions of executive action: "pardons, vetoes, additions and proposals for legislation."[129] Exercise of each of these powers requires presidents to exercise independent judgment on constitutional matters. Even aside from these traditions, it is impossible for the executive to avoid all constitutional judgments without risking absurd results. Imagine a law requiring the President to arrest and execute named opposition politicians and providing that no court would have jurisdiction to entertain challenges to such action.[130] There is no serious argument that the President would have to follow this command. More mundanely, it is undesirable for executive branch officials to forego constitutional judgments when implementing statutory commands. Congress often crafts broad language anticipating that agencies will "specify through application" the meaning of the law.[131] This inevitably calls for consideration of policy objectives underlying a law. It would be passing odd for the executive to account for policy concerns but ignore constitutional concerns.[132] Equally in the criminal law context, U.S. Attorneys make many discrete, functionally unreviewable decisions with potential constitutional ramifications, from equal protection effects to fair trial consequences.[133] It seems perverse to say they should ignore the Constitution in such a context.

[129] Easterbrook, Presidential Review, supra note 16, at 906–07. "Additions" include presidential decisions to supplement the commands of a statute, for example by supplying additional procedural protections in the service of a right. Id. at 908.

[130] The example is modeled on Easterbrook, Presidential Review, supra note 16, at 922.

[131] John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 228, 258–60 (noting that "[m]uch legislation reflects the fruits of legislative compromise, and such compromises often lead to the articulation of broad policies for agencies and courts to specify through application").

[132] On the other hand, judicial shading of legislative text based on constitutional concerns has been criticized on the ground that it results in greater distortions of congressional intent than mere invalidations. Frederick Schauer, *Ashwander* Revisited, 1995 Sup. Ct. Rev. 71, 74 ("[I]t is by no means clear that a strained interpretation of a federal statute that avoids a constitutional question is any less a judicial intrusion than the judicial invalidation on constitutional grounds of a less strained interpretation of the same statute.").

[133] For an exploration of this point respecting prosecutors, see Rachel E. Barkow, Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law, 61 Stan. L. Rev. 869, 874–87 (2009).

There is also a domain of cases in which no other governmental actor will consider the constitutional question. Here, it is the executive or nothing.[134] Since *Hayburn's Case* in 1792, it has been clear that the language in Article III of the Constitution imposes constraints on ex ante judicial settlement of legal questions.[135] Unless a law creates discrete and actionable downstream harms, those questions may never be answered by a court.[136] The "political question" doctrine also carves out large domains in which judicial settlement of a constitutional question will never be available,[137] even when judicially cognizable harms have occurred.[138] Aside from justiciability limits, institutional constraints on judicial fact-finding and the difficulties of fashioning stable agreement on multi-member benches[139] cap the utility of judicial review. As a result, many constitutional norms are "underenforced" in court.[140] Executive officials are often better positioned than federal judges to engage in delicate inquiries into factual circumstances and legislative motives. They are thus arguably better positioned to identify constitutionally problematic enactments.[141]

Finally, ordinary resource constraints counsel for judicious exercise of executive branch constitutional judgment. Adjudication is a

[134] See generally Trevor W. Morrison, Constitutional Alarmism, 124 Harv. L. Rev. 1688, 1694–97 (2011) [hereinafter Morrison, Constitutional Alarmism] (reviewing Bruce Ackerman, The Decline and Fall of the American Republic (2010)).

[135] Hayburn's Case, 2 U.S. (2 Dall.) 409 (1792).

[136] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992) (noting that the "irreducible constitutional minimum" of Article III standing analysis is that a favorable resolution of the plaintiff's claim will "likely" result in a concrete injury being "redressed").

[137] See Baker v. Carr, 369 U.S. 186, 211–17 (1962) (enumerating "formulations" of the political question doctrine).

[138] See, e.g., El-Shifa Pharm. Indus. Co. v. United States, 607 F.3d 836, 840–49 (D.C. Cir. 2010); Doe v. United States, 95 Fed. Cl. 546, 578–82 (2010).

[139] Multi-member courts are vulnerable to "cycling" and other deliberative pathologies that render the results of majority decisional procedures arguably arbitrary and unstable. See Frank H. Easterbrook, Ways of Criticizing the Court, 95 Harv. L. Rev. 802, 816–21 (1982).

[140] Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1213 (1978); see also Barron, supra note 22, at 68 (arguing that "not even the Court believes [judicial doctrine] represent[s] a comprehensive, and thus preclusive, rendering of the meaning of the Constitution").

[141] Barron, supra note 22, at 71; see also Meltzer, supra note 12, at 1191 (emphasizing broad range of circumstances in which the executive must take account of constitutional concerns).

costly good increasingly in demand.[142] Plea bargaining's rise is only the most notorious effort to allocate in an optimal fashion scarce adjudicative resources.[143] As the demand for adjudication rises, pressure to head off that growth by allowing the executive to exercise independent constitutional judgment will grow. Bureaucratic determinations of constitutional questions in the waning shadow of Article III adjudication may increasingly be the future of constitutional law. Given such scarcity, strong reliance on the federal courts as the source of final resolutions of constitutional meaning is therefore a problematic strategy for across-the-board resolution of constitutional questions.[144]

A contrary argument worth considering focuses upon the involvement of both Congress and the President in the lawmaking process.[145] Given that both branches have had an opportunity to influence laws' substance in the legislative process, perhaps the executive should not have a "second bite" at the apple. Yet this is an unsatisfying response. As an empirical matter, Congress enacts laws that undermine constitutional values with some frequency. At least since the Civil War, the rate of judicial invalidation of federal statutes has ticked persistently upward.[146] This suggests bicameralism and presentment do not prevent all unconstitutional enactments. Wholesale executive branch self-restraint is therefore undesirable. Nor is reliance on the veto power persuasive. Increasing use of omnibus legislation bundling together policy choices and "must-pass" appropriations blunts its efficacy.[147]

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[142] Cf. Richard A. Posner, The Federal Courts: Challenge and Reform 62–63 (2d ed. 1999) (charting increasing federal court caseload over the twentieth century).

[143] Compare Frank H. Easterbrook, Plea Bargaining as Compromise, 101 Yale L.J. 1969, 1975 (1992) (endorsing plea bargaining), with Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 464 (2004) (arguing that plea bargaining is structurally beset by distortions).

[144] See infra Section II.C.

[145] See U.S. Const. art. 1, § 7, cl. 2. Supermajorities in both houses can substitute for presidential involvement.

[146] See Aziz Z. Huq, When Was Judicial Self-Restraint?, 100 Calif. L. Rev. 579, 584–86 (2012) (charting historical path of judicial activism from 1800 to 2000).

[147] See Judith A. Best, Budgetary Breakdown and the Vitiation of the Veto, *in* The Fettered Presidency: Legal Constraints on the Executive Branch 119, 121–23 (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989) (arguing that the last-minute omnibus appropriations bill is virtually veto proof).

In sum, it would be both impossible and undesirable to eliminate all independent constitutional judgment on the executive's part. Administrations of both parties have long claimed authority to disregard some federal laws.[148] Creating the Solicitor General's office, Congress effectively affirmed the broad scope of executive branch legal discretion.[149] For all intents and purposes, therefore, weak-form departmentalism is an entrenched, durable fixture of American constitutional practice. Enforcement-litigation gaps cannot be rejected on the ground that independent executive judgment on constitutional matters is *never* acceptable.

### *C. The Impossibility of Strong-Form Departmentalism*

What then of the opposite position—that the executive branch should always implement an independent constitutional judgment without deference to either coordinate branch?[150] This strong-form departmentalist claim is also untenable. There are two problems with it. First, it is in tension with the "current widespread non-use" of an independent executive power of interpretation.[151] Second, strong-form departmentalism is not "incentive compatible" with the institutional arrangements created by the Constitution. Whatever its originalist pedigree, it is therefore unlikely to provide effective guidance on the ground.

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[148] Two recent clear statements were promulgated during Democratic administrations, but there is little question that the Republican administrations take the same approach. See Memorandum from Walter Dellinger, Attorney General, to the Hon. Abner J. Mikva, Counsel to the President, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994), 18 Op. O.L.C. 199 (1994), available at http://www.justice.gov/olc/nonexcut.htm [hereinafter Dellinger Memo]; The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. O.L.C. 55 (1980) [hereinafter Civiletti Memo]. For legal opinions from Republican Administrations, see Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–36 (1992); Issues Raised by Foreign Relations Authorization Bill, 14 Op. O.L.C. 37, 46–52 (1990). These instances must be distinguished from refusals to comply with statutory commands on nonconstitutional grounds. See Train v. City of New York, 420 U.S. 35, 44–46 (1975) (declining to find statutory authority to withhold spending via impoundment); cf. Fisher, supra note 43, at 133–34 (summarizing historical disputes about the impoundment power).

[149] 28 U.S.C. § 505 (2006) (requiring that the Solicitor General be "learned in the law").

[150] The claim is advanced by the sources cited supra note 16.

[151] Paulsen, *Merryman* Power, supra note 16, at 105–06.

As a threshold matter, history does not support the strong claim of independent presidential authority to interpret the Constitution in spite of other branches' interpretations. While there are historical instances aplenty of Presidents exercising constitutional judgment absent contrary direction from other branches, examples of presidential action based on independent constitutional judgments in the teeth of other branches' opposition are surprisingly few and far between.[152] In the early stages of the Civil War in 1861, for example, President Lincoln famously declined to obey Chief Judge Roger Taney's order in a habeas proceeding captioned *Ex parte Merryman*.[153] But Lincoln's subsequent defense of his 1861 actions to Congress was "labored" and "a bit muddled," hinting at his "sincere doubts about the policy."[154] Even in the medium term, Lincoln's faith waivered. He sought congressional authorization for subsequent suspensions of the Great Writ in the form of the March 3, 1863, Habeas Corpus Act.[155]

Lincoln's case, to be sure, is unusual because he did not merely exercise independent judgment, but also defied a federal court order. But other celebrated examples of strong-form departmentalism in action fare no better. In an April 1941 memorandum signed after the Lend-Lease Act's passage,[156] Franklin Delano Roosevelt stated that a provision of the Act authorizing Congress to curtail the powers delegated via a concurrent resolution was "unconstitutional, and [the presidential signature] may not be construed as a tacit acquiescence in any contrary view."[157] Roosevelt, unlike Lin-

[152] Cf. Henry P. Monaghan, The Protective Power of the Presidency, 93 Colum. L. Rev. 1, 29 (1993) ("Outright claims of 'executive Power' to disregard statutes are now seldom advanced before the senior judges."). The exercise of independent presidential judgment respecting a constitutional question in the absence of any information about other branches' views is not especially probative of the strength of strong departmentalist claims.

[153] 17 F. Cas. 144 (C.C.D. Md. 1861).

[154] Mark E. Neely, Jr., The Fate of Liberty: Abraham Lincoln and Civil Liberties 11–13 (1991). More robust was the Jacksonian defense offered by Lincoln's Attorney General Edward Bates. See 10 Op. Att'y Gen. 74, 76 (1861).

[155] Neely, supra note 154, at 68.

[156] See Act of Mar. 11, 1941, Pub. L. No. 77-11, 55 Stat. 31 (1941) (authorizing President to provide allies, including the United Kingdom, China, the Soviet Union, and France, with war-related supplies).

[157] Robert H. Jackson, A Presidential Legal Opinion, 66 Harv. L. Rev. 1353, 1358 (1953).

coln, never had occasion to act upon that independent judgment. More recently, the dispute over CICA generated another case in which executive branch officials took a robust view of executive interpretive authority but got a frosty welcome in the courts.[158]

This historical lacuna is not conclusive proof against the existence of plenary presidential interpretive authority. It might be that "current widespread non-use of [strong executive claims to interpretive autonomy] reflects not a deficiency in the argument for its existence but merely executive forbearance (or perhaps political reality or cowardice)."[159] But traditions and routinized governmental behavior count in filling gaps in the Constitution's meaning.[160] They are a staple of constitutional interpretation by both the executive and the courts.[161] The evidence suggests that Presidents do not frequently treat their view of the Constitution as a trump in the teeth of another branch's contrary judgment.

Second, this historical gap can be explained by observing that there is no "incentive-compatible" account of a presidential power of independent constitutional interpretation. To the contrary, the Constitution creates irresistible incentives to share interpretative authority such that efforts to impose a duty of executive interpretive independence are likely whistling in the wind.

An important and growing body of scholarship at the intersection of political science and law demonstrates that executive actors have "many" incentives to delegate the power of constitutional review to the federal courts, and then to defer to judicial resolutions

[158] See supra text accompanying notes 124–128.

[159] Paulsen, *Merryman* Power, supra note 16, at 105–06.

[160] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring) (stating that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on 'executive Power' vested in the President").

[161] Accord Raines v. Byrd, 521 U.S. 811, 826–28 (1997); see, e.g., Va. Office for Prot. & Advocacy v. Stewart, 131 S. Ct. 1632, 1641 (2011) ("Lack of historical precedent can indicate a constitutional infirmity . . . ."); OLC Best Practices Memo, supra note 26, at 2 ("Particularly where the question relates to the authorities of the President or other executive officers or the allocation of powers between the branches of the Government, precedent and historical practice are often of special relevance.").

of constitutional questions.[162] This literature suggests, in short, that judicial review has political foundations.[163] National political coalitions resort to the courts as tools of political change because the Constitution's architecture engenders several distinct incentives for them to do so. First, the Constitution makes lawmaking costly since at each stage of the Article I, Section 7 process a different *minority* can impede a law's passage. Absent pay-offs to each potential minority veto-wielder, legislation is unlikely to be a vehicle for policy change. The consequence of making legal change through Congress difficult and costly is to encourage politicians to seek alternative modalities of policy change.[164] That is, it is the Constitution itself that induces efforts to circumvent the legislative process through delegation or deference to the courts as vehicles for policy change.[165]

A second aspect of the Constitution's design that fosters incentives toward judicial policy making is "Our Federalism."[166] One of the most important innovations in the Constitution was the creation of an extended Republic through partial consolidation of the several states. This federal structure inexorably yields policy heterogeneity as people move between states seeking an attractive package of regulations and taxation.[167] A national political coalition will inevitably disagree with at least some state policies. Accord-

[162] Keith E. Whittington, Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in U.S. History 104 (2007) [hereinafter Whittington, Political Foundations].

[163] Id. at 120–21.

[164] See Keith Krehbiel, Pivotal Politics: A Theory of U.S. Lawmaking 34–39 (1998) (providing analysis of the effects of bicameralism and presentation on legal stability); Charles Stewart III, Analyzing Congress 364–65 (2001) (modeling effects of a three-fifths cloture rule); see also George Tsebelis, Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism, 25 Brit. J. Pol. Sci. 289, 293 (1995).

[165] The point has been most forcefully made respecting legislative incentives. See David Epstein & Sharyn O'Halloran, Delegating Powers: A Transaction Cost Approach to Policy-Making Under Separate Powers 197 (1999) (arguing that as complexity, difficulty, and enactment costs of legislative specification rise, legislators will tend more and more to delegate decisions rather than resolving hard questions themselves).

[166] Younger v. Harris, 401 U.S. 37, 44 (1971).

[167] See Jenna Bednar, The Robust Federation: Principles of Design 30–35 (2009) (explaining link between federalism and policy innovation). The canonical judicial citation is *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

ingly, it is predictable that national political coalitions will seek to flex political muscles by moving against regional policy outliers. Even as federalism induces policy change by creating circumstances in which it is almost inconceivable that a national political coalition cannot find some state policies they wish to reject, the separation of powers between the federal political branches stifles political change via the national legislative process. The combination of large demand and costly and constrained supply means that federal politicians will work furiously to find alternative ways to obtain policy goals. The result has been the long-standing embrace by federal politicians of judicial review to police the states.[168]

Amplifying that push, judicial review allows politicians to "reduce . . . political risk by seeking and obtaining the approval of another government branch" for a policy.[169] With judicial ratification of a policy, political actors signal that a given proposal is not merely the product of idiosyncratic preferences or interest-group capture. Courts' endorsement thereby "shield[s] individual legislators and the coalition as a whole from having to take clear positions on politically risky issues" while at the same time achieving desirable policy outcomes.[170]

In short, our constitutional system is inevitably characterized by a mix of weak-form departmentalism and judicial review. It is therefore not realistic to condemn or demand categorically independent constitutional judgment by the executive branch. More

[168] Judicial review has hence been used historically to invalidate state or local enactments that fell out of step with the political projects of national political coalitions in the early Republic, see Lucas A. Powe, Jr., The Supreme Court and the American Elite, 1789–2008, at 58 (2009) (summarizing Marshall Court jurisprudence as "nationalistic, circumscribing the states while untethering the federal government"), and in the civil rights era, see Kevin J. McMahon, Reconsidering Roosevelt on Race: How the Presidency Paved the Road to *Brown* 96–176 (2004) (describing how Roosevelt managed to steer the appointment of pro-civil rights judges through Congress and explaining that the "arguments and strategies that . . . laid the foundational precedent for later Supreme Court decisions constitutionally undercutting southern democracy and white supremacy" were first made by the Justice Department "in the course of prosecuting crimes"); accord Mark A. Graber, Constructing Judicial Review, 85 Ann. Rev. Pol. Sci. 425, 435 (2005).

[169] Jide O. Nzelibe & Matthew C. Stephenson, Complementary Constraints: Separation of Powers, Rational Voting, and Constitutional Design, 123 Harv. L. Rev. 617, 640 (2010). The model concerns the interaction of Presidents and Congress. The point, however, is generalizable.

[170] Whittington, Political Foundations, supra note 162, at 136.

tailored inquiry into specific forms of departmentalist practice such as enforcement-litigation gaps is instead needed.

## III. ASSESSING THE CONSEQUENCES OF ENFORCEMENT-LITIGATION GAPS

How then do enforcement-litigation gaps stack up as "constitutional constructions"? Are they a "realistic best practice"[171] that executive branch officials ought to deploy more frequently than they do at present? Or should the practice be discouraged, even marginalized, more than it is today? To reach a considered judgment on the practice of distinguishing enforcement from litigation positions, it is necessary to ask whether the practice—intrinsically and independently of the underlying law in question—has net harmful or beneficial consequences. Because the effects of distinguishing enforcement from litigation defense may be hard to untangle from the merits of a specific statute, it is also useful to frame the question in a rule-utilitarian spirit: how would a sustained practice of distinguishing enforcement from litigation decisions influence constitutionally salient policy outcomes?

This Part pursues that evaluation of enforcement-litigation gaps by considering the downstream positive and negative consequences of their routinized use. That quasi-rule-utilitarian framework provides a basis on which to determine what presumption a conscientious executive branch official should invoke when deciding whether to distinguish enforcement from a litigation position. My methodological assumption here is that the conscientious official will be guided by a kind of rough constitutional consequentialism, which takes account of what can loosely be called costs and benefits denominated in terms of policy goals enumerated in the Constitution.[172] The resulting presumption—which again, to be clear,

[171] Morrison, Stare Decisis, supra note 8, at 1456–57.

[172] That is, I assume that the text of the Constitution establishes certain goals, such as promoting democracy, maximizing liberty, and extinguishing tyranny, and then ask how the persistent use of enforcement-litigation gaps would contribute to such goals. The aim of the analysis is to capture the constitutionally salient effects of enforcement-litigation gaps independent of the substantive merits of the laws at stake. And my use of the terminology of cost-benefit analysis is not meant to introduce a welfarist perspective into the analysis. I do not, that is, assume that the Constitution's goal is simply to maximize social welfare.

might be displaced by the equities of a given case—reflects a judgment about how iterative recourse to enforcement-litigation gaps will, over either a short or long term, influence constitutional goals in either a desirable or negative way. It would operate as a "realistic best practice" default.

This analysis, aiming to identify executive branch best practice, is warranted because official federal policy respecting enforcement-litigation gaps is not at present crisply articulated. Department of Justice memoranda reflect considered views on the question whether to enforce all or some federal laws, but do not clearly speak to the question when to separate enforcement from defense decisions. The government clearly rejects Edward Corwin's view that the executive has an *obligation* to defend all federal statutes.[173] Rather, legal opinions from the Department of Justice stipulate a trigger for nonenforcement decisions.[174] But the same memoranda say little about decisions to *not defend* federal laws beyond vague, hortatory disclaimers that the Department usually defends federal laws in court.[175]

To be sure, the Department is consistently clear that it will take heightened care respecting the prerogatives of the executive under Article II of the Constitution.[176] It is also clear that the President

[173] See Edward S. Corwin, The President: Office and Powers, 1787–1957, at 66 (4th ed. 1957).

[174] See, e.g., Dellinger Memo, supra note 148, at 200 ("If . . . the President, exercising his independent judgment, determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute."). The Civiletti memo speaks of the duties of "defending and enforcing the Act of Congress," but does not explain precisely when those duties fall away. Civiletti Memo, supra note 148, at 55.

[175] Cf. Letter from Andrew Fois, Assistant Attorney General, to the Hon. Orrin G. Hatch (Mar. 22, 1996), *reprinted in* 1 J. L. (1 Pub. L. Misc.) 19, 28 (2011) ("There exist no formal guidelines that [government] officials consult in making [decisions to not defend laws]."); Seth P. Waxman, Defending Congress, 79 N.C. L. Rev. 1073, 1078 (2001) ("[T]he Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality. Unlike litigation decisions in other cases, when an Act of Congress has been challenged, the Solicitor General ordinarily puts a heavy thumb on the scale.").

[176] See Meltzer, supra note 12, at 1199 ("The strong tradition of defending acts of Congress . . . does not extend to separation-of-powers cases—at least not to those that involve a conflict between legislative and executive powers."). Both the Department of Justice's Office of Legal Counsel ("OLC") and the Solicitor General take the position that the executive branch has more latitude for active disapproval of congressional matters on structural constitutionalism grounds than on other questions of con-

has substantial control over Justice Department litigation positions.[177] But as to when it is acceptable to not defend a law there is silence.[178] Worse, currently available legal materials fail to supply a general framework for evaluating enforcement-litigation gaps.

It is important to flag at the threshold that the following analysis rests upon two further simplifying assumptions. First, I treat both the decision to enforce and the decision to defend a law as binary matters, not questions of degree. Within the executive, the degree to which a legal rule is enforced is often a function of many different factors, including the allocation of enforcement resources, the priorities of departmental chiefs, and the extent of political capital the President is willing to expend on that rule. With a few exceptions, it would be possible to treat enforcement of almost any federal law as a continuous variable rather than as a binary matter. Complicating matters further, it is possible to imagine a continuous measure of the executive's felt commitment to defending a law. For example, in the case of DOMA Section 3, the Justice Department might underscore its unconstitutionality in every case. Or it might simply decline to defend the law wholesale. Or it might decline to

stitutional law, such as the individual rights provisions of the Bill of Rights. See Dellinger Memo, supra note 148, at 201 ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Civiletti Memo, supra note 148, at 55–56 (accepting a duty to "defend and enforce the Acts of Congress" but cautioning that "if that equilibrium has already been placed in jeopardy by the Act of Congress itself" especially on separation of powers grounds, that duty falls away); see also The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 128 (1996) (noting that "the executive branch has an independent constitutional obligation to interpret and apply the Constitution," which is "of particular importance in the area of separation of powers"); Recommendation that the Dep't of Justice not Defend the Constitutionality of Certain Provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984, 8 Op. O.L.C. 183, 194–95 (1984) (describing an executive duty to enforce and defend except where a statute impinges on executive authority); The Attorney General's Duty to Defend and Enforce Constitutionally Objectionable Legislation, 43 Opp. Att'y Gen. 55, 57 (1980) (same). The same pattern holds for the Solicitor General. See Days, Solicitor General, supra note 32, at 79–81 (noting that "Solicitors General have always sided with the President in disputes over the constitutionality of congressional attempts to circumscribe presidential power. . . . [They] will not defend a statute . . . [they] determine[] . . . is patently unconstitutional").

[177] Stephen S. Meinhold & Steven A. Shull, Policy Congruence Between the President and the Solicitor General, 51 Pol. Res. Q. 527, 527 (1998).

[178] There is a vague reference to a duty to defend except in "exceptional circumstances" in one Department of Justice Opinion. Constitutionality of Legislation Establishing the Cost Accounting Standards Board, 4B Op. O.L.C. 697, 698 (1980).

defend the law only in those circuit courts of appeal in which sexuality-based classifications have been held to be subject to strict scrutiny—or, as it has done, in those circuits that might so hold. Treating enforcement and defense as continuous variables, however, would inject considerable complexity into the analysis. It would be necessary to generate a comprehensive taxonomy of potential instances of nonenforcement and nondefense, and to rank them in order of importance. The result would be an analytically intractable morass. Accordingly, I simplify and focus on the more tenable binary matter of whether or not the White House has directed that a law be enforced or defended.

Second, to claim that there are costs and benefits from a government practice such as enforcement-litigation gaps is to assume a baseline against which costs and benefits are measured. As a baseline, the government might enforce and defend, or instead it might do neither. Depending on what default posture the government takes, dividing enforcement from litigation might have different effects. To ground the following analysis, I take the officially stated practice of the Department of Justice, as explained above,[179] as my baseline. I thus assume that the executive enforces and defends a law unless the President "determines both that a provision would violate the Constitution and that it is probable that the Court would agree with him, the President has the authority to decline to execute the statute," and that the executive is more likely to take this position on Article II questions of executive branch authority.[180] In what follows, I will take care to note how this assumption interacts with identified costs and benefits, such that a cost or benefit is likely or unlikely to be observed in practice.

### *A. The Case Against Enforcement-Litigation Gaps*

To obtain a threshold sense of possible arguments against using enforcement-litigation gaps, consider a somewhat intuitive account of why the practice might strike some as problematic. Viewing the practice, a naïve observer might be struck that enforcement-litigation gaps require the government simultaneously to take two contrary and mutually exclusive attitudes to a question of constitu-

[179] See supra sources cited in note 176.
[180] See, e.g., Dellinger Memo, supra note 148, at 200.

tional law. That perception of dissonance may foster uncertainty about the status and stability of federal law—and a concern that the links that seem to bind those empowered with formal insignia of national authority are in fact illusory chains. The same prospect of government bifurcation may also trigger a concern that political actors are trying, so to speak, to have their cake and eat it too—clawing out the political benefits of hewing publicly to the Constitution in the courts, while eschewing the practical and political costs of really defying Congress. Hence, a chief executive tells some component of a party base that he is being faithful to the Constitution by declining to defend an unconstitutional law, even as continued enforcement of that law inflicts the very harms that the president has recognized as unconstitutional. The naïve nonlawyer might even be struck by a yet more cynical thought: Surely enforcement-litigation gaps are merely sops to the legal elite, who are comforted by the assurance that important public policy issues remain within the domain of the federal courts (and hence within the purview of their guild), while the White House recklessly and callously ignores those impacted by the putatively unconstitutional law. Our naïve observer might wonder whether the rule of law can be purchased so cheaply and on the backs of those who can least afford it.

This section aims to formalize these intuitive criticisms to enforcement-litigation gaps into two sets of general objections. It focuses on the fact that enforcement-litigation gaps are unusual insofar as they generate a perception of dissonant federal government practice. First, I identify a cluster of "expressive," or communicative, effects that may arise from the government's dissonant bifurcation of deed and word. The practice of distinguishing enforcement from litigation defense communicates to constitutional rights holders that their entitlements are less valuable, and hence imposes a demoralization cost and undermines trust in federal authority. Dissonance between deed and litigation position also exacerbates the deep credibility problem that has long been known to bedevil the enforcement of constitutional precommitments.[181] Second, I argue that the dissonance implicit in enforcement-litigation gaps blurs the lines of accountability for constitutional decisions so as to

[181] See infra text accompanying note 195.

distort public deliberation and promote undesirable misconceptions about how the Constitution is operationalized today. Specifically, the practice misleads the public about the political foundations of judicial review and fosters a flawed concern about countermajoritarian judicial action. Both sets of costs, I note, largely apply to enforcement-litigation gaps without regard to the underlying constitutional question or the baseline course of action the government would otherwise have taken. They are necessary costs of the dissonance that arises whenever the government splits a law's enforcement from its defense.

*1. The Expressive Effects of Enforcement-Litigation Gaps*

The first cost of bifurcation flows from the "expressive" effects of enforcing a law that the President or Attorney General has stated is unconstitutional. Expressive effects can arise from perceptions of government action when the public presumes that government officials "selec[t] actions that, against the background of social norms, express meanings appropriate to [their] purposes and goals."[182] Decisions by the agents of the state "not only bring about certain immediate material consequences but also express . . . values and attitudes."[183] A law or an action by an executive official can communicate to the public, for example, that the state has made a decision on "negative" and "inappropriate" grounds,[184] or alternatively on positive and appropriate ones. So defined, the concept of "expressive effects" can be criticized for its imprecision and manipulability. But empirical studies demonstrate that individuals routinely draw normative inferences from the behavior of state agents and that those inferences influence private decisions in consequential ways. For example, there is a large body of empirical literature showing that public compliance with the law and cooperation with law enforcement are products of normative

[182] Dan M. Kahan, What Do Alternative Sanctions Mean?, 63 U. Chi. L. Rev. 591, 597 (1996).

[183] Richard H. Pildes, Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism, 27 J. Legal Stud. 725, 726 (1998).

[184] Elizabeth S. Anderson & Richard H. Pildes, Expressive Theories of Law: A General Restatement, 148 U. Pa. L. Rev. 1503, 1527–30 (2000).

judgments by the public, and that these judgments in turn rest on normative evaluations of state actors' observed behavior.[185]

Enforcement-litigation gaps have two potentially significant expressive effects that may undermine public confidence in the Constitution. Such support is typically assumed to be valuable because diffuse public support is necessary for the maintenance of constitutional norms on the ground, especially given the Supreme Court's weak implementation authority and the inconstant incentives of the political branches to engage in constitutional enforcement.[186] The first negative effect relates to the expected value of a constitutional right and results in *demoralization and trust costs*. The second relates to public confidence in constitutional rules, which are more apt to be seen as worthless *parchment barriers*. Both of these costs arise because of the dissonant character of the enforcement-litigation gap, which requires officials to say one thing and do another. As a result, they largely arise without regard to whether the baseline of official conduct is defined as "enforce and defend" or "do not enforce or defend."

*a. Demoralization and Trust Costs*

As a threshold matter, a decision to enforce but not defend a constitutionally suspect law not only impacts those against whom the law is enforced but also has wider negative repercussions. A rational holder of a constitutional right sees an enforcement-litigation gap as an instance of the executive recognizing her entitlement *and nevertheless disregarding it*. She learns that even official recognition that a core constitutional right has been violated may not suffice to induce executive branch forbearance. At least when it comes to constitutional entitlements, talk appears cheap and action too costly for government officials. Even governmental recognition of a right, she realizes, will not suffice to ensure the right is honored on the ground. She therefore rationally discounts

[185] For a summary of this work, see Tom R. Tyler, Why People Obey the Law (2006).

[186] Barry Friedman, The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five, 112 Yale L.J. 153, 221 (2002) ("[M]any commentators made the point that judicial power ultimately depended upon popular acceptance."); see also Gregory A. Caldeira & James L. Gibson, The Etiology of Public Support for the Supreme Court, 36 Am. J. Pol. Sci. 635, 637 (1992).

the value of her constitutional entitlement. She thereby suffers a demoralization cost.[187] In this way, an enforcement-litigation gap may be accompanied by a potentially large set of externalities that sound in public confidence and support for the Constitution.

The Dornan Amendment illustrates how this diminution of constitutional faith may even induce undesirable behavioral changes.[188] Enforcement of the Dornan Amendment by the Clinton administration after a public statement about its unconstitutionality would likely have had a demoralizing effect on HIV-positive Americans.[189] The Dornan Amendment communicated that their contributions to maintaining the nation's security were irrelevant or would be discounted even by sympathetic officials. This in turn would discourage some citizens from acquiring skills or entering career paths in which they would contribute to national security. Or it might discourage those who already have relevant skills, such as linguistic capacities, from taking up public service.[190] From a social perspective, such demoralization may be undesirable.

These examples of demoralization costs take as a baseline the expectation of "neither defend nor endorse." But demoralization costs also arise when the baseline is "enforce and defend." That is, demoralization costs may arise when the executive declines to defend a law among the part of the public that believes the law to be

[187] See Frank I. Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165, 1214–15 (1967) (introducing the idea of demoralization costs with respect to owners when property is condemned, and others who believe as a consequence that their property is less secure).

[188] See supra Subsection I.B.3.

[189] Do public statements from the White House really impact the morale and confidence of interest groups in ways that matter in social welfare terms? Consider one response to President Obama's May 9, 2012, announcement that he personally supported same-sex marriage: "The president's role in this is really circumscribed. One interview doesn't make a difference. And then I watched the interview and the tears flooded. There is something about hearing your president affirm your humanity that you don't know what effect it has until you hear it." Andrew Sullivan on Obama's Support of Gay Marriage, All Things Considered (Nat'l Pub. Radio May 9, 2012), available at http://www.npr.org/2012/05/09/152367863/andrew-sullivan-on-obamas-support-of-gay-marriage.

[190] Cf. Dan Eggen, FBI Agents Still Lacking Arabic Skills, Wash. Post, Oct. 11, 2006, at A1, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/10/AR2006101001388.html (discussing the FBI's "continued struggle to attract employees who speak Arabic, Urdu, Farsi and other languages of the Middle East and South Asia").

constitutional and had expected the law to be enforced and defended.[191] Not only has the executive made an undesirable and erroneous policy choice from this perspective, it has done so in a suspect way by enforcing the law in a way that, from one perspective, seems to invite invalidation. The disappointed expectations of DOMA Section 3 supporters might be counted as an undesirable externality from the Obama administration's enforcement-litigation decisions.[192] It is true that this group would also have been disappointed had the government declared that it would neither enforce nor defend. But the manner in which a law is subtly undermined by executive nondefense may undermine public confidence in a fashion quite independent of the (likely limited) effects of nondefense.

Anticipating demoralization costs, executives may also engage in strategic mitigating behavior. This behavior may be undesirable to the extent it involves dissembling and misleading voters in order to vitiate subsequent political costs. For instance, it is possible to imagine that demoralization costs will not arise if rights holders' expectations of constitutional compliance are low from the start. This might well be said to be the case for DOMA Section 3. Same-sex couples and their supporters may have had such low expectations of the Obama administration before Attorney General Holder's February 2011 decision on DOMA Section 3 that no demoralization occurred. Harnessing this observation, a canny executive can always mitigate demoralization costs by signaling falsely to rights holders ex ante that it does not intend to recognize an entitlement. The putative rights holders adapt their preferences in light

[191] By contrast, Daniel Meltzer accurately points out "[t]he executive, if it refused to defend or enforce [DOMA § 3], would not be violating anyone's constitutional rights." Meltzer, supra note 12, at 1189. It is not clear that all relevant constitutional costs, however, are captured in a pure calculus of rights.

[192] To be sure, one might fairly question, from a normative perspective, whether being disappointed when others receive a benefit should be equated with learning that one's own constitutional rights are less valuable. That is, one might think that some kinds of demoralization costs should be weighted more heavily than others. I see no way to distinguish the positive and negative effects of an enforcement-litigation gap on supporters and detractors of a law without taking a view on the substantive merits of the law itself, which by stipulation is outside the bounds of the analysis. I also see little reason to expect that the effects upon supporters and detractors of a given law will simply wash out.

of this behavior.[193] Subsequent recognition in theory but not in fact may then be viewed as cause for celebration. The executive, in short, will manipulate its messaging in ways that reduce demoralization costs, but only by inflicting harm to the government's overall transparency and trustworthiness.[194]

The expressive costs of enforcement-litigation are not exhausted by disappointed expectations. A core element of an enforcement-litigation gap is the appearance of internal inconsistency between the government's deeds and its statements. There is a significant body of empirical research demonstrating that dissonant government action of this kind has a cost denominated in public trust, and even compliance with the law, without regard to the default position government would otherwise take. This research suggests that it is common for people to evaluate institutions, including governmental entities, not solely on the basis of the goods they produce, but also on the basis of whether they behave in a consistent, neutral fashion. "Neutrality means that decisionmakers are honest, impartial, and objective, and that they do not allow their own personal values and biases to enter into their decisionmaking calculus . . . ."[195] Negative evaluations generate distrust, and make it more difficult for the relevant institutions to elicit cooperation or compliance from individuals. Trust-based legitimacy is directly correlated to the cost and success of public action. Strikingly, this result is found in studies at the transnational level, at the national level (focusing on national political institutions), at the level of institutions that interact on a daily basis with people (such as police and local government), and even within complex organizations and bureaucracies. These findings suggest that governments, which are constantly striving to elicit cooperation and compliance with ordinary laws and constitutional rules, are well served avoiding practices that evince inconsistency and thereby engender distrust.

[193] Cf. Jon Elster, Sour Grapes: Studies in the Subversion of Rationality 109, 125–33 (1983) (defining "adaptive preferences").

[194] There is a possibility, however, that if presidents use enforcement-litigation gaps only to enable judicial resolution of constitutional questions, demoralization costs will not emerge. But there are distinct problems with justifying the practice as a means to enable judicial review. See infra Subsection III.A.1.b.

[195] Rebecca Hollander-Blumoff, The Psychology of Procedural Justice in the Federal Courts, 63 Hastings L.J. 127, 136 (2011).

The link between behavioral consistency and public trust in organizations is manifested in a surprisingly broad array of studies conducted at very different scales.[196] To begin at the largest scale, one leading global study of legitimacy and public trust in government finds that the "inclusive and respectful" character of states is the best predictor of states' political legitimacy.[197] This result is somewhat opaque—is there a definition of respectfulness shared from San Francisco to Xinjiang?—but more granular studies in the American context find trust to be a function of the "procedural justice" of state actors,[198] and in particular the "consistency" of official action.[199]

Theorists of state legitimacy suggest that people care about consistency because it provides them with important confirmatory information about within-group status.[200] That is, when there is uncertainty about status and belonging within an institution, manifestations of consistency can quiet such fairness-based concerns. The resulting linkage between behavioral consistency and positive attitudes toward an institution has been identified empirically in a variety of contexts. For example, a recent study of public attitudes toward the Supreme Court found that support for the rule of law is one of the best predictors of support for the courts.[201] Another empirical study conducted in the early 1990s similarly found that "judgments about the Court's neutrality are central to evaluations of the legitimacy of the Court's decisionmaking procedures."[202] Similarly, a series of studies of public attitudes toward po-

[196] Robert J. MacCoun, Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness, 1 Ann. Rev. L. & Soc. Sci. 171, 173 (2005) (noting that the link between procedural justice and legitimacy has been identified in "dozens of social, legal, and organizational contexts").

[197] See Bruce Gilley, The Right to Rule: How States Win and Lose Legitimacy 44 (2009).

[198] See Tyler, supra note 185, at 57–68 (demonstrating connection between legitimacy and compliance with the law).

[199] Id. at 120, 163–64 (emphasizing neutrality).

[200] See Tom R. Tyler & E. Allan Lind, A Relational Model of Authority in Groups, 25 Advances in Experimental Soc. Psychol. 115, 116–17, 124–37, 144–62 (1992).

[201] James L. Gibson & Gregory A. Caldeira, Citizens, Courts, and Confirmations: Positivity Theory and the Judgments of the American People 59 (2009) (reporting results of a multiple regression on loyalty to the U.S. Supreme Court).

[202] Tom R. Tyler & Gregory Mitchell, Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights, 43 Duke L.J. 703, 798 (1994).

lice similarly find consistency and fairness are central to maintaining trust and legitimacy.[203] One form of consistency that matters, and that has received extensive treatment in the literature, is the equal treatment of individuals regardless of race or ethnicity.[204] But the vast empirical literature on procedural justice is not limited to racial distinctions, and instead has investigated and identified the salience of several other forms of inconsistency and perceived unfairness in state action.[205] Finally, it is worth noting that even within an institution such as government, consistency matters. Recent research shows that even within organizations, "authorities and institutions that exercise[] authority fairly and that communicate[] sincere and benevolent intentions encourage[] their members to develop supportive dispositions"[206] that in net facilitate that organization's success.

These findings are of more than academic interest. Social theorists as far back as Max Weber have emphasized that states must generally rely on legitimacy, rather than coercion, to induce practical compliance with the laws.[207] For example, a series of studies of police efforts to elicit cooperation in counterterrorism policing ef-

[203] For surveys of these studies, see Tom R. Tyler & Jeffrey Fagan, Legitimacy and Cooperation: Why Do People Help the Police Fight Crime in Their Communities?, 6 Ohio St. J. Crim. L. 231, 270–71 (2008); Tom R. Tyler & Yuen J. Huo, Trust in the Law: Encouraging Public Cooperation with the Police and Courts (2002). For recent examples, see generally Jacinta M. Gau & Rod K. Brunson, Procedural Justice and Order Maintenance Policing: A Study of Inner-City Young Men's Perceptions of Police Legitimacy, 27 Just. Q. 255 (2010); Lyn Hinds, Youth, Police Legitimacy, and Informal Contact, 24 J. Police & Crim. Psychol. 10 (2009); Tom R. Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283 (2003).

[204] See generally Tom R. Tyler & Cheryl J. Wakslak, Profiling and Police Legitimacy: Procedural Justice, Attributions of Motive, and Acceptance of Police Authority, 42 Criminology 253, 260 (2004) (citing studies that examine the importance of race in police profiling and reactions to it).

[205] See, e.g., Tom R. Tyler, Social Justice: Outcome and Procedure, 35 Int'l J. Psychol. 117, 117–18 (2000) (emphasizing, inter alia, the rule of neutrality in eliciting legitimacy and trust).

[206] Tom R. Tyler, Why People Cooperate: The Role of Social Motivations 167 (2011).

[207] Max Weber, On Law in Economy and Society 336 (Max Rheinstein ed., Edward Shils & Max Rheinstein trans., 1954) (noting that "every domination . . . always has the strongest need of self-justification through appealing to the principles of legitimation"); id. at 341 (describing legitimacy as prestige resting on beliefs of members of a political community); accord Tom R. Tyler, Legitimacy and Criminal Justice: The Benefits of Self-Regulation, 7 Ohio St. J. Crim. L. 307, 309 (2009).

forts—something of potentially large social value—have demonstrated that the fairness and consistency of state action makes a significant difference to rates of cooperation among both minority groups and also members of the majority ethnic or religious population.[208] If consistency and fairness influence individual behaviors toward the state even in the high-stakes context of terrorism, it seems likely that in lower-stakes contexts, evaluations of legitimacy predicated on perceptions of consistency and fairness will have a large effect on willingness to cooperate or comply with the state.

These studies, to be sure, are not directly applicable to enforcement-litigation gaps, which have never been studied empirically because of their infrequency. But the studies are still suggestive. They point to the importance of consistency in official action as a condition precedent of public trust and support. They also suggest that incoherent action or inconsistent treatment damages public support for the state and its policies. Enforcement-litigation gaps are nothing if not exemplars of inconsistency, even invitations to cognitive dissonance. As such, it is plausible to expect that they will sap, albeit gradually and incrementally, important public support for the Constitution and the institutions tasked with defending it. This slow leakage of public support, even if it operates only at the margin, surely counts as a serious cost attendant to the use of enforcement-litigation gaps.

*b. The 'Parchment Barriers' Problem*

The second class of downstream expressive effects from enforcement-litigation gaps relates to the credibility of constitutional rules as constraints on government. This is the problem of parchment barriers: The dissonance necessarily embedded in enforcement-litigation gaps is a reminder that powerful political actors can choose when and if to heed supposedly entrenched constitutional rules. As James Madison famously observed, structural legal constraints on governmental conduct are mere "parchment barriers."[209]

[208] See, e.g., Aziz Z. Huq, Tom R. Tyler & Stephen J. Schulhofer, Why Does the Public Cooperate With Law Enforcement?: The Influence of the Purposes and Targets of Policing, 17 Psychol. Pub. Pol. & L. 419 (2011); Tom R. Tyler, Stephen Schulhofer & Aziz Z. Huq, Legitimacy and Deterrence Effects in Counterterrorism Policing: A Study of Muslim Americans, 44 L. & Soc'y Rev. 365 (2010).

[209] See The Federalist No. 48, at 309 (James Madison) (Isaac Kramnick ed., 1987).

Because there is "nothing external to society" to enforce constitutional rules,[210] designers of constitutions must fashion institutional structures to channel the incentives of majorities and powerful political actors toward constitutional self-enforcement. The challenge is exacerbated by a "dead hand" effect.[211] This is the resentment people may feel because they are governed under rules promulgated by long-dead generations.[212] Dead hand effects further undermine the intrinsic felt authority of constitutional rules. Even though the U.S. Constitution suffers especially acutely from these problems, "Madison never explained why constitutional rules related to structure and process would be any stronger or more secure than rules forbidding particular substantive outcomes."[213] Weak parchment barriers are thus an endemic problem in the U.S. constitutional system.

The difficult task of maintaining fragile parchment barriers is imperiled by the dissonance created by enforcement-litigation gaps. High-salience decisions by the government to comply with statutory commands the government's own lawyers say are unconstitutional suggest to the public that constitutional rules do not really impose strong constraints on government action. The bifurcation of enforcement and litigation decisions instead yields a *memento mori* of constitutional order—a reminder that the whole edifice of constitutional government might rest on the transient preferences of powerful government actors. Enforcement-litigation gaps are unusual in this regard: There are not many other circumstances in which a government acknowledges a constitutional prohibition and then openly and flagrantly acts contrary to that rule. If the prospect of constitutional violation undermines public confidence in the Constitution, and thus diminishes its expected lifespan, it stands to reason that *conceded* violations will have an even greater corrosive effect. That perception may also have harmful downstream effects. Transnational studies of how constitutions en-

[210] Jon Elster, Ulysses Unbound: Studies in Rationality, Precommitment, and Constraints 95 (2000).

[211] See generally Adam M. Samaha, Dead Hand Arguments and Constitutional Interpretation, 108 Colum. L. Rev. 606, 609 (2008) (elaborating problem).

[212] Elster, supra note 210, at 95.

[213] Daryl J. Levinson, Parchment and Politics: The Positive Puzzle of Constitutional Commitment, 124 Harv. L. Rev. 657, 663 (2011).

dure over time have concluded that the likelihood of a constitution's enforcement is correlated with the willingness of political actors to refrain from breaching the constitutional deal.[214] That is, visible nonenforcement increases the likelihood of breach by other parties to the deal.

More generally, enforcement-litigation gaps might be undesirable because they undermine confidence in a version of the rule of law. At their core, enforcement-litigation gaps involve the adoption by government officials of mutually inconsistent positions respecting a law: do this, say that. It has long been recognized that consistency in the application of the laws is a constitutive element of a thick version of the "rule of law."[215] Enforcement-litigation gaps induce skepticism concerning the willingness of officials to conform to the rule of law. There is some evidence of this effect in the wake of the Holder decision not to defend DOMA Section 3. Some Republican Senators expressed dismay at Holder's decision not to defend on the ground that the failure undermined their confidence in the stability and predictability of the law.[216] Partisan criticism, of course, cannot always be taken at face value. But it does suggest that at least some politicians critical of Holder believed that members of the public would also perceive and be concerned by the deed-word inconsistency at the heart of the enforcement-litigation gap; otherwise, the form of their public protests is hard to understand.

In sum, enforcement-litigation gaps are undesirable because of downstream effects on the perceived efficacy of constitutional rules. Currently, enforcement-litigation gaps are used so infrequently that their marginal contribution to public perceptions of the Constitution is relatively small in magnitude. But recall that the question pursued here is rule-utilitarian and not act-utilitarian in its basic approach. In that light, what presently are ephemeral expres-

[214] See Zachary Elkins et al., The Endurance of National Constitutions 76–78 (2009).

[215] Lon L. Fuller, The Morality of Law 36 (2d. ed. 1969) (listing "consistency" as part of the rule of law). This was recognized historically, for example, in the development of the Administrative Procedures Act, which was designed to ensure "uniformity and consistency in the application of law." Jerry L. Mashaw, Federal Administration and Administrative Law in the Gilded Age, 119 Yale L.J. 1362, 1367 (2010).

[216] See sources collected supra note 10.

sive effects may compound, causing tangible harm to confidence in the Constitution.

*2. Accountability for Constitutional Decision Making*

A second species of cost attendant to enforcement-litigation gaps concerns the public's perception of who is accountable for compliance with constitutional rules. This cost arises when there is a disruption of clear lines of accountability for constitutional decisions. By raising the costs to the public of tracing responsibility for constitutional enforcement—and indeed by misdirecting public attention—enforcement-litigation gaps make constitutional compliance more difficult to elicit.[217]

*a. Blurring the Lines of Constitutional Accountability*

An implicit premise of the enforcement-litigation gap is that it is the courts, not political branch actors, who are responsible for vindicating constitutional norms. On this view, judicial settlement of constitutional law is not only useful and publicly acceptable but necessary. Use of an enforcement-litigation gap suggests to the public that in the absence of judicial benediction, the political branches stay their constitutional judgment and comply with rules they believe unconstitutional. But this is not wholly accurate for two separate reasons. First, as explained in Section II.B, political branch actors in our system have significant independent responsibility for the enforcement of constitutional rules. In the first decades of the Republic, "Congress and the executive resolved a breathtaking variety of constitutional issues great and small."[218] To this day, constitutional issues occupy a nontrivial amount of con-

[217] Accountability has a constitutional valence. The Supreme Court has indicated on several occasions that maintaining clear lines of accountability is constitutionally important in distinct institutional contexts. See, e.g., Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3155 (2010) (warning that "diffusion of power [to control federal agencies] carries with it a diffusion of accountability"); New York v. United States, 505 U.S. 144, 168–69 (1992) (discussing loss in accountability when voters cannot distinguish effects of federal and state policy choices).

[218] David P. Currie, The Constitution in Congress: The Federalist Period, 1789–1801, at 296 (1997).

gressional committees' time.[219] There is also a rich tradition of constitutional interpretation by and within the executive branch.[220]

Second, judicial review itself is a product of sustained political investment for all the reasons canvassed in Section II.C. There is, to be sure, a kernel of truth to the intuition that judicial enforcement of constitutional rules is undemocratic. Judges, at least on the federal bench, are insulated from short-term political tides and hence able to promulgate rulings that diverge from the electorate's immediate preferences.[221] Yet an exclusive emphasis on the countermajoritarian character of judicial action in a mapping of accountability for public policy decisions risks dangerous oversimplification. Judicial enforcement of constitutional norms against both state and federal statutes is the result of deliberate long-term investments by interest groups, politicians, and bureaucrats.[222] It emerges because public officials and organized interest groups perceive that constitutional norms are easier or cheaper to enforce through the courts than via democratic legal mandates. It arises, in other words, because of and not in spite of democratic political forces.

Viewed in this light, enforcement-litigation gaps may be undesirable to the extent that they elicit a false belief in an absolute separation of national politics and constitutional law. This belief enables politicians to evade accountability for their ultimate complicity in the constitutional outcomes of judicial action. At the margin, the bifurcation of enforcement from litigation thereby yields an insalubrious mystification of the political foundations of judicial review. It promotes a vision of constitutional responsibility that occludes the proper responsibility of elected actors and dimin-

[219] Keith E. Whittington, Neal Devins & Hutch Hicken, The Constitution and Congressional Committees: 1971–2000, *in* The Least Examined Branch: The Role of Legislatures in the Constitutional State 396, 409–10 (R.W. Bauman & Tsvi Kahana eds., 2006).

[220] See generally Morrison, Stare Decisis, supra note 8, at 1470–75.

[221] See Richard Pildes, Is the Supreme Court a "Majoritarian" Institution?, 2010 Sup. Ct. Rev. 103, 143–49 (arguing that changing political conditions, including the increasing frequency of divided government, and waning presidential ambitions increase the political space available to the Court).

[222] See Whittington, Political Foundations, supra note 162, at 103–60 (cataloguing reasons for, and examples of, political actors favoring judicial resolution of a policy question).

ishes the public's ability to hold representatives accountable for the full range of consequences of their actions.

To the extent they are invoked with the claim that they facilitate judicial review of controversial constitutional issues—an argument taken up and considered in more detail below—enforcement-litigation gaps are further undesirable because they suggest that it is courts alone that limit democratic government through application of constitutional precommitments. The practice thereby feeds the pernicious accusation that constitutional constraints are "undemocratic"[223] by diverting attention away from the ways courts instead channel popular views on the Constitution.[224] We might go further and object that the countermajoritarian critique enabled by enforcement-litigation gaps also draws attention away from nonmajoritarian elements of our national electoral system[225] and the distortions of national political outcomes provoked by growing wealth and income inequalities.[226] By casting the courts as countermajoritarian, in short, the enforcement-litigation gap promotes a distorted and inaccurate understanding of the national political system in ways that hinder the operation of public accountability.

Perhaps one should not make too much of relatively infrequent enforcement-litigation gaps as catalysts of public beliefs about a separation between majoritarian politics and undemocratic courts.

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[223] See Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics 16–17 (1978) [hereinafter Bickel, Least Dangerous Branch]. Bickel's criticism arose in the context of general discontent with the Warren Court. See Barry Friedman, The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution 256–58 (2009).

[224] For a case study of how a popular movement can influence the Court's reading of the Constitution, see Reva B. Siegel, Dead or Alive: Originalism as Popular Constitutionalism in *Heller*, 122 Harv. L. Rev. 191, 222–25 (2008).

[225] See Robert A. Dahl, How Democratic is the American Constitution? 41–55 (2002) (comparing, unfavorably, the democratic pedigree of national elections in the United States with those of other countries); Sanford V. Levinson, Our Undemocratic Constitution: Where the Constitution Goes Wrong (And How We the People Can Correct It) 25–77 (2006).

[226] Professor Larry Bartels's careful quantitative study concludes that "affluent people have considerable clout, while the preferences of people in the bottom third of the income distribution have *no* apparent impact on the behavior of their elected officials." Larry M. Bartels, Unequal Democracy: The Political Economy of the New Gilded Age 285 (2008); see also Jacob S. Hacker & Paul Pierson, Winner-Take-All Politics: How Washington Made the Rich Richer—and Turned its Back on the Middle Class 41–72 (2010) (describing political construction of economic inequality over the past four decades).

It may be, after all, the case that the public already misunderstands the allocation of constitutional responsibility, so the marginal effect of enforcement-litigation gaps will be small. But it is still plausible to posit not only that the practice at issue here involves an especially powerful signal of the division of constitutional labor between courts and the political branches, but also to fear that increased use of enforcement-litigation gaps would have ramifying mystification effects. That is, accountability concerns are a powerful reason not to *expand* use of the practice, even if accountability-related effects are but dimly felt now.

*b. Separating the Costs and Benefits of Constitutional Fidelity*

There is a second accountability problem in the use of enforcement-litigation gaps. It reflects the intuition that the practice allows the President to score political points while externalizing costs to another actor. This "rough without the smooth" intuition might be elaborated by observing that enforcement-litigation gaps allow Presidents to leverage their disproportionate control over channels of public communication to claim credit for taking a stand on constitutional questions of salience to their base. At the same time, they delay any uptake of the costs of a stance until those costs can be shared with the federal courts.

Since the presidencies of Theodore Roosevelt and Woodrow Wilson, Oval Office occupants have wielded powerful tools that enable them to "go over the heads of Congress," as well as the Court, and instead appeal directly to the American public.[227] When effective, Presidents have broad power to frame initiatives and set the terms of debate. This asymmetric control can be employed to maximize the gains and dilute the costs of enforcement-litigation gaps.

Take the DOMA Section 3 decision by way of example (although the argument is generalizable). In February 2011, President Obama claimed credit for advancing a version of equal protection conducive to his base while complying with the rule of law. Supporters of gay rights praised his decision, while opponents con-

[227] Jeffrey K. Tulis, The Rhetorical Presidency 4 (1987); see generally George C. Edwards III & Stephen J. Wayne, Presidential Leadership: Politics and Policy Making 123–46 (8th ed. 2010).

demned it.[228] Presidential control of the announcement's timing and the ability to coordinate supportive voices made the White House's positive message more powerful than countervailing voices. But if DOMA Section 3 is later invalidated—a decision that, if it occurs, is most likely some time away—President Obama may no longer be in office. Even if still in office, he can frame that result as the responsibility of the federal courts. When he ceases to enforce DOMA Section 3, he can resist criticism on the ground that he is simply complying with a court order insofar as he fears a political backlash.[229] That is, the circumstances of nonenforcement mean the President can share blame with the courts, even though he has already taken significant credit ex ante. In this way, Presidents can exploit their powerful bully pulpit and the time lag in judicial review to maximize political gain with core constituencies while partially externalizing political costs onto federal courts. For an elected official to monopolize praise and evade blame is unexceptional. But presidential credit-claiming and blame-deflection may still be a concern when its side effect is the sapping of federal courts' public credibility as a coequal branch.[230]

In sum, the practice of distinguishing enforcement from litigation has costs to stability, confidence, and accountability values that the Constitution is thought to promote. These costs are typically orthogonal to the constitutional value in dispute in a particular instance. They apply, that is, whether the question is same-sex

[228] Charlie Savage & Sheryl Gay Stolberg, In Turnabout, U.S. Says Marriage Act Blocks Gay Rights, N.Y. Times, Feb. 24, 2011, at A1 (quoting one commentator to the effect that the "decision may have bought the president some time with gay rights leaders").

[229] Why do interest groups that favor nonenforcement not condemn the President when the enforcement-litigation gap is announced, and thereby reduce his political gain? The interest groups with the greatest interest in calling the President's bluff—gay-rights groups—are likely to stay their hand in the hope that they can persuade the President to neither enforce nor defend the law. That is, the best informed segment of the President's coalition has an incentive to not fully inform other parts of the coalition that may be paying less attention to sexual orientation rights issues. In this way, a President can leverage the informational heterogeneity of his coalition.

[230] A potential response to this argument would turn on the observation that Presidents have contributed to the viability of judicial review in the first instance because it was a vehicle for achieving their ends. That Presidents would continue to do so is hardly a surprise. But this response is not quite satisfying insofar as it does not address the "sweet without the bitter" point or the concern about inaccurate blame-shifting.

marriage or the fight against Communism. They are also largely independent of the baseline practice of the executive; that is, they accrue whether the executive would otherwise enforce and defend a law, or whether it would decline to stand behind the law either on the ground or before the bench.

Identifying downsides, however, does not end discussion about the practice. These costs create a burden of justification on those who would promote enforcement-litigation gaps in general. They make the question whether there are countervailing gains that could underwrite the practice all the more pressing. I turn to that question now.

### *B. In Defense of Enforcement-Litigation Gaps*

What then is there to be said in favor of enforcement-litigation gaps? This section develops two arguments in support of distinguishing between the enforcement and the defense of a federal law. First, as intimated above, executive officials who have engaged in or defended the practice have suggested a "justiciability" benefit. These officials point out that enforcement-litigation gaps allow suits pressing the alleged constitutional flaw in a statute to proceed, and contend that expeditious judicial resolution of the legal question would promote valuable certainty. This assumes that courts are more favored, or at least less controversial, forums for the settlement of constitutional questions than, say, the Justice Department's OLC. Notwithstanding the political foundations of judicial review, there may indeed be reasons in some cases for preferring a judicial settlement (assuming, that is, no obfuscation of political accountability). Second, the nonenforcement decision has a set of costs sounding in executive self-dealing that decisions about litigation defense do not. These costs relate to a longstanding fear of an executive power to dispense with statutory commands on the basis of disputed and controversial constitutional grounds. Bifurcation is a way of honoring the Constitution while avoiding these costs. Based on these benefits I believe that it is incorrect to assert, as two recent commentators have boldly and categorically proclaimed, that "[t]here is no plausible argument that the Constitution obliges the President to press constitutional claims that he

finds unpersuasive or objectionable."[231] There are, in fact, a number of plausible arguments, albeit ones that arguably prevail in only a fraction of cases.

Both of the benefits I delineate here are most likely to arise if the default for executive action is nonenforcement and nondefense of a law. Given the baseline executive practice on this score at present, in other words, they are more likely to arise in cases concerning Article II values. This fact conveniently resonates with another asymmetry. The benefits of enforcement-litigation gaps turn out to have a quite different distribution than its costs. This is because the two reasons developed here in favor of distinguishing enforcement from litigation choices do not apply with equal strength to all constitutional questions. Rather, they do not attach to laws implicating individual rights guarantees of the Constitution, while they do attach to laws implicating structural separation of powers principles. As a result, the current default practice of the Department of Justice in respect to when a law will be neither defended nor enforced means that the usage of enforcement-litigation gaps will tend to coincide with the class of cases in which the practice has benefits—i.e., those cases concerning Article II values where the baseline for executive action is nonenforcement and nondefense. As a consequence of these dynamics, I conclude that given the present institutional status quo, the case in favor of enforcement-litigation gaps is strong when there is an Article II question at stake, but weak when there is an individual entitlement in play.

Before developing the two arguments in favor of enforcement-litigation gaps, it is worth explaining the distinction between structural principles and individual rights that permeates the analysis. For sophisticated readers, the distinction may seem naïve or implausible. They might object that the individual entitlements in the Bill of Rights are "tightly interconnected" with the structural design of the Constitution.[232] Individual entitlements in the 1787 Philadelphia text have structural ramifications. The bill of attainder

[231] Devins & Prakash, supra note 17, at 510.

[232] Akhil Reed Amar, The Bill of Rights as a Constitution, 100 Yale L.J. 1131, 1132–33 (1990). For an originalist argument that due process entitlements should be understood as instantiations of the separation of powers, see Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672 (2012).

rule[233] applied in *United States v. Lovett* has been characterized as a form of structural protection because it divides legislative and executive authority.[234] Access to habeas corpus as guaranteed in the Suspension Clause[235] is intended both to promote individual freedom and to ensure executive compliance with the law.[236] The Supreme Court routinely echoes Madison's dictum that structural principles such as the separation powers redound to the benefit of individual liberties by fragmenting and restraining government power.[237] If "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers," then the judicial vindication of structural principles cannot be untangled from judicial enforcement of individual rights.[238]

No doubt there is some truth to this. But the common *purpose* shared by rights and structure, however, does not make a distinction between the *operation* of rights guarantees and Article II structural principles infeasible. My argument rests on the premise that rights guarantees and structural principles might pursue similar goals but they do so through different strategies and mechanisms, distinct constituencies, and divergent incentive structures. Given these differences, constitutional constructions can plausibly be hypothesized to have different effects on rights and structural principles. At least as a first cut, it is plausible to analyze and un-

[233] U.S. Const. art. I, § 9, cl. 3.

[234] Comment, The Bounds of Legislative Specification: A Suggested Approach to the Bill of Attainder Clause, 72 Yale L.J. 330, 343–48 (1962) (connecting the Bill of Attainder Clause and separation of powers).

[235] U.S. Const. art. 1, § 9, cl. 2; see also Fay v. Noia, 372 U.S. 391, 401–02 (1963) (explaining habeas's "function [as providing] a prompt and efficacious remedy for whatever society deems to be intolerable restraints").

[236] See INS v. St. Cyr, 533 U.S. 289, 301, 303–04 (2001) (explaining the writ as a "means of reviewing the legality of Executive detention"); Nancy J. King & Joseph L. Hoffman, Habeas for the Twenty-First Century: Uses, Abuses, and the Future of the Great Writ 11 (2011) ("[H]abeas provides a remedy for individuals, but it is a remedy that, at its core, serves to address fundamental problems with institutions of government.").

[237] See, e.g., Mistretta v. United States, 488 U.S. 361, 380–81 (1989); Bowsher v. Synar, 478 U.S. 714, 722 (1986); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 859–60 (1986) (Brennan, J., dissenting); see also The Federalist No. 47, supra note 209, at 302–05, 308 (James Madison) (exploring the relationship between "the structure of the federal government" and "liberty").

[238] Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

derstand the two categories separately—as I do with respect to each of the potential benefits considered in this Subsection.

*1. The Argument from Justiciability*

The creation and preservation of a justiciable controversy is a goal routinely stipulated in official defenses of enforcement-litigation gaps. In explaining the decision to enforce but not defend DOMA Section 3, Attorney General Holder thus contended that such a course of action "respects the actions of the prior Congress that enacted DOMA, and . . . recognizes the judiciary as the final arbiter of the constitutional claims raised."[239] Similarly, one of the reasons given for the decision to enforce but not defend the 1996 Dornan Amendment was the need to give courts "an opportunity to resolve" the constitutional question.[240] More generally, the Department of Justice has long identified the "special role" of the Supreme Court "in resolving disputes about the constitutionality of enactments."[241] In that vein, it has consistently cautioned against "deny[ing] the Supreme Court the opportunity to review" constitutional questions.[242]

At first blush, the notion that the executive branch's default attitude to constitutional settlements reached by the federal courts would be one of deference seems counterintuitive. In one of the most famous arguments in constitutional law, Professor Alexander Bickel raised concerns about the fragility of judicial resolutions of nationally contested constitutional questions.[243] If, as Bickel suggested, there is a "natural qualitative limit" to judicial remediation

[239] Holder Letter, supra note 3, at 3.

[240] Quinn-Dellinger Briefing, supra note 55, at *3.

[241] Dellinger Memo, supra note 148, at 200; accord Waxman, supra note 175 (noting the courts' "historic function of judicial review," and contending that the executive does and should respect the latter).

[242] Dellinger Memo, supra note 148, at 201.

[243] Alexander M. Bickel, The Supreme Court and the Idea of Progress 94 (1978) [hereinafter Bickel, Supreme Court and Progress] ("The Court's effectiveness, it is often remarked, depends substantially on confidence, on what is called prestige."); see also Cass R. Sunstein, Backlash's Travels, 42 Harv. C.R.-C.L. L. Rev. 435, 439 (2007) ("Bickel argued that the Supreme Court maintained a kind of Lincolnian tension, and that it did so through the use of the passive virtues, by which it stayed its own hand in deference to anticipated public resistance.").

of constitutional wrongs,[244] deliberate delegation by the executive to the courts appears counterproductive, a recipe for constitutional underenforcement. Other scholars have posited that the executive has access to superior information to identify, and greater capacity to remedy, infringements upon "underenforced" constitutional norms.[245] These institutional competence concerns count in favor of more, not less, executive enforcement of constitutional rules. Nor can it be argued that court-ordered constitutional solutions are necessarily more stable than political ones. Both political and judicial coalitions change over time. It is an empirical question which is more volatile.

Yet it is still possible to conclude that these concerns do not undermine the case for securing some judicial settlement by enforcement-litigation gaps. As developed in Part II, the political branches have willingly acceded some authority to the federal courts to settle constitutional questions. It is possible they did so with good reason. Judicial resolution of constitutional questions may be valued due to its effects on public beliefs about constitutionalism. Public confidence in the stability and credibility of constitutional norms may grow when such norms are perceived to be the work of apolitical and expert judges rather than politicians fleetingly in possession of high office. Constitutional law may then be construed as *law* not *politics*.[246] Federal judges may also be more likely to be seen as "republican schoolmasters"[247] with a tutelary function that the public accepts.[248] Provided that politicians do not obscure their ultimate responsibility for the consequences of judicial review, that is, there are sound reasons for thinking that some quantum of effective judicial supremacy may be desirable.

[244] Bickel, Supreme Court and Progress, supra note 243, at 94; see also Bickel, Least Dangerous Branch, supra note 223, at 115 (arguing that justiciability constraints "lead[] to sounder and more enduring judgments").

[245] For a development of the notion of an underenforced constitutional norm, see Sager, supra note 140, at 1213–20.

[246] Of course, this begs the larger question of why law would be more respected than politics. I assume there is an intuitive answer, but I pretermit what seems to me a hard question.

[247] This was a role that early federal judges cultivated. See Ralph Lerner, The Supreme Court as Republican Schoolmaster, 1967 Sup. Ct. Rev. 127, 177–80.

[248] For a case study of how the Court can influence public opinion, see Valerie J. Hoekstra & Jeffrey A. Segal, The Shepherding of Local Public Opinion: The Supreme Court and *Lamb's Chapel*, 58 J. Pol. 1079, 1079, 1096–97 (1996).

Nondefense may further these same ends. Supplementing the status quo preservation effect of continued enforcement, an executive branch decision to not defend a law may convey information to the federal courts that enables more effective judicial review. For example, nondefense may signal the absence of cogent justifications for a measure, which may be relevant to whether the law can survive rational basis scrutiny. Nondefense thereby facilitates the delicate judicial task of parsing the factual credibility of possible legislative justifications for a law. An executive decision not to defend is also politically costly (although not as costly as nonenforcement).[249] By incurring some costs, the executive signals that the constitutional values at stake are not trivial.[250] Nondefense further signals that at least one political branch will support a judicial holding of unconstitutionality, mitigating some of the enforcement-related concerns that preoccupied Bickel.

A related but independent justification for enforcement-litigation gaps turns on the prospect of legislative rather than judicial remediation. It could be argued that continued enforcement of a constitutionally suspect law is desirable because absent the shadow of implementation Congress has no incentive to repeal a statute.[251] The prospect of the Dornan Amendment's impending enforcement, for example, may have motivated Congress to undo that measure.[252] To be sure, members of Congress may be under constituent pressure to change a law even if it is not being enforced. But they must still overcome collective action and transaction costs in the lawmaking process. An executive decision to enforce maximizes the probability of successful congressional action even when some legislators would otherwise be willing to act.

The justiciability argument developed here has assumed that enforcement, not nonenforcement, creates the adversity necessary for litigation. But this is not always so. There are many different con-

[249] Waxman, supra note 175, at 1088 ("Any decision not to defend the constitutionality of an Act of Congress tests the mettle of the Solicitor General. That is as it should be.").

[250] See generally Matthew C. Stephenson, A Costly Signaling Theory of "Hard Look" Judicial Review, 58 Admin L. Rev. 753, 755 (2006).

[251] See Johnsen, Presidential Non-Enforcement, supra note 22, at 55.

[252] According to then White House Counsel Jack Quinn, the President committed to do "everything we can . . . to reinstatement [sic] in the event that separation procedures are started." Quinn-Dellinger Briefing, supra note 55, at *6.

sequences that flow from an enforcement-litigation gap. In the legislative veto context, for example, the Attorney General first raised the justiciability concern as a reason for *not* enforcing a legislative veto of education-related regulations.[253] Nonenforcement might have led to some entities being denied federal funds, which would have allowed them to challenge the executive's action in federal court.[254]

The justiciability argument developed here also obviously assumes that judicial settlement of constitutional uncertainty is desirable. This proposition is controversial. As developed above, there are plenty of forceful arguments against the allocation of constitutional settlement to the courts.[255] Hence, it is worth stressing that accepting the justiciability argument described here does also mean accepting that *some* judicial settlement of constitutional questions has value.

*2. When Does the Justiciability Argument Apply?*

The justiciability argument has greater force when Article II values are at stake than when individual rights guarantees are at risk. This is so for two main reasons, which both demand some development and defense.

First, an enforcement-litigation gap is less likely to be warranted in individual rights cases than in respect to Article II matters because continued enforcement of a federal law is less likely to be necessary to ensure judicial resolution of rights questions as opposed to questions of constitutional structure. Consider the equal protection questions raised by the Dornan Amendment and DOMA Section 3. There are at least fifty other entities (the states) that might enact rules with similar classifications. States can (and do) enact measures that in fact distinguish same-sex couples from

[253] Constitutionality of Congress's Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4A Op. O.L.C. 21, 29 (1980).

[254] For an example of a case in which the denial of funds created Article III standing, see Clinton v. City of New York, 524 U.S. 417, 436 (1998).

[255] For a summary of arguments against judicial responsibility for constitutional matters, see generally Jeremy Waldron, The Core of the Case Against Judicial Review, 115 Yale L.J. 1346 (2006).

opposite-sex couples in ways that raise equal protection concerns,[256] and that could precipitate judicial resolution of some (if not all) of the basic doctrinal questions raised by DOMA Section 3.[257] There are also thousands of counties, municipalities, and other governmental entities that could do the same. Like the federal government, states and substate governmental units are prohibited from enacting bills of attainder.[258] The issue in *Lovett* might then have been decided by adjudication of a state enactment analogous to Section 304 of the Urgent Deficiency Appropriations Act. Most individual legal entitlements vested by the federal Constitution apply to both the federal government and the states.[259]

By contrast, the same argument can never be made in respect to the constitutional questions raised by the legislative veto,[260] the line-item veto,[261] or Comptroller-General supervision of deficit spending.[262] There is no state-level analogue to these Article II-related disputes in federal constitutionalism. Absent continued enforcement by the executive of a problematic law, it may well be that the underlying constitutional issue is never resolved in court. The marginal expected epistemic value of judicial review of a constitutionally dubious federal enactment that is enforced but not defended is therefore greater in the Article II context than in the individual rights context.

It is no response to this point to say that there is a loss in informational or precedential value from adjudication of a constitutional question when raised by state rather than federal action. The Court has recently stressed that rights protections "are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment."[263] Even in the class of cases in

[256] See Sonia Bychkov Green, Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States, 14 U. Pa. J.L. & Soc. Change 53, 108–22 (2011) (listing all fifty states' provisions on same-sex marriage access).

[257] See, e.g., Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003–04 (N.D. Cal. 2010).

[258] States are prohibited from enacting bills of attainder under U.S. Const. art. I, § 10, cl. 1.

[259] See McDonald v. City of Chicago, 130 S. Ct. 3020, 3030–36 (2010) (canvassing debates about incorporation of the Bill of Rights against the states).

[260] See INS v. Chadha, 462 U.S. 919, 930–31 (1983).

[261] See Clinton v. City of New York, 524 U.S. 417, 426 (1998).

[262] See Bowsher v. Synar, 478 U.S. 714, 732–34 (1986).

[263] *McDonald*, 130 S. Ct. at 3034 (citing Malloy v. Hogan, 378 U.S. 1, 10 (1964)).

which state and federal governments might muster different policy justifications in defense of a particular measure by dint of their peculiar responsibilities, resolution of the constitutionality of a state enactment at least provides *some* information about the status of a federal enactment.[264] For example, the Warren Court developed the law of equal protection respecting race by adjudicating state statutes, and its results were transposed largely without litigation to the federal context.[265] Continued enforcement of a federal law in order to provide a foundation for a lawsuit is thus less justified in those cases where state or municipal substitutes for resolution of the underlying legal question exist. This is likely to be true in many individual rights cases.[266]

There is a second reason for thinking the justiciability arguments apply differently when it comes to Article II structural questions and individual rights issues. A neutral judicial forum is especially valuable when a constitutional dispute pits one political branch against another. In such cases, there is a greater possibility than usual that political branch efforts at "negotiation and accommodation" will end in "stalemate."[267] Interbranch stalemates are less likely in individual rights cases, which do not systematically pit the institutional interests of Congress against those of the executive. Disputes about the balance of congressional and executive power will therefore benefit disproportionately from judicial settlement because there is a greater possibility that they would not be otherwise resolved, and that the equilibrium result could be continued

[264] For example, "traditions" that provide a basis for state interests may operate differently at the state and federal levels. See Kim Forde-Mazrui, Tradition as Justification: The Case of Opposite-Sex Marriage, 78 U. Chi. L. Rev. 281, 301–08 (2011).

[265] Cf. Richard A. Primus, *Bolling* Alone, 104 Colum. L. Rev. 975, 978–80 (2004) (exploring the early application of equal protection rules, which were initially developed in respect to the several states, not to the federal government). Similarly, final merits resolution of the Proposition 8 case may not resolve the constitutionality of DOMA § 3, but it can supply significant additional information.

[266] My claim is not, to be clear, that a state or municipal substitute will always be available or that a challenge to a state or municipal action will finally resolve the constitutional question. It suffices that these conditions are sometimes met to show that judicial resolution of separation of powers questions (which is impossible in cases arising from the states) is more valuable in expectation than rights-related adjudication.

[267] Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 92–93 (D.D.C. 2008) (describing how an interbranch stalemate justified judicial intervention); accord United States v. AT&T, 551 F.2d 384, 390–91 (D.C. Cir. 1976).

uncertainty and costly interbranch bickering. All things being equal, therefore, a judicial settlement may be valuable because it mitigates friction at least among the political branches.

To amplify this argument from judicial neutrality, it might be observed that the federal law-making process of bicameralism and presentment is more likely to yield laws with relatively difficult Article II questions and relatively easy individual rights questions. From an ex ante perspective, the expected epistemic value of judicial settlement of the former is greater than the expected value of judicial settlement of the latter. To see this, notice that the federal law-making process involves both branches, and creates ample opportunities for the expression of structural constitutional concerns. In particular, the executive influences the law-making process via its power of persuasion, its agenda-setting power,[268] and its party allies in Congress.[269] Presidents can keep laws that raise Article II issues off the legislative agenda entirely, or head off those issues via the bill comment process.[270] As Justice Department opinions show, executive branch lawyers are especially alert to Article II concerns.[271] A separation of powers question that persists through the

[268] See James L. Sundquist, The Decline and Resurgence of Congress 127–54 (1981); see also Vasan Kesavan & J. Gregory Sidak, The Legislator-in-Chief, 44 Wm. & Mary L. Rev. 1, 48–55 (2002) (arguing on originalist grounds that this power is vested by Article II of the Constitution).

[269] See The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 135–36 (1993) (describing routine executive involvement in the law-making process). Based on the degree of intraparty fragmentation at any given moment, this can be a more or less useful avenue of influence. See Daryl J. Levinson & Richard A. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2332–38 (2006).

[270] See Morrison, Stare Decisis, supra note 8, at 1463; accord Pillard, supra note 18, at 711–12.

[271] See, e.g., Dellinger Memo, supra note 148, at 201 ("The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency."); Civiletti Memo, supra note 148, at 56–57 (distinguishing laws that trench on Article II values and concluding that Presidents have a reduced obligation to honor and defend such enactments); Jackson, supra note 157, at 1358 (quoting President Franklin Roosevelt's statement that "I deem it an imperative duty to maintain the supremacy of that sacred instrument (the Constitution) and the immunities of the Department entrusted to my care"). But see Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 920 (2005) (arguing that officials often act based on personal and political incentives that do not entail defending institutional powers and prerogatives of the branch that employs them). For an illuminating example of how substantive views can change upon moving from Congress to the White House, see David E. Lewis, Presidents and the

lathe of bicameralism and presentment is more likely to be particularly intractable simply because it has not been resolved at any of the numerous decision points at which political actors had both incentives and opportunity to address it. It follows that these questions are likely to be particularly well-suited for resolution by a neutral third-party—that is, the federal courts.

This is less likely to be the case for individual rights questions. It is more likely that an individual rights concern will simply go unremarked in the bicameralism and presentment process (and it is certainly not impossible for such problems to be created legislatively through sheer inattention).[272] Individual rights holders are not per se represented in the legislative process. Whether their interests are represented in the consideration of a particular bill depends on the political circumstances of the moment.[273] Rights-related implications of a law are more likely than not to result from inadvertence. The executive may then have means to address such concerns without an enforcement-litigation gap. It can, for example, seek legislative reconsideration or clarification. Or it can interpret and apply a statute by prioritizing the constitutional value over nonconstitutional policy concerns.[274] The expected marginal value of an enforcement-litigation gap in rights cases is diminished by the availability of such substitutes. Moreover, empirical work suggests that members of Congress are most likely to step in to fill in the gap left by executive nondefense in structural cases. A study of congressional amici curiae found that about one-third of cases in which legislators intervened involved structural issues of executive prerogatives or the separation of powers.[275] This bolsters the infer-

Politics of Agency Design: Political Insulation in the United States Government Bureaucracy 1946–1997, at 21–22 (2003) (discussing Harry Truman's changing views).

[272] Note that the argument here is not that individual rights concerns will never be addressed or considered in the legislative process. The argument is comparative: that they are less likely to be considered than structural constitutional questions.

[273] Congress, to be sure, has at times demonstrated great solicitude respecting individual entitlements. Indeed, some have argued that statutory protections of civil rights, voting rights, and equality values play a more important role in our constitutional system. See Eskridge & Ferejohn, supra note 94, at 6–22.

[274] The canon of constitutional avoidance takes precedence over *Chevron* deference. See Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172–73 (2001).

[275] McLauchlan, supra note 88, at 82 (drawing data from figure 3.1).

ence that individual rights questions are more likely than structural questions to be unattended by legislators or the executive.

Two objections to this last point are worth considering. First, it is often posited that a core function of judicial review is the protection of individual rights.[276] From that perspective, it seems rather perverse for courts to prioritize structural matters over individual rights questions. The perceived priority of rights in American constitutional jurisprudence, however, may be illusory. It has long been clear that even at its acme, litigation-focused judicial investments during the civil rights era did not result directly in large gains in civil rights on the ground,[277] and when gains did eventually emerge in the wake of judicial interventions, they are better ascribed to the investments of social movements or the national political branches.[278] More recently, Supreme Court decisions that seemed to vindicate liberty in the teeth of new national security demands have in fact had exiguous real-world consequences.[279] However comforting it is to think of the federal courts as bastions of individual liberty, it is by no means clear that their reputation in this regard is warranted. Accordingly, there is no reason to prioritize rights over structural issues.

The second objection builds on the observation that the fraction of separation of powers disputes that are justiciable is relatively small, due in part to the political question doctrine.[280] By contrast, the fraction of individual rights cases that can be resolved in fed-

[276] See, e.g., Richard H. Fallon, Jr., The Core of an Uneasy Case for Judicial Review, 121 Harv. L. Rev. 1693, 1705 (2008) ("[I]t would seem to me to be dramatically imprudent for a society that thought its legislature did not currently take rights seriously to abolish judicial review in hopeful anticipation that the legislature would thereafter change its ways.").

[277] See Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (1991); accord Corinna Barrett Lain, Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution, 152 U. Pa. L. Rev. 1361, 1365 (2004).

[278] See Kevin McMahon, Reconsidering Roosevelt on Race 150–76 (2004) (exploring the Roosevelt Justice Department's efforts setting the ground work for a legal assault on segregation).

[279] See Aziz Z. Huq, What Good is Habeas?, 26 Const. Comm. 385, 402–05 (2010) (representing empirical evidence to the effect that Supreme Court intervention in military detentions at Guantánamo has failed to have any significant libertarian effect).

[280] Rebecca L. Brown, Separated Powers and Ordered Liberty, 139 U. Pa. L. Rev. 1513, 1516 n.9 (1991).

eral court is reasonably large because political question objections arise less frequently. There are accordingly a larger volume of individual rights questions amenable to federal court resolution. Hence, the latter are more important to resolve. But the relative frequency of justiciable disputes in the structural and the rights domains is orthogonal to the question whether judicial settlement of a particular dispute is valuable. Rather, the political question may narrow the class of Article II questions to which the justiciability argument applies, but it does not mitigate the basic asymmetry between the two kinds of cases. Provided a law raises a justiciable separation of powers question, the executive has reason to enforce but not defend it.

*3. The Anti-Dispensation Argument*

There is a second justification for bifurcating enforcement from litigation defense of a federal law. An executive decision not to enforce a law has costs that a decision to not defend a law does not. Nonenforcement, even upon constitutional rather than policy grounds, carries a risk of executive branch self-dealing that nondefense does not. These costs are more pronounced when the legal basis of nonenforcement relates to the President's Article II powers. They are less so when an individual right is at stake. The conscientious, principled executive branch lawyer therefore has greater cause to have recourse to an enforcement-litigation gap when structural constitutional questions are in play. This might be called the "anti-dispensation" argument for enforcement-litigation gaps because it is based on the view that the executive should not have a power, loosely akin to that of the Stuart monarchs, of "dispensing" with legislative commands, even on constitutional grounds. It resonates with longstanding concerns that the executive branch has accumulated an asymmetric share of federal power over the past century, and that mechanisms must be found to cabin its authority.

The anti-dispensation concern, like the justiciability argument, is aired in OLC legal opinions, although it has not been linked explicitly to enforcement-litigation gaps. Justice Department lawyers instead explain their reluctance to decline either to enforce or to defend federal statutes on anti-dispensation grounds. In 1980, Attorney General Civiletti highlighted the risks of nonenforcement

to "the equilibrium established within our constitutional system."[281] Fourteen years later, Assistant Attorney General Dellinger emphasized how interbranch comity concerns conduced to a presumption "that enactments are constitutional," and therefore must be both enforced and defended.[282] Former Solicitor General Drew Days has similarly underscored his belief in a "general duty to defend congressional statutes against constitutional challenges."[283] In declaring the Obama administration's position on DOMA Section 3, Attorney General Holder echoed the same sentiment.[284] Unfortunately, none of them considered whether the anti-dispensation concern that animates these comments applies differently to nonenforcement and nondefense of federal law.

This is an unfortunate lacuna, for the anti-dispensation argument does apply differently to nonenforcement and nondefense decisions. We see this by considering first the argument in the context of nonenforcement. The core of the anti-dispensation concern invoked by Civiletti, Dellinger, and Days is a worry about perceived concentrations of excessive power in the executive branch.[285] A central aim of the U.S. Constitution's architecture is to diffuse power across different institutions in order to prevent "[t]he accumulation of all powers," which the Framers believed to be "the very definition of tyranny."[286] Concentrations of power are undesirable, on the Framers' view, because they deprive some constituencies of a blocking veto against government action and thereby make deprivations of valuable liberties more likely.[287] Maintaining a *plurality* of representative agents who speak for overlapping but nevertheless distinct constituencies allows the people to induce competition between those agents and thereby lower the agency costs of representative government.[288] Motivated by these concerns,

[281] Civiletti Memo, supra note 148, at 56.

[282] Dellinger Memo, supra note 148, at 200 (recommending "great deference" to Congress).

[283] Days, Solicitor General, supra note 32, at 79.

[284] Adam Liptak, The President's Courthouse, N.Y. Times, Feb. 27, 2011, Wk5.

[285] Hence, anti-dispensation concerns are triggered by institutionally self-regarding motives, but not by the pursuit of mere partisan gain.

[286] The Federalist No. 47, supra note 209, at 293 (James Madison).

[287] Id. (describing separation as an "essential precaution in favor of liberty").

[288] See Tom Ginsburg & Eric A. Posner, Subconstitutionalism, 62 Stan. L. Rev. 1583, 1597–98 (2010).

the Constitution splits federal power between a law-making branch and a law-execution body, and it bars the law-crafting Congress from direct enforcement of the laws.[289] As a correlative, it vests the President with authority to implement but not write laws.[290] Downstream, federal courts are constrained from acting absent a justiciable case or controversy.[291] The intended result is, at least putatively, a benevolent dispersion of authority.

All of these concerns are starkly presented by presidential decisions to enforce or not enforce a law. The anti-dispensation argument is based on a concern that presidential discretion to act or refuse to act without a legislative mandate on constitutional grounds will wrench out of joint the delicate interbranch balance—a concern that simply does not apply with as much force in the litigation defense context.[292] A dispensation power enables the executive to pick and choose between the laws it enforces. Such presidential power to defy the legislature is inconsistent with generally understood historical understandings of the Constitution, and would instead resemble in important ways the "dispensing" power repudiated by American constitution makers.[293] In contrast, decisions not to defend a law do not suggest that the executive has the authority to hunt though the U.S. Code and exercise discretion over which provisions to follow or enforce.

The possibility of presidential dispensation respecting enforcement decisions also creates costs for the public and Congress. Stability and predictability are typically seen as desirable characteristics of the rule of law.[294] They enable planning and foster the confidence necessary to sustain investment. But a broad executive power to second-guess the legality of congressional enactments

[289] U.S. Const. art. I, § 9, cl. 3 (prohibiting federal bills of attainder).

[290] Id. art. II, § 3 ("[The President] shall take Care that the Laws be faithfully executed . . . .").

[291] See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[292] Cf. Ginsburg & Posner, supra note 288, at 1588 ("Concerned that politicians motivated by ambition might seek to aggrandize their power, Madison suggested that the problem could be ameliorated through careful institutional design.").

[293] For an account of the English practice, see Carolyn A. Edie, Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597–1689, 29 Am. J. Legal Hist. 197–99 (1985). For the American response, see Prakash, The Executive's Duty, supra note 16, at 1651–55.

[294] Neil K. Komesar, Law's Limits: The Rule of Law and the Supply and Demand of Rights 156–57 (2001).

creates uncertainty for the public, who can no longer simply look to the statute books to determine which laws are sound. On the legislative side, nonenforcement may "dilute the [legislators'] sense of constitutional responsibility,"[295] creating a moral hazard problem. Legislators' incentives to pay heed to constitutional implications of the laws will at the margin wither if they believe that executive officials are trolling the statute books for constitutional problems. The result will be the enactment of more unconstitutional laws, and less time devoted to notionally worthwhile, lawful legislative projects.[296] Again, these consequences do not flow so obviously from nondefense of a law.

While anti-dispensation arguments apply strongly to nonenforcement decisions, they bear only weakly on nondefense decisions. A refusal to defend a federal law either raises none of the aforementioned concerns, or at most raises them to a lesser degree. The refusal to defend, standing alone, may disrupt the ordinary flow of the litigation process, forcing another party to step into the breach to defend a law. But it does not intrinsically pose a risk of self-dealing.[297] Nor does it automatically concentrate power in the executive's hands. To the contrary, it may invite a judicial ruling against the government that may *limit* official discretion (at least in some cases). Nor does the decision to not defend a federal statute strip Congress of its constitutional power to enact laws: the legislative work product, after all, is still being enforced. The anti-dispensation argument thus applies with far greater force to decisions to not enforce a law than to decisions to not defend a law. As a result, it provides a justification for the decision to bifurcate en-

[295] Adrian Vermeule, Judicial Review and Institutional Choice, 43 Wm. & Mary L. Rev. 1557, 1561 (2002). The feedback argument was initially made in James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 131 (1893).

[296] For an argument that such incentive effects will in fact rarely arise, see Peter L. Strauss, The President and Choices not to Enforce, 63 L. & Contemp. Probs. 107, 122 (2000). The empirical validity of the point, however, is less important than the observation that the Constitution has allocated responsibility for constitutional consideration in a particular way, and it is inappropriate to adopt constitutional constructions for the purpose of disrupting that design in ways that lower the aggregate quantum of constitutional deliberation in the system.

[297] This is not to say it is unimaginable that a decision to not defend could be motivated by narrow interest-group lobbying. It could, but there is no reason to think such refusals will systematically be best explained on those grounds.

forcement decisions from litigation defense decisions. An executive branch lawyer wishing to honor the Constitution, but sensitive to anti-dispensation concerns, could plausibly reason that an enforcement-litigation gap provides a means to honor a constitutional concern without creating a hazardous institutional precedent.

These anti-dispensation arguments could be parried with four objections—none of which are in the end availing. First, it could be posited that the Constitution is designed to pit ambition against ambition.[298] The plenary exercise of independent presidential judgment on constitutional matters might on this basis be thought to be consistent with this goal of promoting interbranch conflict. But the fact that the Constitution's design envisages *some* degree of presidential solicitude for the Constitution does not mean that *all* possible forms of that solicitude are equally effective. To the contrary, the Constitution presumes that ambition in government is dangerous, and so seeks to place each branch's ambition in equilibrium with the others' ambitions. Excessive presidential discretion is harmful to the Constitution's balance of powers because it lacks a corresponding and balancing institutional check.[299] It could tip whatever the balance of power is systematically in favor of Article II.

Second, it could be argued that the dispensation power can be limited by allowing a President to disregard federal law solely on the basis of good faith beliefs about the Constitution.[300] A "good

[298] The Federalist No. 51, supra note 209, at 319 (James Madison).

[299] Indeed, the costs of a broad nonenforcement power are so great that actual instances of nonenforcement are few and far between. The most famous example of nonenforcement, which was coupled with nondefense, concerned a restriction on the President's removal power. See Myers v. United States, 272 U.S. 52, 176 (1926) (upholding removal of a postmaster without statutorily required advice and consent). Another domain in which the executive both refuses to enforce and to defend relates to executive privilege. See, e.g., Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974).

[300] See Prakash, The Executive's Duty, supra note 16, at 1653 (distinguishing a presidential duty to disregard unconstitutional laws from the British monarchy's power to suspend laws on this ground); accord Devins & Prakash, supra note 17, at 535–37 (arguing, with a nice turn of phrase, that "[t]he Constitution establishes a belt, suspenders, and rope approach to its defense"). Devins and Prakash do not account for the possibility that duplicative and potentially redundant devices for constitutional enforcement of the kind they suggest may have perverse effects at odds with their implicit claim of optimality. It is quite possible, for example, that redundant enforcement technologies will generate excessive enforcement of one constitutional value

faith" disagreement test, however, is unlikely to impose much constraint in practice given the state of our current constitutional jurisprudence. Fundamental and irreconcilable differences about the core questions of constitutional methodology and application are a durable trait of American constitutionalism. Two hundred and twenty years after the Founding, for example, large disagreements persist about the scope of congressional power.[301] Fundamental rights undergo revolutionary shifts in meaning and application within the span of a generation.[302] Even the concept of separation of powers remains profoundly unsettled.[303] For all intents and purposes, the substance of constitutional law is extremely volatile—and this quite apart from the persistence of sharp disagreements about interpretative methodology.[304] As a result, limitation of presidential dispensation power to good faith constitutional disagreements alone is not much limitation at all. It would still permit the President to disobey an open-ended set of laws.[305] There is, in

(e.g., federal authority) and diminish some other value (e.g., states' autonomy). Optimizing constitutional compliance, that is, is not a simple maximization problem, but a more complex optimization task.

[301] See, e.g., Nat'l Fed'n Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012) (upholding the Patient Protection and Affordable Care Act, but as an exercise of the Power to Tax rather than under the Commerce Clause).

[302] Compare Claudia Luther, Bork Says State Gun Laws Constitutional, L.A. Times, Mar. 15, 1989, at B5 (categorically rejecting individual entitlement under the Second Amendment), with District of Columbia v. Heller, 554 U.S. 570 (2008) (finding such an entitlement based on an originalist logic initially pioneered by Judge Bork).

[303] Compare Peter L. Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 597 (1984) (arguing that separation of powers principles regulate relations between named heads of each of the three branches, but leave discretion with respect to subordinate components, such as agencies), with Steven G. Calabresi & Saikrishna Bangalore Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 544–49 (1994) ("The Executive Power Clause actually does what it says it does, i.e., it vests (or grants) a power over law execution in the President, and it vests that power in him alone." (citation omitted)).

[304] As a general matter, it seems to me that the President, acting through the power to select Justices and to shape public debate from the bully pulpit, also has significant control over whether certain constitutional claims are plausible or not. If that intuition is correct, it is an additional reason to be leery of allowing a dispensation power in cases in which the executive branch can proffer merely a good-faith legal argument.

[305] Scholars such as Professors Paulsen, Calabresi, and Prakash, who find in the Constitution an executive duty to disregard unconstitutional enactments, have greater confidence than I do in the disciplining effect of one particular interpretive methodology—original public meaning. Even if I concurred in their methodological commitments, however, I would demur to their confidence in originalism's disciplining effect.

sum, a respectable argument that a presidential power to not follow federal statutes on constitutional grounds is costly and undesirably open ended.

Third, the use of enforcement-litigation gaps envisaged here assumes the existence of executive branch lawyers who are motivated by more than institutional self-aggrandizement and are conscientious about the risks of dispensation. But this is not an implausible assumption. The Justice Department employs lawyers who typically employ diligence and care in interpreting the Constitution (albeit with heightened solicitude for Article II values).[306] It is therefore plausible to posit that the enforcement-litigation gap provides a meaningful option to such lawyers. Indeed, on one reading of the historical record, the practice has come into play precisely when conscientious officials seek to balance competing constitutionally inspired obligations.

A fourth and final argument against the concern with executive dispensation with the laws challenges the premise that officials within the executive branch inevitably seek to expand Article II authority.[307] On this account, the Madisonian aspiration of setting ambition against ambition is flawed because bureaucratic incentives are too dispersed and multidirectional to sustain an interbranch balance. Whatever force this observation has elsewhere, it is inconsistent with the OLC practice, followed in both Democratic and Republican administrations, of prioritizing Article II values in analysis and litigation.[308] At least insofar as constitutional law is concerned, there does appear to be consistent pressure from the executive aimed at protecting that branch's domain.[309]

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In my view, the diversity of historical materials and the availability of multiple levels of generality in originalist interpretation undermine that methodology's claim to certainty. For examples of how originalism can lead to unexpected results, see Jack M. Balkin, Abortion and Original Meaning, 24 Const. Comment. 291, 297 (2007); Jack M. Balkin, Framework Originalism and the Living Constitution, 103 Nw. U. L. Rev. 549 (2009).

[306] See Johnsen, Faithfully Executing the Laws, supra note 18, at 1577–79; Morrison, Stare Decisis, supra note 8, at 1460–70.

[307] Daryl J. Levinson, Empire-Building Government in Constitutional Law, 118 Harv. L. Rev. 915, 920 (2005).

[308] See sources collected supra note 176.

[309] Accord Morrison, Constitutional Alarmism, supra note 134, at 1716 n.108.

*4. When Does the Anti-Dispensation Argument Apply?*

Anti-dispensation arguments do not apply evenly, however, to the full spectrum of rights-related and structural constitutional concerns. Like justiciability concerns, anti-dispensation concerns instead apply in different ways to structural Article II questions and to individual rights matters. Following a now-familiar pattern, they weigh more heavily in the structural constitutional domain than in the individual rights domain. This is because, in brief, the concern for self-dealing is more pronounced in regard to Article II issues than in respect to individual rights claims.

Claims mustered under Article II concern the expansion of institutional authority by the executive. At least in the short term, realization of such arguments necessarily amplifies the authority of the claimant executive branch official. The same is not systematically the case with individual rights claims. To be sure, some of those, such as ones implicated by the Dornan Amendment and DOMA Section 3, may happen to concern employees within the executive branch. Or they may happen to be relevant to constituencies that are salient to the electoral strategies of a particular President.[310] The executive may therefore benefit politically in a particular case by not enforcing the relevant law. But individual rights claims do not typically and systematically bear directly on the *institutional* powers of the branches. They do not necessarily augment the discretion and capacity of executive branch officials. To the contrary, vindication of an individual rights claim instead will very often narrow the executive's policy discretion. For example, presidential positions on the Dornan Amendment and DOMA Section 3, if accepted, would close off options for administrative action even absent congressional instructions. The executive would have to supply more compelling rationalizations for actions that previously could have been taken without giving overt, let alone compelling, reasons.

In response to this, it might be argued that self-dealing concerns can arise in cases involving individual rights insofar as chief executives can use nondefense as a way of currying favor with interest groups. On that ground, the dispensation concern furnishes reason

[310] King James II, for example, employed the dispensation power to aid Catholic supporters. I am grateful to Professor Prakash for pointing this example out to me.

to resist nonenforcement in both structural and individual-rights cases. But an equation of legal and political forms of self-dealing is unconvincing and perhaps even misleading. There is an important difference between measures that enhance the permanent institutional authority of a branch and measures that enhance a specific office-holder's transient political authority. The former are likely to be stickier, and hence more worrying, than the latter. Hence, it is no surprise that *institutional* self-dealing, and not political self-dealing, has long been the abiding concern of separation-of-powers law.[311] Moreover, if Presidents are barred from political self-dealing by enforcement-litigation gaps, they have ample substitutes, from nominations to the exercise of prosecutorial discretion to pardons. If Presidents are barred from legal-institutional self-dealing, they do not have substitutes. Furthermore, self-help on Article II matters predictably augments the executive's institutional powers, while self-help on individual rights matters is likely to diminish the reach of such powers. If the animating concern behind anti-dispensation arguments is the possibility of institutional self-dealing by one branch or another, it would seem sensible to worry less about actions motivated by a concern for the rights of others than actions motivated by Article II worries.

This asymmetrical distribution is reinforced by the baseline executive branch approach to enforcement-and-defense decisions. For it is in the Article II-related context that nonenforcement and nondefense are most likely to be the default approach of the Justice Department. That is, it is precisely in those cases in which the executive is most likely to adopt a baseline of wholesale resistance to a law (i.e., neither enforcing nor defending) that the alternative of enforcing but not defending will have the greatest benefit.

In sum, those who accept the anti-dispensation argument for enforcement-litigation gaps on the ground that it promotes the Framers' goals of controlling agency costs, limiting self-dealing, and promoting stability should be cautious in using that tool in respect to individual rights concerns. Careful analysis of the anti-dispensation argument reinforces the conclusion drawn in the previous Subsection from study of the justiciability ground: the use of

[311] See, e.g., Morrison v. Olsen, 487 U.S. 654, 691–92 (1988) (focusing on aggrandizement by a branch in institutional terms).

enforcement-litigation gaps has firmer foundations when the underlying constitutional value in play is structural and rooted in Article II concerns rather than when it emerges from an individual rights provision.

*5. Other Constitutionalism Questions and Enforcement-Litigation Gaps*

What if a matter involves both an individual right and a structural constitutional matter, or a non-Article II structural principle such as federalism? Consider first a case of overlap. President Clinton's decision about how to treat HIV-positive members of the military could have been framed as an exercise of the Commander-in-Chief power or in the alternative as an application of equal protection principles. The same is true in bill of attainder cases. Indeed, in *Lovett*, the Solicitor General devoted most of his brief to a separation of powers argument, and only in his closing pages turned briefly to the bill of attainder question.[312] How should cases of overlap be analyzed? Recall that it is only the *benefits* of enforcement-litigation gaps that are asymmetric. Every use of the practice has expressive and accountability costs. Only those instances that involve an Article II question, however, accrue offsetting justiciability and anti-dispensation benefits. If there are both structural and individual rights questions at play, the justiciability and anti-dispensation arguments apply with just as much force as if there was only a structural issue at stake. There is hence no reason in dual structure-rights cases to disfavor enforcement-litigation gaps.

By contrast, non-Article II structural constitutional cases—for example, those implicating federalism concerns—present a closer case. They fit within the "rights of others" class of cases because they do not involve a self-dealing benefit to the federal government. But they are also akin to structural cases insofar as they may be nonjusticiable in the absence of an enforcement-litigation gap. The justiciability argument, however, is weaker when it comes to states as opposed to individual rights holders because of states'

[312] See Lovett brief, supra note 37 passim.

greater ability to vindicate rights in the political process.[313] Given the presence and influence of the powerful states' lobby on Capitol Hill, it is hard to see why the presumption in federalism cases should favor enforcement-litigation gaps.

### *C. Summary*

This Part has developed a taxonomy of both the advantages and disadvantages of generalizing and regularizing the use of enforcement-litigation gaps. I have aimed to show that both supporters and detractors of the practice can draw on reasonable arguments that sound in our constitutional traditions and values. But the case for distinguishing enforcement from litigation defense turns importantly on the species of constitutional value in play. The costs I have identified accrue in every instance of the practice. Its benefits, however, have a more irregular distribution. They are strongest (and most likely to occur given background executive branch practice) when the underlying constitutional question is a matter of Article II structural constitutionalism. They are weakest (and also least likely to arise) when an individual rights matter is at issue. Hence, there is a case for thinking that enforcement-litigation gaps should be presumptively favored when there is an Article II issue in play, and presumptively disfavored for other sorts of constitutional questions.

To be sure, the merits and demerits of enforcement-litigation gaps identified here are not fully commensurable. They cannot easily be translated into simple dollar values. Reasonable people will disagree about their importance. But such incommensurability is a persistent feature of almost all constitutional analysis, a domain in which multiple and diverse normative considerations are simultaneously in play and in which officials are almost always trying to satisfice across those disparate goals.[314] Here, the incommensurability concern is mitigated by the fact that the arguments point uniformly in one direction: all the costs and none of the benefits ac-

[313] See generally Larry Kramer, Putting the Politics Back into the Political Safeguards of Federalism, 100 Colum. L. Rev. 215 (2000). Federalism concerns thus likely do not warrant enforcement-litigation gaps.

[314] Accordingly, I am skeptical that a cost-benefit analysis that accounts only for harms and goods that can be measured and monetized can capture the full spectrum of relevant concerns in contemporary constitutional law practice.

crue when an individual rights question is at issue, while both the costs and the benefits arise when a structural matter is in play. Accordingly, it is plausible to posit that as a threshold matter, the executive was justified in distinguishing enforcement from litigation defense in cases concerning structural principles but not in cases concerning individual rights.

## CONCLUSION

So what presumption should Attorney General Holder have applied when considering the use of an enforcement-litigation gap in respect to DOMA Section 3? From a principled perspective that accounts for the full range of issues raised by constitutional constructions, the applicable presumption did not favor a decision to enforce but not defend that provision of federal law.

Strictly speaking, it is beyond the scope of my project here to determine whether the equities of that specific case overcome that presumption. But for supporters of equal rights for gays and lesbians, I suspect that the case is clear. They might say that without an enforcement-litigation gap, the Obama administration would have taken the less desirable tack it did with "don't ask, don't tell," and continued both to defend and to enforce the law. But was the path really taken that much better even from the perspective of such a supporter? I am skeptical that a supporter of same-sex marriage should have been enthused about what Attorney General Holder did. Consider again how the bifurcation of enforcement and litigation in respect to DOMA Section 3 advanced equality interests on the ground—or rather failed to do so. DOMA Section 3 remains largely in force as of the time of this writing. Those harmed by the ongoing application of the law obtain little tangible in terms of changed policies from an administration nondefense decision.[315] Those without health coverage remain in the cold. Those excluded at the border remain in limbo. Plaintiffs in the Second Circuit lawsuits exchanged tepidly motivated Justice Department opposing counsel for committed and highly skilled counsel acting for Congress. Indeed, the publicity attendant on Attorney General Holder's decision may have rendered the discrete use of equitable

[315] With the exception of two noncitizens already within the United States, who benefited from stays of deportation proceedings.

discretion in the course of enforcing rules even more difficult than it would have otherwise been. Nor did continued enforcement of DOMA Section 3 change the likelihood of legislative action, as might have been the case with "don't ask, don't tell."[316] To be sure, executive nondefense may influence the Supreme Court's attitude to the basic constitutional question. But how confidently can Holder claim that his decision will be decisive in this regard? And how should that fragile contingency be measured against the certain and grave harms that an opponent of DOMA Section 3 observes racking up even as the White House clambers onto the high ground?

Viewed with a gimlet eye then, perhaps the Holder decision should provoke a measure of skepticism even from fervent supporters of same-sex marriage and sexuality-related equality values. Perhaps it is preferable to be clear-eyed about the fact that the most tangible winner from the decision was the Obama White House, which made a politically valuable gesture to its base even as it left out in the cold many thousands whose constitutional rights it allegedly continues to violate. That skepticism might swell once it is noted that the administration also won support from many lawyers, who tend to weight formalist rule-of-law gains from enabling adjudication heavily and who (as a rule) do not have to bear the costs of the statute's continued enforcement. In contrast, what supporters of same-sex marriage within the Obama base really got was the husk of what they could (and, in some eyes, should) have secured had not the White House shucked off the costs of constitutional fidelity onto the courts in favor of short-term political gain. It is perhaps not unfair to say that it is only a particularly chilly kind of legalism, shorn of human sympathies and attachments, that conduces to wholehearted applause of the White House under such circumstances.

Compromise will always seem attractive to officials within the White House wishing to seem the soul of bipartisan moderation. But inconsistent moderation can be a vice. Sometimes being forced to choose between extremes forces one to think harder about a choice than would be the case if a compromise position were avail-

[316] Karen Parrish, President Signs "Don't Ask" Repeal Act into Law, Am. Forces Press Serv., Dec. 22, 2010, http://www.defense.gov/news/newsarticle/aspx?id=62213.

able.[317] There is solid ground for thinking that the Obama administration should have resolved a more difficult choice than it did, and that it should have picked between standing behind DOMA Section 3 in court and on the ground, or repudiating the law in its entirety. There is solid ground, that is, for thinking it should have evinced something more than a tepid fidelity to norms supposedly basic to our constitutional system.

The Constitution matters if and when it is taken seriously. Eschewing the sweeping and categorical judgments that currently dominate the departmentalism literature, I have aimed here to get some traction on what this simple and naïve dictum means by attending to the specifics of particular varieties of departmentalism. One of these, enforcement-litigation gaps, is costly because it is a sort of cheap talk about the founding document. Such gaps foster public skepticism about the credibility of fragile constitutional precommitments. Sometimes the corrosive bifurcation of deeds and words, and the expressive harms it induces, can be justified in terms of the harms and difficulties raised by executive defense of Article II claims. But when it comes to individual rights, the toll of constitutional cheap talk cannot be justified. When it comes to the rights of others, the bureaucrats, lawyers, and elected officials of the executive branch should mean what they say and do what they mean.

[317] See Matthew C. Stephenson, Information Acquisition and Institutional Design, 124 Harv. L. Rev. 1422, 1443 n.50 (2011).

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