THE PRESENTMENT CLAUSE MEETS THE SUSPENSION POWER: THE AFFORDABLE CARE ACT'S LONG AND WINDING ROAD TO IMPLEMENTATION

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I. INTRODUCTION

Amidst the political cacophony during the Patient Protection and Affordable Care Act (ACA)[1] rollout, Attorneys General from eleven states sent Kathleen

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[1] Dominic Rushe & Amanda Holpuch, *Health Insurers Bemoan Obamacare 'Fix' as Ad-*

Sebelius, Secretary of the U.S. Department of Health and Human Services (HHS), a legal memo calling for HHS to refrain from postponing statutory requirements.[2] The letter came in response to the Obama Administration's decision in November 2013 to delay portions of the individual mandate that required health insurance plans to cover a certain threshold of services.[3] Earlier, in July 2013, the Treasury Department similarly delayed the employer mandate—a provision of the ACA stipulating that employers with fifty or more full-time workers must provide affordable health-insurance coverage—until 2015.[4] The employer mandate originally would have taken effect on January 1, 2014.[5] Overall, President Obama has made thirteen major changes or delays to the ACA since signing it into law.[6]

President Obama's decision to delay the ACA employer mandate and portions of the individual mandate violates the Presentment Clause of the Constitution.[7] Stepping back from the political fray, a president's authority to delay or suspend enacted laws proves troubling because it disrupts the carefully designed separation-of-powers system of government envisioned by the Founders.[8] Specifically, a suspension power bypasses bicameralism and the Presentment Clause of the Constitution.[9] As the Supreme Court explained in *Clinton v. City of New York*,[10] "There is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes."[11] Bicameralism and the Presentment Clause mandate that both houses of Congress approve a bill that

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ding Confusion to Rollout, THE GUARDIAN (Nov. 15, 2013), http://www.theguardian.com/world/2013/nov/15/health-insurers-bemoan-obamacare-fix-rollout.

[2] Letter from Patrick Morrisey, Attorney Gen., W.Va, to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Dec. 26, 2013). The attorneys general hailed from West Virginia, Alabama, Georgia, Idaho, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, Texas, and Virginia. *Id.*

[3] Letter from Gary Cohen, U.S. Dep't of Health & Human Servs. to Ins. Comm'rs. (Nov. 14, 2013); Juliet Eilperin, Amy Goldstein, & Lena H. Sun, *Obama Announces Change To Address Health Insurance Cancellations*, WASH. POST (Nov. 14, 2013), http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fb0c0_story.html. More precisely, the administration gave states the option to allow insurance companies to renew non-compliant health plans. *Id.*

[4] Mark Mazur, *Continuing to Implement the ACA in a Careful, Thoughtful Manner*, U.S. DEP'T OF THE TREASURY (July 2, 2013), http://www.treasury.gov/connect/blog/Pages/Continuing-to-Implement-the-ACA-in-a-Careful-Thoughtful-Manner-.aspx.

[5] 26 U.S.C. § 4980H (2012).

[6] *Changes and Delays to the Health Law,* N.Y. TIMES (Mar. 6, 2014), http://www.nytimes.com/interactive/2013/12/20/us/politics/changes-and-delays-to-health-law.html.

[7] *See infra* Part V.

[8] *See generally* I.N.S. v. Chadha, 462 U.S. 919, 927 (1983).

[9] U.S. CONST. art. 1, § 7, cl. 2–3.

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

[11] *Id.* at 438.

then goes to the President, who, according to George Washington, either "approve[s] all the parts of a Bill, or reject[s] it in toto."[12] Thus, the Founders possessed a clear vision of the legislative process.[13]

As administrative agencies flourish, the Executive branch increasingly performs legislative duties in the name of convenience and efficiency.[14] However, convenient governance does not excuse explicit constitutional requirements.[15] The power to delay or suspend duly enacted laws hurts political minorities, compromises the political process, and aggrandizes Executive power in a way antithetical to the Founders' intentions.[16] If emulated by future Presidents, the Presidency would resemble the type of government the Founders revolted from: the English Crown.[17] Even if President Obama has proceeded with good intentions, "the fact that a given law or procedure is efficient, convenient, or useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."[18]

Part II of this Article traces the historical context leading the Founders to include the Presentment Clause in the Constitution. Next, Part III provides the current jurisprudence surrounding the growth of executive power. Part IV then examines the ACA and how the employer and individual mandates fit into the law's overall scheme. Finally, Part V analyses how President Obama's decision to suspend ACA provisions lacks any constitutional basis and conflicts with the Presentment Clause.

II. FROM A KING TO A PRESIDENT

The Presentment Clause was not meant to be a theoretical safeguard or superfluous provision in the Constitution; the Founders included it to prevent the President from acting like King James II.[19] For nearly 400 years, the Crown

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[12] *Id.* at 440 (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940).

[13] *Id.* at 438.

[14] *See generally* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013) (examining Congressional delegation of statutory waiver power to executive agencies).

[15] I.N.S. v. Chadha, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.").

[16] *See generally* R. Craig Kitchen, *Negative Lawmaking Delegations Constitutional Structure and Delegations to the Executive Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525 (2013) (arguing that a President's waiver, cancellation, or amendment to proposed legislation is constitutionally suspect under Article 1, Section 7).

[17] *See infra*, Parts II, V.

[18] *Chadha*, 462 U.S. at 944.

[19] Christopher N. May, *Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative*, 21 HASTINGS CONST. L.Q. 865, 867 (1994) (providing an exhaustive study of presidential disregard of what they believe are unconstitutional laws).

had ignored or suspended Parliament's laws on a whim.[20] Against this backdrop, the Framers sought to provide procedural safeguards against this suspension power: bicameralism and the Presentment Clause.[21] To complement these provisions, they also included a substantive safeguard, the Take Care Clause, which declared that the President "shall take Care that the Laws be faithfully executed . . . ."[22]

A. *English Bill of Rights 1688*

Although the Crown had suspended laws for almost 400 years, the practice became increasingly egregious once James II assumed the throne in 1685.[23] A Catholic, James II clashed with the mostly Protestant Parliament.[24] Royal prerogatives—broad discretionary powers exercised by a monarch—allowed James II to evade Parliament's laws.[25] The suspension prerogative allowed him to negate statutory language, and the dispensation prerogative allowed him to arbitrarily apply the law to certain individuals.[26] For example, Parliament passed the Test Acts of 1673 and 1678, which mandated anyone holding public office to denounce Roman Catholicism and receive Anglican sacraments.[27] Upon taking the throne, James appointed Catholics to military posts dispensing them from the Acts.[28] In a separate, but related, incident, seven Protestant bishops refused to read aloud in church James II's declaration announcing that all religious laws were suspended.[29] In response, the Crown subsequently charged them with seditious libel.[30]

Eventually, James's abuse of royal prerogatives led to the Glorious Revolution of 1688 and his overthrow.[31] Wary of royal prerogatives, the English memorialized their disdain for the royal dispensing and suspension powers in the

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[20] *Id.* at 870.

[21] *Id.* at 873.

[22] U.S. CONST. art. II, § 3.

[23] May, *supra* note 19, at 869.

[24] May, *supra* note 19, at 871.

[25] May, *supra* note 19, at 871.

[26] May, *supra* note 19, at 871.

[27] Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 805–06 (2013).

[28] *Id.*

[29] May, *supra* note 1919, at 871. In the subsequent trial, the trial judge advised the jurors that if the suspension prerogative "be once allowed of, there will need no parliament; all the legislature will be in the king, which is a thing worth considering." May, *supra* note 1919, at 871 (quoting Colin R. Lovell, ENGLISH CONSTITUTIONAL AND LEGAL HISTORY 371–72 (1962)).

[30] May, *supra* note 1919, at 871.

[31] May, *supra* note 1919, at 871.

English Bill of Rights of 1689.[32] The first article states, "That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall."[33] Oft-cited English jurist Sir William Blackstone, who influenced and taught many Framers personally,[34] echoed these notions, writing that "[t]he principal duty of the king is to govern his people according to law . . . And . . . [this] has always been esteemed an express part of the common law of England, even when [the royal] prerogative was at the highest."[35] Consequently, strong English history helped form the Founders' expectation that the executive branch would faithfully enforce Congress's laws.[36]

B. *The Founding*

As part of the overall separation-of-powers scheme contained in the U.S. Constitution, the Presentment Clause, bicameralism,[37] and the Take Care Clause[38] serve as safeguards against the President emulating James II.[39] These provisions act in concert with the rest of the Constitution to accomplish the Founders' overall goal: keeping two or more lawmaking authorities—judicial, executive, and legislative—out of one branch.[40] As Englishmen, the Founders were acutely aware of James II's royal suspension and dispensation prerogatives.[41] They believed a republic could not function properly if one branch encroached upon another's control.[42] Quoting Baron de Montesquieu, James Madison wrote, "'[w]hen the legislative and executive powers are united in the same person or body,' says he, 'there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to

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[32] May, *supra* note 1919, at 871.

[33] The Bill of Rights (1688), 1 W. & M., sess. 1, c. 2.

[34] Delahunty & Yoo, *supra* note 27, at 797.

[35] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 233–34; *see also* Delahunty & Yoo, *supra* note 27, at 797–98 (citing other contemporary scholars' opinions on the importance of restricting the power of the executive branch).

[36] Delahunty & Yoo, *supra* note 27, at 798.

[37] "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States: If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." U.S. CONST. art. 1, § 7, cl. 2.

[38] The Executive "shall take Care that the Laws be faithfully executed. . . ." U.S. CONST. art II, § 3.

[39] May, *supra* note 19, at 873.

[40] *See generally* THE FEDERALIST No. 47 (James Madison) (writing that separation of powers among the three branches is necessary to avoid tyranny).

[41] May, *supra* note 19, at 882 (supplying an expansive review of English and American history).

[42] May, *supra* note 19, at 882.

execute them in a tyrannical manner."[43] In other words, the separation-of-powers principle attempts to prevent any branch from acting like James II.[44]

1. The Take Care Clause

The Take Care Clause speaks directly to James II's abuses in that the Founders intended it to limit the President's power to suspend or alter the law.[45] James Wilson, a member of the Constitutional Convention and later Supreme Court Justice, wrote years after the Convention that the President has "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established."[46] The 1755 edition of Samuel Johnson's Dictionary of the English Language defines 'execute' as "to put in act; to do what is planned or determined."[47] Further, it defines 'faithfully' as "strict adherence to duty and allegiance" and "without failure of performance; honestly; exactly."[48] Thus, the Take Care Clause, as envisioned by the Founders, binds the President to the statutory language that Congress prescribes.[49]

2. Bicameralism and Presentment

Primarily, bicameralism and presentment provide for an exhaustive legislative procedure by dividing lawmaking authority amongst three institutions: the House, the Senate, and the President.[50] The Founders split Congress into two

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[43] THE FEDERALIST No. 47, at 240 (James Madison) (Oxford ed., 2008). *But see* THE FEDERALIST No. 66, at 325 (Alexander Hamilton) (Oxford ed., 2008) ("This partial intermixture [of powers] is even, in some cases, not only proper but necessary to the mutual defense of the several members of the government against each other.").

[44] *See generally* May, *supra* note 19.

[45] *See* May, *supra* note 19, at 873–74; Delahunty & Yoo, *supra* note 27, at 799 ("Early American Courts and commentators on the Constitution understood the Take Care Clause to impose a duty on the President to enforce the law, regardless of his own administration's view of its wisdom or policy."); Kitchen, *supra* note 16; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996).

[46] 2 JAMES WILSON, LECTURES ON LAW 878 (Kermit L. Hall & David Hall eds., 2007).

[47] 1 SAMUEL JOHNSON, A GENERAL DICTIONARY OF THE ENGLISH LANGUAGE 736 (1755).

[48] *Id.* at 703.

[49] Lawson & Moore, *supra* note 45. The Antebellum Supreme Court understood the Take Care Clause the same way. Kendall v. United States *ex rel.* Stokes, 37 U.S. 524 (1838). In *Kendall*, the Supreme Court held that a President could not refuse to pay a fee to a government contractor required by statute. *Id.* at 612. It wrote, "To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution is a novel construction of the constitution, and entirely inadmissible." *Id.* at 613. Harkening back to James II, the Court wrote that recognizing a suspending power "would be vesting the President with a dispensing power, which has no countenance for its support in any part of the constitution . . . [it] would be clothing the President with a power to control the legislation of congress, and paralyze the administration of justice." *Id.*

[50] *See* I.N.S. v. Chadha, 462 U.S. 927 (1983).

houses to check one another.[51] In turn, the Presentment Clause provided the President with a veto power to check Congress.[52] Importantly, the veto serves as the President's only official tool to influence legislation.[53] According to George Washington, the Constitution gave the President a choice to either "approve[ ] all the parts of a Bill, or reject it in toto."[54] Thus, the Constitution intends for the President to influence legislation ex ante, not ex post.[55]

Of course, no provision exists that explicitly prohibits a President from suspending the law.[56] Professor Christopher May forcefully argues that there was a "widespread understanding" that the Framers would not prohibit a power not in existence.[57] Nevertheless, all three provisions work to prevent "the tyrannical concentration of all the powers of government in the same hands."[58] The legislature writes the laws; the Executive executes the laws.[59]

III. MODERN JURISPRUDENCE: FORMALISM VS. FUNCTIONALISM

Currently, two legal theories offer different understandings of the shared lawmaking process between the President and Congress.[60] Formalists contend the executive and legislative branches should strictly adhere to the procedures

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[51] THE FEDERALIST NO. 62, at 306 (James Madison) (Oxford ed., 2008) (positing that bicameralism "doubles the security to the people by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one could otherwise be sufficient"); 1 JAMES WILSON, THE RECORDS OF THE FEDERAL CONSTITUTION OF 1787 254 (Max Farrand ed., 1937) ("In a single house there is no check, but the inadequate one, of the virtue & good sense of those who compose it.").

[52] U.S. CONST. art. 1, § 7, cl. 2–3.

[53] *See* John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1942–43 (2011).

[54] Clinton v. City of New York, 524 U.S. 417, 438 (1998) (quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940)). Washington also described his role in relation to statutory mandates as a "duty to see the Laws executed." 32 WRITINGS OF WASHINGTON 143, 144 (John C. Fitzpatrick ed. 1940).

[55] *See generally Clinton*, 524 U.S. 417.

[56] May, *supra* note 19, at 889.

[57] May, *supra* note 19, at 889.

[58] THE FEDERALIST, NO. 48, at 249 (James Madison) (Oxford ed., 2008).

[59] *Id.*

[60] Manning, *supra* note 53, at 1942–43. This note does not enter the debate over the scope of the President's power in relation to his subordinates. *See, e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 594–96 (1994). Some scholars urge for a strong "unitary" executive who controls his administrative agencies decision-making entirely. *See* Steven G. Calabresis & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1166 (1992). Others contend the President may oversee these administrative agents, but may not make decisions for them. Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123–24 (1994). The debate goes beyond this Comment's scope.

delineated in the Constitution.[61] Functionalists shy away from the axiomatic separation-of-powers principle and champion efficiency as the governing lodestar.[62] They argue that the Constitution proscribes a rough balance of powers, not a hermetically sealed separation-of-power structure.[63] To reconcile the two competing theories, some scholars offer theories that blend salient aspects of formalism and functionalism.[64]

A. *Formalism*[65]

As the name suggests, Formalists strictly adhere to the Constitution's formal requirements.[66] Two relatively recent cases, *Immigration and Naturalization Service v. Chadha* and *Clinton v. City of New York,* embody and articulate Formalist principles.[67] The Supreme Court in each restricted Congress and the President's ability to work around constitutional requirements in enacting legislation.[68] While some argue that these cases are outliers,[69] both cases make clear that one branch may not occupy another branch.[70]

1. *Immigration and Naturalization Service v. Chadha*

Chadha concerned Congress's effort to exercise power concerning decisions of administrative agencies.[71] Specifically, the case consisted of a law that gave either house of Congress a final veto over the Attorney General's deportation determination.[72] The Immigration and Nationality Act allowed immigrants resisting deportation a hearing before an immigration Judge.[73] Upon finding that they met certain requirements, the judge then could suspend deportation.[74] Next the judge would report the findings to Congress where either house could veto the determination.[75]

The Supreme Court invalidated the veto provision because it violated separa-

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[61] Manning, *supra* note 53, at 1958.

[62] Manning, *supra* note 53, at 1950.

[63] Manning, *supra* note 53, at 1950.

[64] *See infra* Part III.C–D.

[65] Obviously, no exact definition of formalism or functionalism exists. Rather, this Comment merely provides an overview of the principles these theories espouse.

[66] Manning, *supra* note 53, at 1950.

[67] Clinton v. City of New York, 524 U.S. 417 (1998); I.N.S. v. Chadha, 462 U.S. 927 (1983).

[68] *Clinton*, 524 U.S. 417; *Chadha*, 462 U.S. 927.

[69] Kitchen, *supra* note 16, at 531 (pointing out that courts almost never invoke *Chadha* or *Clinton* to invalidate laws).

[70] *See Clinton*, 524 U.S. 417; *Chadha*, 462 U.S. 927.

[71] *See Chadha*, 462 U.S. at 924.

[72] *Id.* at 924–928.

[73] *Id.*

[74] *Id.*

[75] *Id.*

tion-of-powers provisions, specifically bicameralism and presentment.[76] The Court focused on the Framers' intentions in drafting the Constitution to divide the legislative process between the President, House, and Senate.[77] Harkening back to the Constitutional Convention, it wrote that the Framers intended the legislative process to "be exercised in accord with a single, finely wrought and exhaustively considered, procedure."[78] The Act at issue violated this process in two ways. First, it flipped the Presentment Clause in that an administration official presented legislation to Congress, which holds a veto power.[79] Second, it elided bicameralism by allowing either house a dispositive veto.[80] Thus, the Court deemed the veto provision unconstitutional.[81]

Throughout the opinion, the Court used strong formalism language and included a litany of phrases stressing faithfulness to the Constitution's text.[82] For example, it announced that "[t]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers."[83] Further, it reiterated that the "[e]xplicit and unambiguous provisions of the Constitution prescribe and define the respective functions of the Congress and of the Executive in the legislative process."[84] Mostly, the Court maintained that government may not sacrifice the Constitution for efficiency.[85]

In his functionalist dissent, Justice White derided the Court for its strict adherence to the text of the Constitution.[86] He praised the legislative veto as an "important if not indispensable political invention," and recited its many uses.[87]

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[76] *Id.* at 959.

[77] *Id.* at 947.

[78] *Id.* at 959 ("[I]t is crystal clear from the records of the Convention, contemporaneous writings and debates, that the Framers ranked other values higher than efficiency . . . There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process.").

[79] *Id.* at 946–948.

[80] *Id.* at 951 ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings.").

[81] *Id.*

[82] *See, e.g.*, *id.* at 959 ("With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.").

[83] *Id.* at 946 (quoting Buckley v. Valeo, 424 U.S. 1, 124 (1976)); *see also* Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("Once we depart from the text of the Constitution, just where short of that do we stop?").

[84] *Chadha*, 46 U.S. at 945.

[85] *Id.* at 958–59 ("To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded.").

[86] *Id.* at 967, 978 ("We should not find the lack of a specific constitutional authorization for the legislative veto surprising, and I would not infer disapproval of the mechanism from its absence.").

[87] *Id.* at 972.

Further, he questioned the Court's use of history, arguing that the separation of powers has a history "of accommodation and practicality."[88] Mainly, he posited that the three branches of government should not be hermetically sealed against each other.[89] Nevertheless, the Court set a strong precedent that the Framers envisioned a deliberate legislative process, not a rough approximation.[90]

2. *Clinton v. City of New York*

Echoing the precedent in *Chadha*, *Clinton* stands for the proposition that a President may not alter or amend "duly enacted statutes."[91] *Clinton* concerned the Line Item Veto Act (LIVA), which authorized the President to cancel a line of spending already signed into law.[92] Hence, the LIVA effectively granted the President the power to amend or repeal legislation after signing it into law.[93]

The Court held that the LIVA violated the Presentment Clause.[94] Acknowledging the Constitution's silence on the President's power to change enacted statutes, the Court maintained that "no provision in the Constitution authorizes the President to enact, to amend, or to repeal . . . duly enacted statutes."[95] Upon presentment, the Constitution mandates the President to either veto the bill or sign it into law.[96] The Court reasoned the LIVA compromised the legislative process because, by cancelling a spending provision, the President rejects the policy judgment made by Congress and inserts his own.[97] Citing *Chadha*, the

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[88] *Id.* at 999.

[89] *Id.*

[90] *Id.* at 959.

[91] Clinton v. City of New York, 524 U.S. 417, 439 (1998).

[92] Specifically, the President could cancel "(1) any dollar amount of discretionary budget authority; (2) any item of new direct spending; or (3) any limited tax benefit." 2 U.S.C. § 691(a) (1994), *invalidated by* Clinton v. City of New York, 524 U.S. 417 (1998).

[93] *Clinton*, 524 U.S. at 439.

[94] *Id.* at 440.

[95] *Id.* at 438, 447.

[96] *Id.*

[97] *Id.* at 444; *see also* Morrison v. Olson, 487 U.S. 654, 709 (Scalia, J., dissenting) ("Once we determined that purely legislative power was at issue we would require to be exercised, wholly and entirely, by Congress."). *But see* Terran v. Sec'y of Health and Human Servs., 195 F.3d 1302 (Fed. Cir. 1999). In *Terran*, the Secretary of Health and Human Services—at his own discretion granted in the statute—rendered an initial vaccine table under the Vaccine Act ineffective and promulgated a new table. *Id.* at 25–28. The court found the agency did not violate the Presentment Clause. *Id.* at 28. It distinguished the Secretary's promulgation from *Clinton* for three reasons: (1) The Vaccine Act accounted for the facts underlying the legislation to change in the future; (2) the Act "set forth detailed procedures and substantive considerations . . . that channel [the Secretary's] discretion; (3) the Secretary was following congressional policy by creating a new table, instead of rejecting it. *Id.* at 28–32. The court compared the first table to a "sunset" provision that Congress often includes in legislation "to specify the date on which a particular piece of legislation ceases to have effect." *Id.* at 27.

Court determined that a cancellation under the LIVA was not a "'finely wrought' procedure that the Framers designed."[98]

In his concurrence, Justice Kennedy wrote in explicitly formalistic terms, adding that Congress's voluntary delegation of power does not make the LIVA legal.[99] For a government to work properly, he stressed that constitutional requirements trump efficiency or practicality, noting that "[t]he Constitution's structure requires a stability which transcends the convenience of the moment."[100] So, *Clinton* and Justice Kennedy's concurrence stand in line with *Chadha* by holding government actors to a strict interpretation of the legislative process.[101]

3. Accountability

Formalists worry that if elected officials do not follow the textual requirements of the Constitution, political accountability becomes compromised, and political minorities become especially vulnerable.[102] More precisely, if citizens cannot discern who is making policy decisions—one or both houses of Congress, an administrative agent, or the President personally—then these government officials evade accountability to the electorate.[103] Additionally, if Presidents pick and choose whom to enforce the law against, then political minorities become harmed as they have the least political power.[104] The Framer's "finely wrought" legislative process is meant to protect political minorities.[105] But when government officials eschew constitutional requirements, the specter of James II materializes.[106]

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[98] *Clinton*, 524 U.S. at 440.

[99] "Abdication of responsibility is not part of the constitutional design." *Id.* at 452. The dissent vigorously argued the majority focuses too much on unnecessary semantics. *Id.* at 466 (Scalia, J., dissenting). "[T]here is not a dime's worth of difference between the Congress's authorizing the President to *cancel* a spending item, and Congress's authorizing money to be spent on a particular item at the President's discretion. And the latter has been done since the founding of the Nation." *Id.*

[100] *Id.* at 449.

[101] *See id.* at 440.

[102] *See* Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 565 (1998) (advocating for a "tyranny-minimizing" constitutional perspective, rather than a "preference-maximizing" one).

[103] *Id.* at 567. *See also* THE FEDERALIST No. 70, at 347 (Alexander Hamilton) (Oxford ed., 2008) ("It becomes impossible, amidst mutual accusations, to determine on whom blame or punishment of a pernicious measure, or series of pernicious measures, ought really to fall.").

[104] *See generally* Kitchen, *supra* note 16.

[105] *See generally* Kitchen, *supra* note 16.

[106] *See generally* Kitchen, *supra* note 16. Scholars generally agree that a President may refuse to enforce laws he feels are unconstitutional. May, *supra* note 19, at 867. However, this discretion "does not entitle the President to disregard laws simply because he thinks they are bad policy." Lawson & Moore, *supra* note 45, at 1306.

B. *Functionalism*

The Necessary and Proper Clause[107] lies at the heart of functionalism.[108] For laws to be effectively administered and enforced, Congress must cede some legislative powers.[109] Functionalists emphasize a rough balance of powers, rather than a strict separation of powers.[110] While accepting that all legislative and executive power cannot be concentrated in one branch, functionalists contend that the Framers did not intend the branches to be hermetically sealed either.[111] They point to the Constitution's silence on the separation-of-powers principle as evidence that the President may retain some legislative powers.[112] Further, they contend laws are ambulatory.[113] In a complex modern world, Congress cannot be expected to cover every minute detail in a statute.[114] Instead, Congress must give the Executive branch leeway to amend laws or administer laws differently based on rapidly changing events.[115]

For almost a century, Congress has granted Presidents the discretion to enact legally binding regulations under the "intelligible principle" standard.[116] Officially recognized by the Supreme Court in 1928, the intelligible-principle standard allows for presidential discretion "[i]f Congress shall lay down by legislative act an *intelligible principle* to which the person or body . . . is directed to conform, [and] such legislative action is not a forbidden delegation of legislative power."[117] Thus, Congress must provide an intelligible principle for which the executive branch bases its policy decision.[118]

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[107] U.S. CONST. art. 1, § 8, cl. 18 (granting Congress the power to make all laws that are "necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[108] Manning, *supra* note 53, at 1952.

[109] Manning, *supra* note 53, at 1952.

[110] Manning, *supra* note 53, at 1952.

[111] Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 14 (1998).

[112] Manning, *supra* note 53, at 1951.

[113] Manning, *supra* note 53, at 1951.

[114] Manning, *supra* note 53, at 1951.

[115] Prakash, *supra* note 111, at 31. Another scholar argues that an increasingly deadlocked Congress makes it imperative the President fill the legislative and policy vacuum. Michael J. Teter, *Congressional Gridlock's Threat to Separation of Power*, 2013 WIS. L. REV. 1097, 1104 (2013) (tabulating how recent Congresses have passed fewer laws than their predecessors).

[116] Prakash, *supra* note 111, at 31.

[117] J.W. Hampton v. United States, 276 U.S. 394, 409 (1928) (emphasis added).

[118] Mistretta vs. United States, 488 U.S. 361, 373 ("[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."). This test brought about an explosion of executive authority. *See generally* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

If Congress includes an intelligible principle, a statute may authorize the President to wield a crucial governing tool: a waiver provision.[119] If the President is acting in furtherance of the intelligible principle, he may waive certain provisions of a duly enacted law.[120] In other words, a waiver provision allows the President or an administrative agency to dispense with laws Congress has enacted.[121] Instead of making laws, the executive branch is unmaking Congress's laws.[122]

Waivers play a prominent role in many massive government programs, such as the No Child Left Behind Act (NCLB).[123] As part of a national education overhaul, NCLB encourages states to receive federal grants by reaching certain academic standards.[124] However, the NCLB Secretary of Education allows states a waiver if they request one based on certain conditions.[125]

Another prominent waiver provision occurred in *Defenders of Wildlife v. Chertoff*, where environmentalists challenged the Department of Homeland Security's (DHS) application of various environmental laws.[126] At Congress's request, DHS began constructing physical barriers along the United States border with Mexico to deter illegal entry into the U.S.[127] In particular, the DHS began construction on the San Pedro Riparian National Conservation Area (SPRNCA), an extremely biologically diverse area.[128] Environmentalists sought an injunction stopping construction on the grounds that the law conflicted with other federal laws prohibiting construction on SPRNCA.[129] Soon thereafter, the DHS Secretary published a notice waiving any laws conflicting with construction on SPRNCA.[130] The Secretary cited the REAL ID Act as his authority for such a waiver.[131]

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[119] *See* Barron & Rakoff, *supra* note 14, at 267 (reviewing waiver provisions in health care, welfare, and foreign policy).

[120] *See* Barron & Rakoff, *supra* note 14, at 267.

[121] *See* Barron & Rakoff, *supra* note 14, at 267 ("[I]t gives agencies the broad, discretionary power to determine whether the rule or rules that Congress has established should be dispensed with. It is the delegation, in other words, of the power to waive Congress's rules. Or, put another way, it is the delegation of the power to unmake law Congress has made rather to make law Congress has not.").

[122] *See* Barron & Rakoff, *supra* note 14, at 269.

[123] The government also uses waivers in other vast areas such as health care, welfare, the budget, and national security. Barron & Rakoff, *supra* note 14, at 281–290.

[124] 20 U.S.C. § 7861(b) (2014).

[125] The waivers must stipulate that they will "increase the quality of instruction" and "improve . . . academic achievements." *Id.* Further, they must identify "measurable education goals" and "methods to be used to measure annually" students' improvement. *Id.*

[126] Defenders of Wildlife v. Chertoff, 527 F.Supp.2d 119 (D.D.C. 2007).

[127] *Id.* at 121.

[128] *Id.* at 120–21.

[129] *Id.* at 121.

[130] *Id.* at 121–22.

[131] *Id.* at 122. Specifically, the REAL ID Act gave the Secretary of Homeland Security

The district court held the waiver constitutional under the intelligible-principle standard.[132] Distinguishing the REAL ID Act from the LIVA in *Clinton*, the district court noted that the Secretary's waiver did not repeal or cancel in whole any statute.[133] In fact, the laws still retained the same legal force, just not as applied to the SPRNCA.[134] Further, the district court noted that if this waiver was unconstitutional, then so are all waivers "no matter how limited in scope."[135] Here, the REAL ID Act's intelligible principle was limited in scope and defined clearly enough to pass constitutional muster.[136]

C. *Clause-Centered Approach*

In an attempt to reconcile functionalism and formalism, Professor Manning advocates for a clause-centered approach.[137] This approach respects the Constitution's specific requirements—presentment and bicameralism—while granting government officials sizable leeway in interpreting indeterminate clauses, such as the Necessary and Proper Clause.[138] To appease formalists, the clause-centered approach preaches faithfulness to definite constitutional requirements, such as the Appointments Clause,[139] bicameralism, and presentment.[140] He posits several reasons for respecting fine-grained constitutional requirements. First, he reasons that because the Constitution is a "bundle of compromises," any explicit efforts by the Framers to separate the branches should be respected.[141] In other words, these explicit requirements *are* the safeguards in place to separate the branches, not the good intentions of administrative agencies.[142] Second, he asks a simple question: why would the Framers include "exquisitely detailed legislative procedures" if they envisioned alternative pro-

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"the authority to waive all legal requirements . . . necessary to ensure expeditious construction . . . to deter illegal crossings in areas of high illegal entry." 8 U.S.C. § 1103 (2006).

[132] *Defenders of Wildlife*, 527 F. Supp. 2d at 129.

[133] *Id.* at 124.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 126–27. The Court also cited foreign affairs and immigrations as areas where the Executive Branch exercises independent constitutional authority. *Id.* at 127. *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The Supreme Court subsequently denied certiorari. 554 U.S. 918 (2008) (cert. denied).

[137] Manning, *supra* note 53, at 1948–49.

[138] Manning, *supra* note 53, at 1948–49.

[139] U.S. CONST. art. II, § II, cl. 2.

[140] Manning, *supra* note 53, at 1978–81.

[141] Manning, *supra* note 53, at 1948–49. (quoting MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 201 (2013)). *But see* Jeremy Waldron, *The Clough Distinguished Lecture in Jurisprudence: Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433 (2013) (deriding much of the historical sources formalists rely on, such as Montesquieu, to support their strict separation-of-power theories as "mostly tautologies").

[142] Manning, *supra* note 53, at 1978–81.

cedures as equally adequate?[143]

To appeal to functionalists, the clause-centered approach allows for breathing room in interpreting more elastic phrases.[144] Chief among them, the Necessary and Proper Clause grants Congress the power to carry into execution not just its own legislative powers, but all powers given to the government.[145] Professor Manning agrees with the functionalist assertion that this gives Congress broad power to enact legislation.[146] Additionally, the Vesting Clauses,[147] while at first blush appearing to cabin the branches, prove very indeterminate in relation to the Necessary and Proper Clause which, once again, governs "all powers vested" in the government.[148] Accordingly, while all executive power is vested in the President, Congress may still make laws that are necessary and proper to carry laws into execution.[149] The clause-centered approach concedes that no baseline exists for the separation of powers. Yet where the Framers did include specific requirements, it merely seeks to enforce these so as to promote political accountability.[150]

D. *Executive Enforcement Discretion*

Within the functionalist-formalist debate, a major point of contention deals with how much discretion the President possesses in enforcing civil statutes. As both an axiomatic separation-of-powers tenant and a matter of practicality, the President holds absolute prosecutorial discretion in deciding whether to prosecute a criminal case.[151] Common sense dictates that the executive branch should not be expected to prosecute every single colorable offense.[152]

For civil statutes, *Heckler v. Cheney* stands as the controlling authority that created a strong presumption against judicial review of an administrative agency's non-enforcement decision.[153] Citing numerous enforcement factors, the Court ceded to the agency's expertise in choosing whether to enforce a civil

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[143] Manning, *supra* note 53, at 1952, 1983.

[144] Manning, *supra* note 53, at 1948–49.

[145] Manning, *supra* note 53, at 1945.

[146] Manning, *supra* note 53, at 1945.

[147] Three separate clauses vest all judiciary, executive, and legislative powers in each respective branch. *See* U.S. CONST. art. I, § 1; art. II, § cl. 1; art. III, § 1.

[148] Manning, *supra* note 53, at 1945.

[149] Manning, *supra* note 53, at 1945.

[150] Manning, *supra* note 53, at 1945.

[151] Nixon v. United States, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.").

[152] *See generally id.* (citing a government's lack of resources as a key reason for enforcement discretion).

[153] The facts of the case surrounded death row inmates who claimed the lethal injection drugs used by the prison were outdated according to FDA regulations. Heckler v. Chaney, 470 U.S. 821, 823–24 (1985). They sued when the FDA refused to enforce the regulation. *Id.* The Supreme Court refused to review the FDA's decision. *Id.*

statute.[154] However, the Court cracked the door to judicial review if Congress explicitly mandates it in the statute.[155] Additionally, the Court embraced the notion found in *Adams v. Richardson*[156] that courts may review an agency's decision where the agency "'consciously and expressly adopted a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities."[157] Still, many scholars question how far this discretion goes: May an agency disregard an entire statute?[158]

Just within the past year, scholars have offered solutions delineating the proper circumstances for when a president should exercise his enforcement discretion.[159] These solutions generally fall along formalist-functionalist lines.[160] Mostly, their solutions attempt to couch unrestrained discretion so as to quell concerns about transparency and separation of powers.[161]

1. Institutionalized Presidential Enforcement

Like Professor Manning's clause-centered approach, Professor Kate Andrias

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[154] *Id.* at 832. ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise . . . An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with many variables involved in the proper ordering of priorities."); *see also* Arizona v. United States, 12 S. Ct. 2492, 2499 (2012) (emphasizing that agencies are better positioned to gauge "the equities of an individual case").

[155] *Heckler*, 470 U.S. at 838.

[156] Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973) (en banc).

[157] *Heckler*, 470 U.S. at 821 n.4 (quoting *Adams*, 480 F.2d at 1162). Courts will also review executive action if it directly conflicts with a statutory mandate. Massachusetts v. Envtl. Prot. Agency, 549 U.S. 487, 527 (2007). In that case, the Environmental Protection Agency (EPA) refused to apply the Clean Air Act's prohibition against "air pollutants" to greenhouse-gas emissions as a matter of interpretation. *Id.* at 534–35 (citing 42 U.S.C. § 7521(a)(1)). The Court disagreed with the EPA's interpretation. *Id.* at 534–35. It concluded that greenhouse-gas emissions constituted air pollutants and forced the EPA to follow the Act's protocol for regulating "air pollutants." *Id.* It announced that "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws." *Id.* at 534.

[158] *See* discussion *infra* Part III.D.1–2. Justice Jackson's famous concurrence in the *Steel Seizure Case* casts doubt upon a President's power to completely disregard a statute. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter . . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established in our constitutional system.").

[159] *See* discussion *infra* Part III.D.1–2.

[160] *See* discussion *infra* Part III.D.1–2.

[161] *See* discussion *infra* Part III.D.1–2.

introduces a solution—the institutionalized presidential enforcement (IPE) system—which cautions against unrestrained enforcement discretion.[162] The IPE is functionalist in the sense that it accepts the pragmatic notion that political and policy value judgments will occur in massive regulatory schemes.[163] But, the IPE calls for the President to ground any enforcement decision in law—a metaphoric hat tip to formalism.[164] In an IPE system, the President would transparently articulate his decision, making it "easier for Congress, the bureaucracy, and the public to evaluate and respond to presidential action."[165] Andrias succinctly describes it as a "nonjudicial form of *Chevron* review."[166] While strongly resembling functionalism, IPE distinguishes itself by stressing disclosure to assuage formalism's concerns over accountability and democracy.[167]

As an illustration, Andrias cites President Obama's Deferred Action for Childhood Arrival (DACA) program, where a President transparently exercised "prosecutorial discretion."[168] Frustrated with Congress's inability to pass immigration reform, President Obama announced he would use "prosecutorial discretion" to postpone the deportation of young illegal immigrants.[169] He issued a Compliance Memorandum outlining the enforcement steps the Administration would take.[170] Notably, this Memorandum came in an "accessibly, downloadable, and searchable online" format.[171] While the policy change concerned mul-

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[162] Kate Andrias, *The President's Enforcement Power*, 188 N.Y.U. L. REV. 1031, 1108 (2013).

[163] *Id.* at 1115.

[164] *Id.* at 1117.

[165] *But see* Arizona v. United States, 132 S. Ct. 2492, 2511 (2012) (Scalia, J., dissenting) (arguing the Executive Branch was selectively enforcing immigration laws to merely change duly enacted laws).

[166] Andrias, *supra* note 162, at 1115. *Chevron* Review refers to the standard of review for administrative agencies. *See* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc. 467 U.S. 837 (1984). Under *Chevron* Review, courts use a two-step process to review agency interpretations. *Id.* at 842. First, courts look if the congressional intent is unambiguous. *Id.* at 842–43. If yes, then a court will enforce the statute accordingly. *Id.* If the intent is ambiguous, then a court will accept an agency's reasonable interpretation. *Id.* at 843. Likewise, under an IPE, the President must root his enforcement decision in a reasonable interpretation of law. Andrias, *supra* note 162, at 1115.

[167] Andrias, *supra* note 162, at 1117; In a similar vein, Professor Michael Sant'Ambrogio advocates for an "extra legislative veto" where a President refuses to enforce a law, but proceeds transparently. Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351 (2014). The "extra-legislative veto" consists of the tools presidents use to weaken or change statutory mandates. *Id.* at 357. He argues it helps democracy because it allows presidents to protect Americans from laws gone bad. *Id.*

[168] Andrias, *supra* note 162, at 1117.

[169] Andrias, *supra* note 162, at 1068.

[170] Presidential Memorandum on Regulatory Compliance, 76 Fed. Reg. 3825, 3825–26 (Jan. 18, 2011).

[171] *Id.* at 3825.

tiple agencies,[172] Andrias notes that President Obama made clear that he "intended to claim the policy decisions as his own," based on a speech shortly after the announcement.[173] In the face of congressional deadlock, President Obama set public policy through transparent and accountable non-enforcement decision.[174]

2. Professor Price's Framework

Unlike Professor Andrias's IPE, Professor Zachary S. Price espouses a more formalist framework centered around two presumptions: one presumption in favor of executive discretion for particular cases and one against "categorical suspensions" of statutes.[175] Thus, Professor Price distinguishes between the specific and the general.[176] He posits that non-enforcement for specific cases complies with the Take Care Clause.[177] For more general non-enforcement choices, he argues that "prospective licensing of prohibited conduct [or] policy-based non-enforcement of federal laws for entire categories of offenders" reaches outside the proper scope of executive enforcement discretion.[178] General non-enforcement becomes a President's "second veto"—a blatant violation of the Constitution.[179]

Like Professor Andrias, Professor Price also cites DACA as an example, but contends it amounted to an impermissible suspension of immigration laws.[180] Besides the removal of immigrants, he also notes that DACA suspended laws mandating penalties for employers who hire individuals without proper documentation.[181] While supposing these immigration laws may be unwise or even harsh, he stresses that Congress should be held accountable for their deficiencies.[182] He maintains a president should not rewrite laws to set policy.[183]

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[172] Namely, the Immigration and Customs Enforcement Agency and the Department of Human Services. Andrias, *supra* note 162, at 1066.

[173] Andrias, *supra* note 162, at 1066. Professor Sant'Ambrogio also cites the DACA program as a shining example of the extra-legislative veto due to the robust public policy and legal debates surrounding it. Sant'Ambrogio, *supra* note 167, at 402. These discussions curbed any concerns over transparency. Sant'Ambrogio, *supra* note 167, at 402.

[174] Andrias, *supra* note 162, at 1066.

[175] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 675 (2014).

[176] *Id.* at 677 (phrasing the general versus specific dichotomy as "priority setting" versus "policymaking").

[177] *Id.* at 675.

[178] *Id.*

[179] *Id.* at 674.

[180] *See id.* at 759–761.

[181] *See id.*

[182] *Id. But see* Arizona v. United States, 12 S. Ct. 2492, 2499 (2012) (maintaining that the executive branch may exercise discretion for "embrac[ing] immediate human concerns" and can better gauge "[t]he equities of an individual case").

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Essentially, these constitutional perspectives disagree over the extent to which the President is tethered to statutory text.[184] Formalists present a high bar for a President to alter statutory text.[185] Using the Take Care Clause, bicameralism, and presentment as lodestars, they champion an almost strict adherence to statutory text.[186] On the opposite pole, functionalists argue that courts should defer to Congress's judgment to determine what is "necessary and proper" to enact legislation.[187] Due to the Constitution's silence, no bright line exists for when the President possesses too much legislative power.[188] Therefore, courts should give Congress breathing space to legislate and invalidate only "extreme" laws such as the LIVA in *Clinton*.[189] Splitting the difference, Professor Manning's clause-centered approach advocates that Presidents should stay faithful to the Constitution's explicit requirements.[190] Finally, these perspectives manifest themselves especially in terms of presidential enforcement discretion.[191] Going forward, this discretion's limit will play a prominent role in shaping public policy.[192]

IV. THE ACA'S LONG ROAD TO IMPLEMENTATION

President Obama's implementation of the Patient Protection and Affordable Care Act—his signature legislative achievement[193]—included thirteen major changes or delays.[194] The ACA consists of many laudatory goals: lowering the

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[183] Price, *supra* note 175, at 761.

[184] *See supra* Part III.

[185] *See supra* Part III.A.

[186] *See supra* Part III.A.

[187] *See generally* Barron & Rakoff, *supra* note 14.

[188] *Id.*

[189] *Id.* at 317. One scholar even goes so far to suggest the President may execute a statute according to his own interpretation. Michael Stokes Paulsen claimed the power to interpret the Constitution is vested in each branch separately, rather than solely the judiciary. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994). He claims political pressure and public accountability will prevent a branch from usurping the entire government. *Id.* at 224. Unsurprisingly, this article has been met with an avalanche of criticism. *See* Lawson & Moore, *supra* note 45 at n.4 and accompanying text.

[190] *See supra* Part III.C.

[191] *See supra* Part III.D.

[192] *See infra* Part V.D.

[193] Juliet Eilperin, Amy Goldstein, & Lena H. Sun, *Obama Announces Change To Address Health Insurance Cancellations*, WASH. POST (Nov. 14, 2013), http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fb0c0_story.html (calling the ACA "the crowning achievement of his presidency").

[194] *Changes and Delays to the Health Law*, N.Y. TIMES (last updated Mar. 10, 2014),

price of health care, expanding access to health care, and expanding the scope of health care benefits.[195] In order to achieve these goals, Congress included, amongst others, three crucial provisions—Medicaid expansion, the employer mandate, and the individual mandate.[196] Through an aforementioned waiver provision, the Medicaid expansion widens the safety net for low-income individuals to receive health care.[197] The individual mandate requires Americans to buy health insurance or pay a tax.[198] The statute required the individual mandate to go into effect on Jan. 1, 2014.[199] Similarly, the employer mandate requires that businesses with fifty or more employees provide congressionally-prescribed health care insurance plans to their employees or pay a penalty.[200] The statute reads that the employer mandate "shall apply to months beginning after December 31, 2013."[201]

In July 2013, the Obama Administration announced it would be postponing or suspending the employer mandate until 2015.[202] It offered two reasons for the decision. First, it explained that this postponement responded to business leaders who were concerned[203] that they would not be ready to satisfy the

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http://www.nytimes.com/interactive/2013/12/20/us/politics/changes-and-delays-to-health-law.html.

[195] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[196] *Id.* The ACA's other major provision—Medicaid expansion—includes a waiver provision for states. Barron & Rakoff, *supra* note 14, at 281–283. To receive federal funds for Medicaid, states must adopt federal minimum coverage requirements. *Id.* Similar to the NCLB's waiver, states may propose an alternative health care scheme if it accomplishes certain objects. 42 U.S.C. § 18052(a)(1)–(2). In particular, the Secretary of Health and Human Services must be able to determine if the state's plan, as compared to the ACA's, is "at least as comprehensive" and "at least as affordable . . . to at least a comparable number of its residents." 42 U.S.C. § 18052(b)(1). Also, the proposed plan cannot "increase the Federal deficit." *Id.*

[197] Barron & Rakoff, *supra* note 14, at 281–83. To receive federal funds for Medicaid, states must adopt federal minimum coverage requirements. *Id.* at 281–83. Similar to the NCLB's waiver, states may propose an alternative health care scheme if it accomplishes certain objects. 42 U.S.C. § 18052(a)(1)–(2). In particular, the Secretary of Health and Human Services must be able to determine if the state's plan, as compared to the ACA's, is "at least as comprehensive" and "at least as affordable . . . to at least a comparable number of its residents." 42 U.S.C. § 18052(b)(1). Also, the proposed plan cannot "increase the Federal deficit." *Id.*

[198] 26 U.S.C. § 5000a (2012).

[199] *Id.* The individual mandate also raised separate constitutional concerns under the Commerce Clause. *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566.

[200] 26 U.S.C. § 4980(H) (2012).

[201] *Id.*

[202] Mazur, *supra* note 4.

[203] Ezra Klein, *Obamacare's Employer Mandate Shouldn't be Delayed. It Should be Repealed*, WASH. POST (July 2, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/07/02/obamacares-employer-mandate-shouldnt-be-delayed-it-should-be-repealed/.

ACA's requirements by 2014.[204] Thus, to assuage these fears, the Administration postponed the mandate, affording businesses more time to get acclimated with the regulatory scheme.[205]

The second reason concerned a need to propose, establish, and publish new rules to implement the mandate.[206] Specifically, the Internal Revenue Service (IRS) needed to implement a reliable reporting system where businesses would supply information regarding their employees and any health benefits they already offer.[207] This information would be reported on an employer's tax return.[208] Obviously, the IRS cannot collect a penalty without that particular information.[209] Additionally, the ACA mandates that those returns be submitted "at such time as the Secretary [of the Treasury] may prescribe."[210] In sum, the IRS needed more time to simplify this process.

Seven months later, the Obama administration postponed the employer mandate again.[211] In February 2014, it postponed the employer mandate until 2016 for companies with between fifty and ninety-nine employees.[212] It described the new policy as "transitional relief" for medium companies.[213]

In November 2013, the Obama Administration tweaked the individual mandate after many insurers abruptly cancelled their healthcare plans.[214] Responding to public outrage over these canceled plans, HHS allowed insurance companies to renew canceled plans that did not comply with the ACA's minimum-care standards.[215] This so-called "administrative fix" essentially grandfathered

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[204] Mazur, *supra* note 4.

[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] 26 U.S.C. § 6055–56. (2012).

[211] Robert Pear, *Further Delays for Employers in Health Law*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/2014/02/11/us/politics/health-insurance-enforcement-delayed-again-for-some-employers.html?hpw&rref=us&_r=0.

[212] *Id.*

[213] *Id.*

[214] Specifically, the ACA mandated that any health insurance plans bought or changed after 2010 were to be automatically canceled, and the recipients were forced to buy a more comprehensive health care plan. Carole E. Lee and Louise Radnofsky, *White House to Allow Insurers to Continue Canceled Health Plans*, WALL ST. J. (Nov. 14 2013), http://online.wsj.com/news/articles/SB10001424052702303789604579197733759439274.

[215] More precisely, the HHS gave states the option to allow insurance companies to renew non-compliant health plans. Juliet Eilperin, Amy Goldstein, & Lena H. Sun, *Obama Announces Change To Address Health Insurance Cancellations*, WASH. POST (Nov. 14, 2013), http://www.washingtonpost.com/politics/obamato-to-announce-change-to-address-health-insurance-cancellations/2013/11/14/3be49d24-4d37-11e3-9890-a1e0997fb0c0_story.html (reporting that some states were still not allow insurance companies to renew noncompliant plans).

in existing plans.[216] For its legal justification, an HHS spokesperson defended the "administrative fix" as an application of the President's "inherent authority to exercise discretion" in enforcing laws according to statutory goals.[217] The spokesperson cited *Heckler*[218] as its legal authority for the proposition that the President possesses discretion when implementing new regulatory regimes.[219] A Washington Post blogger elicited this justification from HHS.[220]

The "administrative fix" engendered serious legal attention. Attorneys General from eleven states sent Kathleen Sebelius, the Secretary of HHS, a legal memo calling for HHS to rescind the "administrative fix."[221] The memo claimed the "administrative fix" violated the Take Care Clause.[222] It demanded the administration cease the "illegal actions" of altering the ACA and allow Congress to implement any changes to the ACA.[223]

In academia, Professor Price criticizes both the "administrative fix" and the employer mandate suspension as an overreach of executive power.[224] He labels the "administrative fix" as a "prospective suspension of the law . . . precisely the form of executive non-enforcement that is presumptively impermissible."[225]

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[216] The "fix" was also largely political due to President Obama's famous campaign pledge that if individuals like their health plan, they could keep it. Glenn Kessler, *Obama's Pledge That 'No One Will Take Away' Your Health Plan*, WASH. POST (Oct. 30, 2013), http://www.washingtonpost.com/blogs/fact-checker/wp/2013/10/30/obamas-pledge-that-no-one-will-take-away-your-health-plan/.

[217] Greg Sargent, *White House Defends Legality of Obamacare Fix*, WASH. POST (Nov. 14, 2013), http://www.washingtonpost.com/blogs/plum-line/wp/2013/11/14/white-house-defends-legality-of-obamacare-fix/.

[218] Heckler v. Chaney, 470 U.S. 821, 832 (1985).

[219] *Id.* A month later, the Obama Administration widened the exemptions to include those under thirty who could not receive only catastrophic plans. Jennifer Haberkorn & Carrie Budoff Brown, *White House Broadens Obamacare Exemptions*, POLITICO (Dec. 19, 2013), http://www.politico.com/story/2013/12/white-house-obamacare-affordable-care-act-canceled-plans-101355_Page2.html.

[220] Sargent, *supra* note 217.

[221] Letter from Patrick Morrisey, Att'y Gen., W.Va., to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Dec. 26, 2013).

[222] *Id.*

[223] *Id. See also* Jacob Gersham, *The Legality of Obama's Health Insurance Move*, WALL ST. J. (Nov. 15, 2013, 5:49 PM), http://blogs.wsj.com/law/2013/11/15/the-legality-of-obamas-health-insurance-move/.

[224] Price, *supra* note 175, at 751. *But see*, Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and Separation of Powers*, 112 MICH. L. REV. 1195, 1221–22. Love and Garg argue that the employer mandate suspension is lawful because the delay "meant to serve the goals of the enacting Congress." *Id.* at 1222. Overall, they warn against too much presidential discretion to protect the separation-of-powers principle. *Id.* While admitting the delay raises difficult questions, they still maintain President Obama's benign motivations outweigh any constitutional concern. *Id.* In other words, he wanted to help the law, not hurt it.

[225] Price, *supra* note 175, at 751.

For the employer mandate suspension, he calls for "more explicit statutory authorization" in order to suspend a major portion of the law.[226] Thus, Price argues these delays violate the separation-of-powers principle.[227]

V. THE SUSPENSION POWER: NECESSARY OR IMPROPER?

President Obama's ACA implementation—specifically the employer mandate suspension and the "administrative fix"—usurps congressional power. While each constitutional theory views the President's enforcement duties differently, President Obama's ACA implementation provokes serious questions about the scope of executive power under any constitutional perspective.[228] First, formalists contend that the President's unilateral action postponing the employer mandate and comprehensive-care requirements violates the Presentment Clause.[229] Functionalists maintain that effective implementation of a law with a massive scope like that of the ACA requires that minor provisions be tweaked.[230] Further, the delay seeks to accomplish the congressional objectives of the ACA.[231] In between, the clause-centered approach, Professor Price's framework, and the IPE system each have more nuanced theories on the ACA's implementation.[232] Nevertheless, even on strict functionalist grounds, the ACA's implementation violates specific constitutional requirements, namely presentment and bicameralism, which the President should respect.[233]

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[226] Price, *supra* note 175, at 753 (noting that allowing individuals to retain non-compliant plans may actually hurt the ACA's overall goal of lowering health care costs).

[227] The debate also spilled over onto the blogosphere and editorial boards. *Compare* Nicholas Bagley, *Does the administration have the legal authority to delay the employer mandate? And what if it doesn't?*, THE INCIDENTAL ECONOMIST (July 3, 2013, 12:42 PM), http://theincidentaleconomist.com/wordpress/does-the-administration-have-the-legal-authority-to-delay-the-employer-mandate-and-what-if-they-dont/ (arguing the delay is constitutional according to the assumption that Congress intends agencies to resolve ambiguities they administer) *with* Editorial, *Employer Mandate? Never Mind*, WALL ST. J. July 4, 2013, 11:38 PM), http://online.wsj.com/news/articles/SB10001424127887323899704578583493972896364 ([The ACA] does not say the Administration can impose the mandate whenever it feels it is politically convenient.") and George F. Will, *Obama's Never-Mind Presidency*, WASH. POST (July 5, 2013), http://www.washingtonpost.com/opinions/george-will-delay-of-obamacare-mandate-augurs-a-similar-approach-to-immigration/2013/07/05/4144fc06-e58a-11e2-aef3-339619eab080_story.html ("Although the Constitution has no Article VIII, the administration acts as though there is one that reads: 'Notwithstanding all that stuff in other articles about how laws are made, if a president finds a law politically inconvenient, he can simply post on the White House Web site a notice saying: Never mind.").

[228] *See supra* Part III.

[229] *See supra* Part III.A.

[230] *See supra* Part III.B.

[231] *See supra* Part IV.

[232] *See supra* Part III.C–D.

[233] *See supra* Part III.B.

A. *The ACA Delays Under Formalism*

From a formalist perspective, the illegality of the employer mandate delay is quite simple. In delaying the mandate, the President's actions mirror those of James II's whose exact behavior the Framers sought to prevent.[234] By suspending aspects of the law, the President inserted his policy judgment for that of Congress's in violation of the Presentment Clause.[235]

From a procedural standpoint, President Obama's ACA suspensions are polar opposite from *Chadha*, but the results are the same: one branch possessed both executive and legislative power.[236] In *Chadha*, either house of Congress could exercise a veto, a purely executive function.[237] Here, President Obama changed statutory language, a purely legislative function.[238] The drafters of the Constitution expressly forbid this result as evidenced by James Madison warning that, "'[w]hen the legislative and executive powers are united in the same person or body' . . . there can be no liberty."[239] Thus, citing *Chadha* as simple precedent, President Obama's ACA implementation is unconstitutional.[240]

From a purely statutory perspective, the delays act as a paradigmatic violation of the Presentment Clause as described in *Clinton*.[241] After signing legislation into law, President Obama altered statutory language.[242] The ACA required that the employer mandate "*shall* apply to months beginning after December 31, 2013," to which the Obama Administration changed to 2015.[243] Moreover, the ACA set minimum healthcare-levels, and the Obama Administration pushed back the compliance time.[244]

Clinton cautions that laws are not ambulatory.[245] The Court may well have been admonishing President Obama instead of President Clinton when it stated that no constitutional provision gives the President the authority to amend "duly enacted statutes."[246] As George Washington framed presentment, the President must either reject all the parts of the bill or veto it.[247] In changing statutory language after enactment, President Obama disrupts the "finely wrought and exhaustively considered procedure."[248]

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[234] *See supra* Part II.A.

[235] *See supra* Part III–IV.

[236] *See* I.N.S. v. Chadha, 462 U.S. 919 (1983).

[237] *Id.* at 924–28.

[238] *See supra* Part IV.

[239] THE FEDERALIST No. 47, at 240 (James Madison) (Oxford ed., 2008).

[240] *See generally Chadha*, 462 U.S. 919 (1983).

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

[242] *See supra* Part IV.

[243] 26 U.S.C. § 4980(H) (emphasis added).

[244] *See supra* Part IV.

[245] *See Clinton*, 524 U.S. 417.

[246] *Id.* at 439.

[247] *Id.* at 438.

[248] I.N.S. v. Chadha, 462 U.S. 927, 959 (1983).

Of course, the very legitimate response against these constitutional concerns merely asks, 'so what'? President Obama fully supports the legislation, and the delay further serves the congressional objectives of the ACA to increase the number of Americans with health care.[249] If he followed the January 1, 2014 deadline, then confusion would have ensued because the Treasury Department and IRS were not adequately prepared.[250] The extra year serves a two-fold purpose. First, it gives the Administration time to effectively implement the employer mandate.[251] Second, it allows individuals to slowly merge into the marketplace rather than have their plans abruptly canceled.[252] Accomplishing these objectives overshadow any nominal constitutional concerns.[253]

The separation-of-powers principle, however, transcends any good intentions.[254] As Justice Kennedy pointed out in *Clinton*, "The Constitution's structure requires a stability which transcends the convenience of the moment."[255] The problem with President Obama's delaying the employer mandate is not that the IRS will collect a tax a year later or individuals will buy health care a year later.[256] Rather, the paramount problem concerns the precedent the delay sets: a President may change statutory language at whim.[257] A president, for purely political reasons, could adjust laws to satisfy a political base.[258] Under this scenario, acceptable presidential behavior begins to resemble James II's actions.[259]

One could propose a simple good-faith requirement as a panacea to this constitutional problem.[260] Under this hypothetical regime, a President could change statutory language only in good faith.[261] However, the difficulty in proving good faith sinks this solution, as a president could just as convincingly argue he is suspending the entire ACA because he believes it raises the cost of health care.[262] Of course, that would undermine Congress's obvious intent in passing

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[249] *See supra* Part IV. In fact, President Obama's legacy largely depends on the ACA's success. Eilperin, Goldstein & Sun, *supra* note 193.

[250] *See* discussion *supra* Part IV.

[251] *See supra* Part IV.

[252] *See supra* Part IV.

[253] *See supra* Part III.B.

[254] *See supra* Part III.A.

[255] Clinton v. City of New York, 524 U.S. 417, 449 (1998) (Kennedy, J. concurring).

[256] *See supra* Part IV.

[257] Whether the president may change statutory language with a legal explanation is a question explored later. *See infra* Part V.D.

[258] *See supra* Part II.A.

[259] *See supra* Part II.A.

[260] See Love & Garg, *supra* note 224, at 1217 (making this argument).

[261] *See id.*

[262] In fact, during the 2012 presidential election, this scenario came close when Gov. Romney vowed to repeal the ACA if elected. Mitt Romney, *Repeal Obamacare to Make Way for Real Healthcare Reform*, U.S. NEWS. (July 10, 2012, 11:13 AM), http://www.us

the ACA.[263]

On a micro-level, President Obama's changes to the ACA's implementation appear insignificant. But the delay proves more troublesome when examining the example it sets.[264] To paraphrase Justice Scalia, once Congress, the President, or the Supreme Court starts ignoring small constitutional provisions, when or where will they stop?[265]

B. *The ACA Delays Under Functionalism*

On the opposite constitutional pole, a functionalist would deem President Obama's decision as squarely in-step with a long line of Presidents who veered from strict compliance of a statute.[266] His actions fail to raise constitutional concerns because they do not disturb the de facto balance of powers between the branches.[267] Once again, functionalists emphasize a rough balance of power versus a strict, hermetically sealed, separation.[268]

Furthermore, the President's use of the suspension power is distinguishable from James II's abuses concerning the Framers.[269] As James discriminately applied the law to aid his political supporters,[270] President Obama suspended certain ACA provisions to appease a host of different groups—medium sized employers, the business community at large, and individuals with canceled plans.[271] Instead of suspending laws to favor political groups, President Obama adjusts the ACA in pursuit of apolitical, universally accepted objectives: increasing access to health care and lowering the cost of health care.[272] Moreover, while James suspended the law in direct violation of Parliament's wishes, President Obama is acting in accord with the congressional objectives of the ACA.[273] These ACA delays are essentially no different than the legal NCLB and ACA state-waiver programs.[274]

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news.com/debate-club/should-congress-repeal-the-affordable-care-act/mitt-romney-repeal-obamacare-to-make-way-for-real-healthcare-reform (arguing that the ACA will raise the cost of health care for Americans).

263 *See supra* Part IV.

264 *See generally supra* Part IV.

265 Morrison v. Olson, 487 U.S. 700, 710 (1988) (Scalia, J., dissenting).

266 *See supra* Part III.B.

267 *See supra* Part III.B.

268 *See supra* Part III.B.

269 *See supra* Part II.A.

270 *See supra* Part II.A.

271 *See supra* Part IV.

272 Paul Krugman, *Obamacare's Secret Success*, N.Y. TIMES (Nov. 28, 2013), http://www.nytimes.com/2013/11/29/opinion/krugman-obamacares-secret-success.html?_r=0 (noting how since the ACA's implementation the rise of health care costs has slowed dramatically).

273 *See supra* Part II.A, IV.

274 *See supra* Part III.B.

A significant distinction between those legal waiver programs and the ACA delays lies in the absence of either congressional approval in the statute or an intelligible principle.[275] Nowhere in the statute does it give the President any discretion to alter the employer or individual mandate enforcement dates.[276] In fact, a glaring weakness in the functionalist argument concerns the ACA Medicaid state waivers.[277] If Congress gave the Secretary of HHS discretion to grant waivers for Medicaid,[278] why did it not also include an intelligible principle to guide the enactment for the rest of the law?

Once again, the legal deficiency in President Obama's actions lies not in a malignant motivation, but rather, the precedent set by his actions.[279] Comparisons to James II stem from this precedent. Future presidents could use judicial acquiescence to President Obama's suspension power as legal authority to suspend entire laws.[280] Unlike President Obama, these presidents could have nefarious motivations similar to James II.[281] The Founders realized this danger.[282] Hence, they included presentment and bicameralism to separate the powers of government.[283]

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[275] This fact is also where the ACA's suspensions diverge from *Terran*. Terran v. Sec'y of Health and Human Servs, 195 F.3d 1302 (Fed. Cir. 1999). In *Terran*, the court looked to these three guideposts to distinguish its case from *Clinton*: (1) the Act cabined the Secretary's discretion; (2) the Act accounted for underlying facts to change; and (3) the Secretary was following congressional policy, instead of rejecting it. *Id.* at 1325–28. Here, none of those factors exist. First, the ACA does not speak to any executive discretion besides the state Medicaid waivers. *See supra* Part IV. Second, no underlying facts have changed besides arguably the public outrage over the unexpected cancellations of plans. *See supra* Part IV. While the implementation may prove unexpectedly difficult, no assumptions have changed since Congress passed the ACA. *See supra* Part IV. Finally, one could argue that President Obama is following Congressional policy by suspending parts of the law, but Congress left no traces in the law indicating it wanted him to intervene. *See supra* Part IV. Once again, good faith may not overcome the Presentment Clause.

[276] Here again, the intelligible principle's absence separates this case from *Defenders of Wildlife*. Defenders of Wildlife v. Chertoff, 527 F. Supp. 2d 119 (D.D.C. 2007). The REAL ID Act granted the DHS Secretary discretion to waive laws. *Id.* at 120. It plainly gave the DHS Secretary "the authority to waive all legal requirements . . . necessary to ensure expeditious construction . . . to deter illegal crossings in areas of high illegal entry." 8 U.S.C. § 1103. The ACA simply lacks a similar provision. *See supra* Part IV.

[277] *See supra* Part IV.

[278] *See supra* Part IV.

[279] *See supra* Part II.A.

[280] Morrison v. Olson, 487 U.S. 654, 711 (1988) (Scalia, J., dissenting) ("Once we depart from the text of the Constitution, just where short of that do we stop?").

[281] *See supra* Part II.A.

[282] *See supra* Part II.B.

[283] *See supra* Part II.B.

C. *The ACA under the Clause-Centered Approach*

Although Professor Manning's clause-centered approach affords the president the power to make pragmatic and quick decisions, President Obama still has abused the suspension power under this approach.[284] Bicameralism and presentment are determinate clauses providing simple, but strict requirements.[285] Unlike the Necessary and Proper Clause, they do not lend themselves to elastic interpretations.[286]

In particular, the Obama administration's legal justification for the "administrative fix" raises two concerns in a separation-of-powers analysis using the clause-centered approach.[287] First, does this "inherent authority to exercise discretion" supplant statutory language?[288] President Obama derives the inherent authority from the Vesting Clause,[289] but surely duly enacted statutes supersede this inherent authority. If not, the Presidency would swallow Congress.

Second, any inherent authority rides roughshod over the bundle of compromises within the Constitution meant to protect political minorities.[290] These constitutional provisions serve no purpose if a President can claim an "inherent authority" privilege to change statutory language.[291] Presentment and bicameralism are the constitutional safeguards which preserve democratic ideals.[292]

Furthermore, what makes the "inherent authority" explanation so problematic is that the Administration barely attempts to ground the suspensions in any constitutional law.[293] As observed earlier, the clause-centered approach does not demand a strict interpretation of the Constitution.[294] It grants the President leeway to experiment with the implementation if he can attach his actions to an elastic phrase of the Constitution, such as the Necessary and Proper Clause.[295] But here, President Obama merely gives a salutation to the legality of his acts.[296] The clause-centered approach merely asks the executive to tie his actions to the Constitution, to preserve a rough balance of power.[297] Because President Obama fails to satisfactorily provide a legal justification, the delays would be unconstitutional under the clause-centered approach.

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284 *See supra* Part III.C.

285 *See supra* Part III.C.

286 *Compare* U.S. CONST. art. 1, § 8, cl. 18, *with* U.S. CONST. art. 1, § 7, cl. 2–3.

287 *See supra* Part III.C, Part IV.

288 Sargent, *supra* note 217.

289 U.S. CONST. art II, § 1, cl. 1.

290 *See supra* Part III.C.

291 Sargent, *supra* note 217.

292 *See supra* Part II.B.

293 *See supra* Part IV.

294 *See supra* Part III.C.

295 *See supra* Part III.C.

296 *See supra* Part IV.

297 *See supra* Part III.C.

D. *Solution for Presidential Enforcement Discretion*

More than formalism, a clause-centered approach, or even functionalism, presidential enforcement discretion under *Heckler* presents a strong legal argument for why President Obama's use of the suspension power is constitutional.[298] Put another way, the Obama administration possesses the discretion to postpone ACA requirements as Congress did not make agency decisions explicitly available for judicial review.[299] HHS chose not to enforce certain provisions of the law due to a myriad of factors which courts are ill-suited to review.[300] Thus, the Obama administration argues its actions are constitutional and judicially unreviewable per *Heckler*.[301]

Although plausible, that argument is a strained reading of *Heckler*.[302] At best, the relevance of *Heckler* remains unclear in a situation like the ACA implementation where the executive suspends entire portions of a law. As the state Attorneys General argued, the Court in *Heckler* did not contemplate sweeping suspensions like the "administrative fix."[303] Rather, the Court referred to single violations and described agencies as choosing between particular violations when deciding to enforce a statute.[304] In other words, *Heckler* encompasses individual violations, while the Obama Administration simply suspended entire portions of the law.[305] Essentially, the difference is between HHS choosing specific individuals to penalize and HHS declining to penalize any individuals.[306]

Although the attorneys general distinguished *Heckler* only in relation to the "administrative fix," the Court's reasoning in *Heckler* is also inapposite to the employer mandate suspension.[307] The Court argued that agencies are better positioned to view the merits of a case due to their expertise in balancing multi-

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298 Heckler v. Chaney, 470 U.S. 821, 828 (1985).

299 *See supra* Part II.D, IV.

300 *See Heckler*, 470 U.S. at 828.

301 *Id.*

302 In fact, even a scholar supporting the proposition that delay is unreviewable still equivocated. Bagley, *supra* note 227. ("[Discretion is] a plausible legal argument . . . [but] the ACA is blunt that it '"hereby impose[s] on the employer an assessable payment' for failing to adhere to the employer mandate. And the effective date of the penalty provision is categorical. The natural inference is that the penalty comes into force on January 1, 2014, whether or not the agency has the reporting machinery in place to administer it. This is probably the most straightforward reading of the statute . . . ." (alteration in original) (quoting 26 U.S.C. § 6055).

303 Letter from Patrick Morrisey, Attorney Gen., W.Va., to Kathleen Sebelius, Sec'y, U.S. Dep't of Health & Human Servs. (Dec. 26, 2013).

304 *Heckler*, 470 U.S. at 831.

305 *See* Letter from Patrick Morrisey to Kathleen Sebelius, *supra* note 303.

306 *Id.*

307 *Heckler*, 470 U.S. at 831.

ple factors.[308] Yet, the employer mandate serves as a massive policy choice by Congress.[309] It is an integral part of the ACA.[310] To lower the cost of health care, Congress stipulated that businesses with fifty or more employees would provide health insurance plans.[311] The expertise reasoning in *Heckler* does not apply to a major congressional policy decision that went through the gauntlet of the "finely wrought and exhaustively considered" legislative process.[312] Once again, the paramount difference is between specific versus general discretion, suspending the law for one company versus every company.

This difference is more than just semantics. If constitutional protections become defanged and the executive branch may unilaterally suspend portions of the law, then political minorities, such as those employees who expected to receive health insurance benefits in 2014, are injured.[313] Presentment and bicameralism act as the safeguards to ensure that powerful political constituencies, here employers, cannot circumvent the legislative process.[314]

With presidential enforcement discretion scholarship in its infancy, two scholars recently advocated for framework solutions which are illuminating, but both ultimately prove unsatisfying when analyzing the ACA suspensions.[315] Using Professor Andrias's mostly functionalist IPE system, one would still probably disapprove of the Obama administration's implementation of the ACA. As noted above, Professor Price came out against the ACA's implementation. However, his solution proves equally untenable in analyzing future executive enforcement discretion questions. Going forward, a more fully-formed solution combines Price's emphasis on the text and Andrias's focus on transparency to help address future enforcement problems.

1. Institutionalized Presidential Enforcement Option

Under an IPE system, the Obama administration's opaque announcements of the ACA suspensions raise concerns over transparency.[316] Although allowing for regulatory policy judgments in massive programs, the essence of the IPE requires a transparent, articulate announcement explaining the legal justification for why the president exercised enforcement discretion.[317] Here, the Obama administration failed that requirement. For the employer mandate, the

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[308] *Id.*

[309] *See supra* Part IV.

[310] *See supra* Part IV.

[311] 26 U.S.C. § 4980H.

[312] I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).

[313] *See supra* Part II, IV.

[314] *See supra* Part II.B.2.

[315] *See supra* Part III.D.1–2.

[316] Andrias, *supra* note 162.

[317] Andrias, *supra* note 162, at 1038. The IPE is more forgiving than the clause centered approach in that the president's legal justification need not be tied to any determinate clause in the constitution, but merely grounded in some law. *See supra* Part III.D.

Treasury Department announced the postponement on its website two days before the Fourth of July holiday.[318] On the same day, an Obama advisor further explained the decision on the White House website as an effort to help businesses get acclimated.[319] This attempt at transparency still falls short of the IPE's goal of making it "easier for Congress, the bureaucracy, and the public to evaluate and respond to presidential action."[320] Postponing a massive statutory requirement warrants more than an information dump right before a federal holiday.

Even more alarming was the "administrative fix" announcement where a blogger pushed the Administration to offer legal justification.[321] HHS announced the fix through a letter to insurance carriers, but failed to provide a legal explanation for exercising enforcement discretion.[322] This omission is problematic, as massive regulatory programs already lend themselves to confusion over accountability.[323] Professor Andrias merely asks agencies to transparently ground these decisions in law, so Congress and the public may react accordingly.[324]

A legal explanation becomes especially vital in light of the fact that the administration has made thirteen major changes to the law since its inception.[325] When an implementation proves difficult, the executive branch must make an effort to cabin its enforcement discretion.[326] In suspending laws, the danger becomes acute to ride roughshod over legislative compromises and intent.[327] Here, the administration has provided medium sized employers relief at the expense of their employees who probably expected their employers to provide them a health insurance plan by 2014, or at the very least, by 2015.[328] In a transparent and accountable democracy, those employees deserve a legal expla-

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318 *See* Mazur, *supra* note 4.

319 *See supra* Part IV.

320 Andrias, *supra* note 162, at 1039. Moreover, the IPE expects the President to coordinate amongst numerous agencies, but here, the IRS, Treasury Department, and the HHS are acting alone. *See supra* Part III.D.1, IV. Each agency's decision with respect to the ACA does not appear to be in conjunction with another agency's postponement. *See supra* Part IV.

321 Sargent, *supra* note 217.

322 Letter from Gary Cohen, *supra* note 3.

323 *See generally supra* Part III.A.3.

324 As evidenced by *Massachusetts v. EPA*, this concern can have real judicial consequences. 549 U.S. 497 (2007). In that case, the EPA refused environmentalists' requests to label greenhouse gases "air pollutants." *Id.* at 505. The Court basically championed an IPE system. *Id.* at 527–528. It demanded the EPA either label greenhouses gases as "air pollutants" or present a legal justification for why it would not. *Id.* Thus, the Supreme Court evinced serious concern about unrestrained executive enforcement discretion.

325 *Changes and Delays to the Health Law*, N.Y. TIMES (Feb. 10, 2014), http://www.nytimes.com/interactive/2013/12/20/us/politics/changes-and-delays-to-health-law.html.

326 *See generally supra* Part III.D.

327 *See generally supra* Part II.

328 *See supra* Part IV.

nation.[329]

2. An Enforcement Discretion Solution

Although Professor Price argues against the ACA suspensions, his framework proves unworkable in the future because it elides transparency and favoritism concerns.[330] Professor Price advocates for a presumption against categorical suspensions of prospective laws and a presumption for executive discretion to enforce specific cases.[331] However, he forgets transparency in this dichotomy. A president could just as easily show favoritism or animus towards certain groups through non-enforcement of particular cases. Under Price's framework, President Obama could lawfully suspend the employer mandate for well-connected donors. His framework may emphasize statutory text, but it still provides no safeguards for cronyism.

A more complete and developed solution would take Price's emphasis on statutory text and incorporate Andrias's focus on transparency.[332] Accordingly, a president who wished to exercise enforcement discretion could only do so in specific instances, rather than broad, sweeping suspensions of the law.[333] Moreover, this discretion would be anchored by legal support presented in a clear and accessible fashion.[334] For example, the Obama administration could refrain from exacting a penalty from a business or individual who could show a real hardship in complying with the law.[335] This process would be done in a clear manner giving Congress the time to react if it so wishes. This solution encompasses the redeemable qualities of both formalism and functionalism.[336] Going forward, this solution works best because it respects the constitutional safeguards—bicameralism and presentment—without ignoring the pragmatic concern that agencies must be able to react quickly to a fast-moving situation.[337]

VI. Conclusion

The Founders intended the Constitution to transcend evolutions in society. The world is incredibly more complex than when the drafters wrote the Constitution. More people are alive. Various groups of people are now voting. Yet,

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[329] *See supra* Part III.A.3.

[330] Price, *supra* note 175, at 751.

[331] Price, *supra* note 175, at 675.

[332] *See supra* Part III.D.

[333] Price, *supra* note 175, at 675.

[334] Andrias, *supra* note 162.

[335] To take DACA as another example, President Obama's justification was clear enough. *See supra* Part III.D.1. However, he could have limited the deferrals in a more specific way. Instead of prospectively suspending the law for a certain group, he could have put the burden on the individuals to show a hardship.

[336] *See supra* Part III.A–B.

[337] *See supra* Part III.

the Constitution serves both as an agent of change and an impediment to change. Through the Constitution, elected representatives should positively change society. Accordingly, they should not be going around the Constitution to fulfill campaign pledges.

Thus, President Obama's suspension of the employer and portions of the individual mandate is unconstitutional because it bypasses presentment. In reaching towards his lofty health care goals, President Obama sets a precedent which will prove troubling if used by future presidents for spurious reasons. The "finely wrought and exhaustively considered" legislative process intends to protect political minorities and prevent favoritism.[338] The Executive Branch should respect the Constitution and not invade the Legislative Branch.

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[338] I.N.S. v. Chadha, 462 U.S. 919, 959 (1983).