
LETTING CONGRESS VOTE: JUDICIAL REVIEW OF ARBITRARY LEGISLATIVE INACTION

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ABSTRACT

Our constitutional jurisprudence is in large measure built around the concept of guarding against arbitrary governmental action. But in an age of increasing legislative dysfunction, a more pronounced threat may be arbitrary congressional inaction. Individual members of Congress block majorities from voting on key legislation, and a single senator may prevent votes on executive and judicial branch nominations through the use of holds and other tactics. This form of congressional inaction not only poses a threat to many framework principles such as legislative supremacy, democratic accountability, and separation of powers, but also embodies the very concerns over arbitrary government that form the basis of over two hundred years of judicial review. For these reasons, this Article advances a novel, and undoubtedly contentious argument: federal courts should review certain types of congressional inaction for arbitrariness. To overcome the skepticism likely to greet the proposal, the Article establishes the solid historical and analytic foundations for such review before undertaking the step of explaining how it might work in practice.

I. INTRODUCTION

Americans' current disdain for our national legislature is well documented and indisputable.¹ The contempt primarily stems not from

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1. E.g., Aaron Blake, *Congress's Approval Rating Hits New Low: 9 Percent*, WASH. POST (Nov. 12, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/11/12/congresss->

what Congress is doing, but from what it is not doing. Important legislation languishes, critical policy matters go unaddressed, and well-qualified and essential judicial and executive branch nominees await a vote. This would all be frustrating enough were it a deliberate decision by Congress as a collective body not to act. Instead, though, far too often the obstruction and delay—the congressional inaction—is the result of a single individual's desire to halt the process. What's more, the obstructionist's motive is frequently unrelated to the underlying merits of the decision Congress is being kept from making. This display of unbridled discretion, motivated by idiosyncratic and unconnected objectives, epitomizes the concept of government arbitrariness.

Much ink has been spent decrying the obstruction and resulting dysfunction of this arbitrary congressional inaction. For example, when the federal government shut down in October 2013, commentators criticized the willingness and ability of a small faction of legislators to chart a course with such severe consequences for the nation.² When a group of senators blocked nominee after nominee from receiving a vote, newspaper editorials decried the obstruction. But, when it comes time to find a solution, little, if anything, presents itself. The problem of this legislative dysfunction feels too big—and its roots too entrenched, political, and varied—to solve; or, worse yet, that somehow, this is what the Framers intended. So, we throw up our hands and suffer through the consequences.

This Article suggests that there is a possible, as-of-yet-unexplored option: judicial review of arbitrary congressional inaction. To be sure, this idea pushes against many of our shared legal and historical sensibilities, in particular, our understanding of the federal judiciary's proper role. As this Article will discuss, however, there exist many other foundational principles and precedents favoring judicial review of congressional inaction, including a constitutional structure devised expressly to prevent arbitrary government.³

Of course, there will be many skeptics—both initially and even after

approval-rating-hits-new-low-9-percent; David A. Fahrenthold & Sarah Khan, *Stakes are Rising, and Public Disdain of Congress is Right Behind*, WASH. POST (July 19, 2011), http://www.washingtonpost.com/politics/stakes-are-rising-and-public-disdain-of-congress-is-right-behind/2011/07/19/gIQAFtDIOI_story.html.

2. E.g., Janet Novack, *Federal Government Begins First Shutdown in 17 Years*, FORBES (Oct. 1, 2013, 2:00 AM), <http://www.forbes.com/sites/janetnovack/2013/09/30/clock-ticks-to-first-federal-shutdown-in-17-years/>.

3. Moreover, it seems uncontested that at some point, congressional inaction must become unconstitutional. What if Congress refused to appropriate funds for the federal judiciary? What if Congress refused to comply with an order from the Supreme Court?

reading the case for such review. At the very least, though, the argument offered here should raise the question of whether there is a role for the judiciary in addressing the problem of congressional inaction. Moreover, my goal is that those who would have reflexively and automatically answered in the negative before may now be given pause—even if, ultimately, the response remains unchanged.

To make the case, the Article proceeds in Part II by first defining the relevant terms. What is “congressional inaction” and how do we know when it is arbitrary? After setting the parameters of “arbitrary congressional inaction,” in Part III the Article focuses on why such inaction presents a significant constitutional concern. By tracing the historical, scholarly, and jurisprudential roots of the anti-arbitrariness principle, it becomes apparent that in many instances, arbitrary congressional inaction poses as great a problem as arbitrary governmental action. Part IV then engages with the foundational principles which judicial review of congressional inaction might be thought to jeopardize. While recognizing their importance, Part IV explains that it is actually arbitrary congressional inaction that threatens these tenets, and judicial scrutiny of such inaction would therefore serve these interests. Finally, Part V addresses how judicial review of congressional inaction would proceed. It explains why standing and the political question doctrine would not prevent a court from reaching the merits of a challenge to congressional inaction. It then builds from existing jurisprudential structures to establish the core features of judicial review and relies on two recent instances of inaction to concretely illustrate the approach.

II. WHAT IS “ARBITRARY CONGRESSIONAL INACTION”?

It is difficult to proceed to the main thrust of my argument without first articulating a clear understanding of what I mean by “arbitrary congressional inaction.” In fact, each of these three words requires some elaboration, though it is helpful to discuss them out of order.

A. “CONGRESSIONAL INACTION”

“Congressional,” simply put, means relating to Congress. But, beyond that basic definition, there are nuanced questions to consider. The United States Congress, after all, is composed of 535 voting members. When one of its members acts or speaks, it is certainly not “Congress” acting or speaking.⁴ What decisions—or indecisions—can therefore properly be

4. Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”*: Legislative Intent as Oxymoron, 12

labeled “congressional”?

Fortunately, for my purposes, explaining what I mean by inaction also serves to illuminate what I mean by congressional. A body of 535 people is always active in some way. At any given time, members of the House of Representatives and Senate are meeting with constituents, lobbyists, or colleagues. They are giving speeches on the floor of their respective chambers, at town hall meetings, or at fundraisers. They are holding hearings, appearing on talk shows, or negotiating statutory language. Members of Congress are constantly active.

Given the whirl of activity within the halls of Congress, how can one ever proclaim the existence of congressional inaction? The Constitution itself provides the answer. The Framers created a bicameral legislature⁵ and vested in it certain powers and responsibilities.⁶ For example, Congress enjoys the power to tax and spend for the general welfare,⁷ regulate interstate and foreign commerce,⁸ make rules related to immigration,⁹ naturalization,¹⁰ and the military,¹¹ and to declare war.¹² In short, Congress has the constitutional authority to “make all [l]aws which shall be necessary and proper for carrying into [e]xecution” its powers.¹³ Absent from the enumerated list are requirements that members speak on the floor, meet in committees, or appear on Meet the Press (or the 1787 equivalent). Thus, congressional inaction occurs when Congress—as a body—fails to perform one of its constitutional functions.

This definition requires a strong caveat. One of Congress’s constitutional responsibilities is to debate and reject legislation and nominations.¹⁴ Congress is fulfilling its duties when it *decides* not to act. Congressional inaction, therefore, is not the failure to enact laws or to confirm nominees. Instead, it is the absence of deliberative decision-making. In the context of legislation, it is the failure to debate and vote on public policy choices put before Congress. With judicial and executive branch nominations, congressional inaction is the failure by the Senate to

INT’L REV. L. & ECON. 239, 244 (1992).

5. U.S. CONST. art. I, § 1.

6. U.S. CONST. art. I, § 8.

7. U.S. CONST. art. I, § 8, cl. 1.

8. U.S. CONST. art. I, § 8, cl. 3.

9. U.S. CONST. art. I, § 8, cl. 4.

10. *Id.*

11. U.S. CONST. art. I, § 8, cl. 14.

12. U.S. CONST. art. I, § 8, cl. 11.

13. U.S. CONST. art. I, § 8, cl. 18.

14. U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 2, cl. 2.

make a substantive decision on the merits of the nominee.

When considering the Senate's responsibility to advise and consent to nominations, it is necessary to explicitly discuss the role of the filibuster and cloture rules of the chamber. In the past, filibusters and the need to invoke cloture to end debate were rare.¹⁵ Today, the Senate operates as if sixty votes were the threshold for any measure or nomination to succeed.¹⁶ For this reason, some may wish to conflate the failure to invoke cloture as a decision on the substance of the legislation or the merits of the nomination. In other words, they argue, we should treat the failure to invoke cloture as the fulfillment by the Senate of its constitutional responsibility to make a substantive decision on matters before it. That is not the case, however. A filibuster serves to prevent a decision on the merits, and the failure to invoke cloture keeps the Senate from voting on the legislation or nomination. Indeed, many times, a cloture vote fails despite support from a majority of Senators to end debate.¹⁷ Thus, a cloture vote is not the same as a vote on the substance of the matter and should not be treated as synonymous.

By any measure, congressional inaction reigns. Congress is enacting fewer laws than in the past;¹⁸ confirming fewer executive branch and judicial nominees;¹⁹ and relying on brinksmanship,²⁰ changes in the rules,²¹ and omnibus legislation to enact that legislation which does make it through the logjam.²² In short, Congress is gripped by gridlock.

B. "ARBITRARY"

We can look to a number of sources to arrive at an understanding of "arbitrary." Merriam-Webster defines the term as "depending on individual

15. Michael J. Teter, *Congressional Gridlock's Threat to Separation of Powers*, 2013 WIS. L. REV. 1097, 1107.

16. The Senate changed the rules in 2013 to lower the sixty-vote threshold required for cloture on executive branch and non-Supreme Court judicial nominations. Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html>. The rule change is only effective for the 113th Congress, so it is too early to tell whether the fifty-vote requirement will remain in place. The sixty-vote threshold still exists for legislation and Supreme Court nominations.

17. Teter, *supra* note 15, at 1108.

18. *Id.* at 1104.

19. *Id.* at 1106.

20. Gail Russell Chaddock, *Congress's New Brinkmanship: Better or Worse than Politics as Usual?*, CHRISTIAN SCI. MONITOR (Oct. 4, 2011), <http://www.csmonitor.com/USA/Politics/2011/1004/Congress-s-new-brinkmanship-Better-or-worse-than-politics-as-usual>.

21. BARBARA SINCLAIR, UNORTHODOX LAWMAKING 258–61 (4th ed. 2012).

22. *Id.*

discretion . . . and not fixed by law;” and as “marked by or resulting from the unrestrained and often tyrannical exercise of power.”²³

Perhaps more helpfully, the Supreme Court has, on many occasions, struck down governmental actions that are arbitrary. In a few of those instances, the Court has even identified factors that help aid its determination as to whether a law is arbitrary.²⁴ Indeed, from these cases—which will be discussed in detail later—we know that governmental action is likely arbitrary if it is motivated by private interests or animus, directed by an official exercising ill-defined discretion, treats similarly situated people differently, or threatens important constitutional principles.²⁵

In the context of administrative law, courts frequently give agency rulemaking decisions a hard look to see whether the agency acted in an arbitrary or capricious manner.²⁶ Courts reviewing an agency action undertake “a thorough, probing, in-depth review”²⁷ to ensure that the agency decision “was based on a consideration of the relevant factors.”²⁸ When an agency relies on elements that Congress has not intended it to consider, entirely fails to consider an important aspect of the problem, or offered an explanation that either runs counter to the evidence or is simply implausible, an agency has acted arbitrarily.²⁹

Building from the relevant case law, scholars have also sought to define arbitrariness. Relying on administrative law standards, Lisa Schultz Bressman has offered that arbitrary exercise of governmental power involves “conclusions that do not follow logically from the evidence, rules that give no notice of their application, or distinctions that violate basic principles of equal treatment.”³⁰ Others have arrived at similar definitions based on a review of the Supreme Court’s decisions both inside and outside the administrative law context.³¹ As one scholar notes, arbitrary means “without adequate determining principle; irrational, not based in reason;

23. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 63 (11th ed. 2003).

24. See *infra* notes 238–286 and accompanying text.

25. See *infra* notes 238–286 and accompanying text.

26. See, e.g., *Motor Vehicle Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43, 57 (1983) (finding an agency’s rescission of an administrative rule to be “arbitrary and capricious”).

27. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971).

28. *Id.* at 416.

29. *State Farm*, 463 U.S. at 46–57.

30. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 496 (2003).

31. See, e.g., Christine N. Cimini, *Principles of Non-Arbitrariness: Lawlessness in the Administration of Welfare*, 57 RUTGERS L. REV. 451, 451–63 (2005).

tyrannical, despotic, oppressive or by caprice.”³²

Thus, from all of these sources, it is possible to distill a working definition of arbitrariness: a decision or action that is based on improper motivations, lacks a rational connection to a legitimate end, or is untethered to any controlling standards.

Combining each of these points together, then, produces the following understanding. Arbitrary congressional inaction exists when Congress fails to act on a matter within its constitutional domain, and such failure lacks a proper motivational or factual basis or is the exercise of discretionary power that involves no clear standards or explanation.

In inviting judicial review of arbitrary congressional inaction, the obvious question is how a court can distinguish between arbitrary and non-arbitrary inaction. This, of course, is also the crux of the issue and would pose a significant challenge to courts scrutinizing congressional inaction for arbitrariness. There are, however, standards that courts could employ to help guide the inquiry, which I discuss in detail later. It suffices here to say that though distinguishing between arbitrary and non-arbitrary inaction may be difficult, it is not impossible. Courts already engage in arbitrariness reviews of congressional acts—and of arbitrary inaction by agencies.³³ What, then, currently prevents courts and scholars from taking the next logical step: judicial review of congressional inaction? I turn to that question in Part IV. First, however, I explain why arbitrary congressional inaction poses such significant problems to our constitutional system as to warrant a call for judicial review.

III. THE PROBLEMS WITH CONGRESSIONAL INACTION

What is so troubling about Congress failing to act on certain matters that it requires constructing a new judicial mechanism for addressing the problem? Why does arbitrary congressional inaction require judicial scrutiny? The answer to those questions rests in constitutional theory, history, and text, as well in the work of courts and scholars who have described why arbitrary governmental action frustrates our standards of governance. I explain why arbitrary congressional *inaction* invites the same constitutional objections, while presenting additional threats not inherent in arbitrary action.

32. *Id.* at 457–58.

33. *See infra* notes 287–94 and accompanying text.

A. HISTORICAL ROOTS OF THE ANTI-ARBITRARINESS PRINCIPLE

Citizens have sought to stamp out arbitrary government since at least the medieval ages, when a rebellion by his subjects led King John to sign the Magna Carta in 1215.³⁴ The effort to end arbitrary rule became a rallying cry of the American revolutionaries in the mid-eighteenth century.³⁵ The First Continental Congress railed against the “arbitrary proceedings of parliament and administration” that sought to impose the Intolerable Acts on the colonies.³⁶

The American fear of arbitrary exercise of power continued well after winning independence from the crown. The Framers created much of our constitutional structure with the goal of guarding against arbitrary governmental action.³⁷ Indeed, the “skeleton”³⁸ of our Constitution is the separation of powers doctrine, which itself is designed in large part to avoid arbitrary action.³⁹ The two components of separation of powers—distinct functions assigned to each branch and checks and balances—both serve to prevent arbitrary government. Separating functions grants each branch domain over only one core aspect of government, thereby protecting against the tyrannical exercise of accumulated power.⁴⁰

Additionally, the checks and balances feature of separation of powers places another branch between arbitrary action and the public, to ensure that arbitrary decisions have a minimal effect on the citizenry.⁴¹ The structural features of the Constitution also serve to answer the concern of aggrandized governmental power exercised by a single person.⁴² By diffusing power and securing several checks against its exercise, the Framers addressed this long-held fear.⁴³ Drawing from the constitutional

34. Jeffrey Brauch & Robert Woods, *Faith, Learning and Justice in Alan Dershowitz's The Genesis of Justice: Toward a Proper Understanding of the Relationship Between the Bible and Modern Justice*, 36 VAL. U. L. REV. 1, 55 (2001).

35. Cimini, *supra* note 31, at 469–70.

36. Res. of Oct. 14, 1774, in 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 63 (Worthington C. Ford ed., 1904), available at <http://www.usconstitution.net/intol.html>.

37. David P. Currie, *The Distribution of Powers After Bowsher*, 1986 SUP. CT. REV. 19, 19.

38. Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 412 (1996).

39. Currie, *supra* note 37, at 19.

40. THE FEDERALIST NO. 47, at 323–31 (James Madison), NO. 78, at 521–30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

41. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1167–68 (2000).

42. See MONTESQUIEU, THE SPIRIT OF THE LAWS 182 (Anne M. Cohler et al. trans. & eds., 1989) (1748) (explaining how the power of the Gracchi in Rome led to the loss of “the liberty of the citizen”).

43. THE FEDERALIST NO. 48, at 332–33, NO. 51, at 341–49 (James Madison) (Jacob E. Cooke ed., 1961).

structure and Federalist Papers, the Supreme Court has reinforced the idea that our system is designed to prevent the evil of arbitrary exercises of power. For example, the Court has identified principles of non-arbitrariness in federalism,⁴⁴ in bicameralism and the Presentment Clause,⁴⁵ and in the manner in which the president appoints principal officers.⁴⁶

In sum, it is clear that concepts of non-arbitrariness are rooted in history and pervade our constitutional structure and case law.

B. CONSTITUTIONAL SIGNIFICANCE OF THE ANTI-ARBITRARINESS PRINCIPLE

Further, we know that preventing governmental arbitrariness is of constitutional importance. But why? At the risk of asking what may appear quite obvious, why does arbitrary governmental action pose such a problem?

The answer is that a government that is arbitrary—that arrives at its decisions without clear reason, consistency, or process—threatens its own legitimacy, as well as the liberty interests of its people. In short, arbitrary governmental action undermines the rule of law.⁴⁷

Moreover, for law to be legitimate, it must be applied consistently and with standards that are known and followed. This is why the Court has relied on the Due Process Clause to review government actions for arbitrariness.⁴⁸ Ensuring that the government follows standard processes before taking action helps to root out the type of individualized decision-making that leads to arbitrariness—or worse, tyranny. For this reason, when power is placed in a single official's hands, the concern over arbitrariness rises.

A similar problem develops when Congress deviates from the constitutionally prescribed process for acting. The Court emphasized that fact when it struck down the one-house legislative veto in *INS v. Chadha*,⁴⁹

44. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011).

45. *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 957–59 (1983).

46. *Weiss v. United States*, 510 U.S. 163, 186 (1994).

47. See JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE 138–39 (1997) (describing the ability of a legislature to adopt vague statutes as “an apparently serious flaw in American government”); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 307 (2001) (“The notion of reasoned judgment, as opposed to arbitrary abuse of power, is at the core of the notion of the rule of law . . .”).

48. E.g., *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998); *City of Eastlake v. Forest City Enters.*, 426 U.S. 668, 676 (1976).

49. *Chadha*, 462 U.S. at 951.

as well the Budget Control Act in *Bowsher v. Synar*,⁵⁰ and the Line Item Veto Act in *Clinton v. City of New York*.⁵¹ The Framers developed a process for enacting legislation, featuring separated functions and checks and balances, and the failure by Congress to abide by that process promotes arbitrary action.

Process, therefore, matters. Another primary evil of arbitrary government is the lack of notice it gives those who are affected by it.⁵² If there are no established and followed standards for governmental decision-making, citizens cannot respond accordingly. Thus, a basic premise of our constitutional system is that individuals should have fair notice of the laws that apply to them and how government will enforce those rules.⁵³ Arbitrary government threatens that premise by making notice impossible or, at least, less meaningful.

The Court has also labeled arbitrary governmental action as irrational.⁵⁴ Indeed, so important is the concept of rationality to our constitutional system, that every governmental action is subjected at minimum to rational basis review. And though most actions and laws will survive such a review, the point is clear: citizens are entitled to a government that makes sense.⁵⁵ Moreover, the rational basis test still requires that the means—the government action or statute—be rationally related to a legitimate end.⁵⁶ As I discuss later, in the context of congressional inaction, often even this deferential standard is not met.

Similarly, arbitrary government is also seen as promoting private interests over the public good. Lisa Schultz Bressman makes this point well. The constitutional design, she contends, demonstrates that the Framers were not concerned exclusively with the notion of tyranny of the majority.⁵⁷ Instead, Bressman suggests that the Framers evinced a desire to avoid another form of arbitrary government: elected officials “[r]esponding to their own special agendas [and] pursu[ing] these commitments overzealously at public expense.”⁵⁸ Separation of powers, electoral

50. *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

51. *Clinton v. City of New York*, 524 U.S. 417, 451–52 (1998) (Kennedy, J., concurring).

52. Cimini, *supra* note 31, at 506–08.

53. *Id.*

54. *Id.* at 504–506.

55. See Bressman, *supra* note 30, at 500–03 (arguing that arbitrariness “is a foremost consideration” in constitutional law).

56. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 552 (4th ed. 2011).

57. Bressman, *supra* note 30, at 498.

58. *Id.* See also Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV.

accountability, and the procedural requirements of lawmaking all play a role in ensuring non-arbitrary, public-minded governance. Arbitrary governmental decisions—those formed by improper motives, or irrational, or made by officials exercising unchecked discretion—are much more likely to be in service of particularized or idiosyncratic interests than the public good.

C. WHY ARBITRARY CONGRESSIONAL INACTION POSES A MORE ACUTE CONCERN

Individualized, indiscriminate, irrational decision-making that provides insufficient notice to those affected—these are the evils that arbitrary governmental action entails, thereby threatening governmental legitimacy and the rule of law.

If all of this is what is wrong with arbitrary governmental action, arbitrary congressional inaction is significantly worse. First, arbitrary congressional inaction poses the same problems as arbitrary action. As discussed earlier, there is no clear standard for when judicial or executive branch nominees will be afforded a vote. Often, the decision as to whether to allow a nomination or bill to advance is in the hands of a single legislator—the tyranny of one.⁵⁹

Additionally, the inaction is often irrational. Of course, some rational explanation exists for why the House fails to move forward on legislation or why a senator places a hold on a nomination. But rationality in the constitutional context requires a connection between the means and a *legitimate* end.⁶⁰ Many times, that rational connection does not exist. Recall that I am defining inaction as it relates to Congress fulfilling its constitutionally prescribed powers. The House and Senate enjoy the power to enact legislation, and the Senate advises on and consents to nominations.⁶¹ Those are the legitimate ends. When the Speaker of the House insists that in order for the House to debate a bill, it must enjoy support from a “majority of the majority,”⁶² that requirement is not

1689, 1692 (1984) (explaining that the Constitution attempts to apply a “prohibition of naked preferences”).

59. Recent examples abound. Perhaps the most egregious one involves Senator Tom Coburn, who placed holds on nearly eighty pieces of legislation at one time, many of which had already passed in the House of Representatives unanimously. Carl Hulse, *Democrats Try to Break Grip of the Senate’s Dr. No*, N.Y. TIMES (July 28, 2008), <http://www.nytimes.com/2008/07/28/washington/28coburn.html>.

60. CHEMERINSKY, *supra* note 56, at 552.

61. U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 2, cl. 2.

62. George Crawford, *The Majority of the Majority Doctrine*, THE HILL (Sept. 19, 2007, 7:22

sufficiently connected to the legitimate end of enacting policy that *Congress* desires. Instead, it is about preserving the speaker's power within the majority caucus, and the majority party's position in the chamber. That may be a rational political objective, but it is arbitrary as it relates to the House fulfilling its constitutional duty to debate and enact—or reject—legislation.

The same is equally true, for example, when a senator refuses to allow a nomination to proceed to a debate and vote because of the senator's views on an unconnected matter. Recent history is replete with examples of senators holding up nominations or legislation for reasons unrelated to the nominee's merits.⁶³ It is irrational and arbitrary for Senate inaction on a nomination to be premised on such idiosyncratic motives.

The inaction also comes at the expense of the public good and often to promote private interests. As just suggested, congressional leaders prevent action often to serve their own political interests.⁶⁴ Beyond that, congressional inaction has led to a judicial vacancy emergency that threatens the administration of justice and has stymied enforcement of duly enacted laws, many aimed at protecting the public.⁶⁵ And, of course, congressional inaction has led us to the brink of economic meltdowns several times between 2011 and 2014.⁶⁶ In fact, even when Congress managed to act in the midst of the first budget showdown between House Republicans and President Obama, in August 2011, it did so by creating a mechanism—the sequester—that Congress thought was so irrational and arbitrary that it would surely inspire the legislature to act.⁶⁷ Of course, the irrationality ran so deep that the threat of the arbitrary cuts imposed by the sequester was insufficient to inspire congressional action, and so the cuts

PM), <http://thehill.com/business-a-lobbying/k-street-insiders/k-street-insiders/20145-the-majority-of-the-majority-doctrine>.

63. E.g., Emily Heil, *Lindsey Graham's Block Complicates Path for Nominees*, WASH. POST (Oct. 28, 2013), <http://www.washingtonpost.com/blogs/in-the-loop/wp/2013/10/28/lindsey-grahams-block-complicates-path-for-nominees> (describing Senator Graham's decision to block all nominations because of concerns over the U.S. embassy attack in Benghazi); Press Release, Landrieu to Block OMB Nominee Until Drilling Moratorium is Lifted, Permit Issuance is Accelerated (Sept. 23, 2010), http://www.landrieu.senate.gov/?p=press_release&id=1292 [hereinafter Landrieu Press Release].

64. E.g., Paul Kane, *John Boehner, Between a Rock and a Hard Place on Shutdown and Debt Limit*, WASH. POST (Oct. 2, 2013), http://www.washingtonpost.com/politics/john-boehner-between-a-rock-and-a-hard-place-on-shutdown-and-debt-limit/2013/10/02/32a27f1a-2b9f-11e3-8ade-a1f23cda135e_story.html.

65. Teter, *supra* note 15, at 1142.

66. See THOMAS E. MANN & NORMAN J. ORNSTEIN, *IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* 3–30 (2012) (describing the 2011 budget fight).

67. *Id.*

that nobody wanted went into effect.⁶⁸

Beyond these harms, however, emerge additional consequences of arbitrary congressional inaction that render the problem even more acute than those associated with arbitrary action.

The first issue concerns accountability. This may, initially, seem odd. After all, we are often reminded that Congress is the most accountable branch.⁶⁹ Perhaps so, if the only measure of an institution's accountability is whether its members are elected. But, for a variety of reasons, that approach to accountability is lacking. While each member of Congress faces voters, it is an electorate severely hamstrung in its ability to hold representatives accountable. After two or six years in office, a lawmaker has made countless decisions for voters to consider. Moreover, with numerous actions and votes to consider when assessing a legislator's term, how does one weigh—or even know about—non-votes? There is at least a record of floor speeches made and votes cast; no such documentation exists for words never spoken and votes never held.

Some may respond that Congress is often criticized for “doing nothing” and that legislative inaction has been a campaign issue in the past, and may well be in the future.⁷⁰ In truth, however, individual members of Congress are rarely held accountable for this inaction. Even in a “wave” election year like 1948, in which Congress was reportedly punished for doing nothing,⁷¹ voters returned 78 percent of congressmembers to their seats.⁷² Additionally, those campaigns generally focused on ideological inaction—the failure to pass substantive, partisan measures. It is difficult to point to a single election that centered on Congress's failure to confirm a district court judge or a deputy attorney general.

Thus, traditional notions of congressional accountability are misplaced in the context of arbitrary congressional inaction. This is in sharp contrast to arbitrary congressional and executive action, which enjoys another form

68. David Uberti & Tracy Jan, *Sequester Goes Into Effect as Both Sides Trade Blame*, BOSTON GLOBE (Mar. 02, 2013), <http://www.bostonglobe.com/news/nation/2013/03/02/sequester-goes-into-effect-president-obama-and-republicans-trade-blame/sBaw2si3zxTBz6vOnEMjkK/story.html>.

69. E.g., William N. Eskridge, Jr., *America's Statutory "Constitution,"* 41 U.C. DAVIS L. REV. 1, 37 (2007).

70. See, e.g., DAVID MCCULLOUGH, TRUMAN 652, 661, 696 (1992) (describing criticism levied against Congress in 1948).

71. *Id.*

72. See GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 22–23 tbl. 3–1 (5th ed. 2001). In 1948, 400 members of the House of Representatives sought reelection, of which 79 percent were reelected. *Id.* Twenty-five senators sought reelection during the same year, with a 60 percent success rate. *Id.*

of accountability: institutional checks. If Congress acts arbitrarily when passing legislation, the president can veto the bill or a court can review it. That is true of arbitrary administrative agency actions, which are reviewable by a court, as well as by Congress. Unless we rethink judicial review of congressional inaction, no such form of accountability exists for arbitrary inaction.

In addition to lacking an institutional check against it, arbitrary inaction actually serves to undermine separation of powers.⁷³ As discussed earlier, the elements of the doctrine are separated functions and checks and balances.⁷⁴ Congress's constitutional responsibility is to legislate and confirm nominees.⁷⁵ If Congress cannot fulfill these functions—and is not fulfilling them for arbitrary reasons—then the separated functions feature of separation of powers falters. Moreover, to fill in the gap of a legislature failing to legislate, the executive encroaches on Congress's legislative domain.⁷⁶ And, of course, the inaction on nominees curtails the ability of the judiciary and executive branches to meet their own functional obligations.⁷⁷

Arbitrary inaction also prevents Congress from serving as a meaningful institutional check on the other two branches. Congress often cannot respond to executive encroachment on legislative functions or to judicial decisions incorrectly interpreting statutes because of arbitrary inaction.⁷⁸

Finally, arbitrary congressional inaction is pushing the government toward a constitutional crisis, as perhaps best exemplified by the recent debt ceiling standoffs, the uproar over recess appointments, and the efforts by President Obama to sidestep Congress by issuing executive orders.⁷⁹

While the government was shut down in October 2013, and the United States moved closer to defaulting on its obligations because of the debt ceiling, several House members stated that if the Treasury did default they

73. Teter, *supra* note 15, at 1135–49.

74. Magill, *supra* note 41, at 1167–68.

75. U.S. CONST. art. I, § 7; U.S. CONST. art. II, § 2, cl. 2.

76. Teter, *supra* note 15, at 1136–38.

77. See Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 935–46 (2009) (describing problems executive agencies face when positions are left unfilled); Chief Justice Roberts, *2010 Year-End Report on the Federal Judiciary*, U.S. SUP. CT. 3–8 (Dec. 31, 2010), <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf> (explaining the problem the judiciary faces when positions are left unfilled).

78. Teter, *supra* note 15, at 1138–39, 1155–59.

79. See *id.* at 1149–60.

would consider it an impeachable offense by the president.⁸⁰ Alternatively, many Democrats, legal scholars, and other commentators pushed President Obama to unilaterally invoke the Fourteenth Amendment to “raise” or ignore the debt ceiling.⁸¹ Though President Obama rejected that approach, he was still only left with other unconstitutional—or at least illegal—options from which to choose.⁸²

Or consider President Obama’s decision to recess appoint Richard Cordray to head the Consumer Financial Protection Bureau (“CFPB”). For over two years, Senate Republicans threatened to block a vote on any person nominated to head the CFPB.⁸³ When President Obama nominated Cordray, Republicans made good on the threat, not because they believed that Cordray lacked the experience, intelligence, skills, or integrity to serve.⁸⁴ Instead, Republicans sought to make changes to the underlying law, and used Cordray’s nomination to frustrate the CFPB’s work.⁸⁵ In response to the Senate’s failure to invoke cloture and allow a vote on Cordray’s nomination, President Obama used his power to make recess appointments to install Cordray as director of the CFPB.⁸⁶ The problem was that Congress had been meeting every three days in short, pro forma sessions to prevent a recess and such an appointment.⁸⁷ Nevertheless, the Obama Administration labeled such efforts a “gimmick” and interpreted the Recess Appointments Clause in a way that allowed the president to make the appointment.⁸⁸ Thus, the two political branches had conflicting

80. E.g., Ashley Alman, *Louie Gohmert: A Debt Default Is ‘An Impeachable Offense by the President,’* HUFFINGTON POST (Oct. 13, 2013, 7:50 PM), http://www.huffingtonpost.com/2013/10/13/louie-gohmert-impeach_n_4094707.html; Dana Milbank, Op-Ed., *Republicans See One Remedy for Obama: Impeachment,* WASH. POST (Dec. 3, 2013), http://www.washingtonpost.com/opinions/dana-milbank-republicans-see-one-remedy-for-obama--impeachment/2013/12/03/e623d61e-5c65-11e3-be07-006c776266ed_story.html.

81. Adam Liptak, *The 14th Amendment, the Debt Ceiling and a Way Out,* N.Y. TIMES (July 24, 2011), <http://www.nytimes.com/2011/07/25/us/politics/25legal.html>.

82. Garrett Epps, *If Congress Won’t Raise the Debt Ceiling, Obama Will Be Forced to Break the Law,* THE ATLANTIC (Oct. 2, 2013, 7:42 PM), <http://www.theatlantic.com/politics/archive/2013/10/if-congress-wont-raise-the-debt-ceiling-obama-will-be-forced-to-break-the-law/280176>.

83. George Zornick, *Obama Bucks GOP, Nominates CFPB Chief,* THE NATION (Jan. 4, 2012, 3:41 PM), <http://www.thenation.com/blog/165446/obama-bucks-gop-nominates-cfpb-chief>.

84. See John H. Cushman, Jr., *Senate Stops Consumer Nominee,* N.Y. TIMES (Dec. 8, 2011), <http://www.nytimes.com/2011/12/09/business/senate-blocks-obama-choice-for-consumer-panel.html> (stating that Republican Senator Orrin Hatch told a reporter that “[t]his is not about the nominee, who appears to be a decent person and may very well be qualified”).

85. *Id.*

86. Zornick, *supra* note 83.

87. Jonathan Weisman, *Appointments Challenge Senate Role, Experts Say,* N.Y. TIMES (Jan. 7, 2012), <http://www.nytimes.com/2012/01/08/us/politics/experts-say-obamas-recess-appointments-could-signify-end-to-a-senate-role.html>.

88. Dan Pfeiffer, *America’s Consumer Watchdog,* WHITE HOUSE BLOG (Jan. 4, 2012, 10:45

interpretations of a key constitutional provision—that affected them both—with no clear way to resolve the dispute, absent intervention by the Supreme Court⁸⁹ or institutional conflict.

Republicans have also called for President Obama's impeachment because of his efforts to maneuver around congressional inaction through issuing executive orders on controversial matters such as immigration reform and gun control.⁹⁰ These calls for impeachment have yet to go far, but it is fair to see the president pushing the bounds of executive power precisely as a response to congressional inaction, which may ultimately lead to a constitutional confrontation between the two branches, or perhaps among all three.

Even without a crisis, it is certain that the current period of arbitrary congressional inaction is undermining separation of powers, which itself serves as a foundational principle of American government.

IV. THE CASE FOR JUDICIAL REVIEW OF ARBITRARY CONGRESSIONAL INACTION

As noted earlier, courts and scholars have long recognized the constitutional concern over arbitrary government and the need for at least rational basis review of legislative enactments.⁹¹ Additionally, in the context of judicial review of executive branch inaction, many have pushed for increasing judicial scrutiny.⁹² Finally, there have been repeated calls for reforming congressional procedures to make action less arbitrary.⁹³ Taking the undisputed logic from each of these lines of analysis, we know that: (1) the Framers designed the Constitution to prevent arbitrary government; (2) arbitrary inaction can be as harmful as arbitrary action; (3) the judiciary already reviews congressional actions for arbitrariness; and (4) courts are equipped to review executive branch inaction for arbitrariness.

In this part, I seek to demonstrate that judicial review of congressional

AM), <http://www.whitehouse.gov/blog/2012/01/04/americas-consumer-watchdog>.

89. *E.g.*, Nat'l Labor Relations Bd. v. Noel Canning, 134 S. Ct. 2550, 2574 (2014) (holding that President Obama's recess appointments made during three-day breaks between pro forma sessions of the Senate were invalid).

90. Milbank, *supra* note 80.

91. *See supra* notes 54–56 and accompanying text.

92. *See, e.g.*, Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1658 n.1 (2004) (identifying scholarly criticism of courts' reluctance to review agency inaction).

93. *See, e.g.*, Harold J. Krent, *Turning Congress into an Agency: The Propriety of Requiring Legislative Findings*, 46 CASE W. RES. L. REV. 731, 733–34 (1996) (explaining why it would be advantageous to “forc[e] Congress to articulate the basis of its exercise of jurisdiction”).

inaction is a justifiable response to the increasing problem of legislative dysfunction. Or, put more defensively, I hope to explain why calling for judicial review of congressional inaction is not as extreme a measure as some may reflexively think.

I approach this task in two ways. First, I show that federal court review of legislative inaction enjoys roots in well-established doctrines and principles. I then tackle directly the long-held views and assumptions that might inspire skepticism of my suggestions.

A. THE ANALYTIC UNDERPINNINGS FOR JUDICIAL REVIEW OF ARBITRARY CONGRESSIONAL INACTION

As discussed in Part III.A, the Framers designed the constitutional structure to avoid arbitrary government.⁹⁴ Separation of powers, federalism, bicameralism, and elections all served as a means to reduce the risk of a government that is arbitrary.⁹⁵ In other words, non-arbitrariness is a constitutional principle.⁹⁶ As the Court stated in *Yick Wo v. Hopkins*,⁹⁷

When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.⁹⁸

The Court long ago established the federal judiciary as a guard against arbitrary legislative action. From due process⁹⁹ to equal protection,¹⁰⁰ from the Eighth Amendment¹⁰¹ to the Commerce Clause,¹⁰² arbitrary legislative

94. See *supra* notes 37–46 and accompanying text.

95. See *supra* notes 41–46 and accompanying text.

96. Bressman, *supra* note 30, at 499–501.

97. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

98. *Id.* at 369–70.

99. *Hurtado v. California*, 110 U.S. 516, 532 (1884) (stating that the due process clauses have “become bulwarks also against arbitrary legislation”).

100. See, e.g., *Romer v. Evans*, 517 U.S. 620, 631–34 (1996) (invalidating a state constitutional amendment under the Equal Protection Clause using rational basis review); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83 (1988) (“[A]rbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review.”)

101. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 305–06 (1987) (“In sum, our decisions . . . have identified a constitutionally permissible range of discretion in imposing the death penalty . . . [T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker’s judgment . . .”).

102. See, e.g., *United States v. Lopez*, 514 U.S. 549, 557 (1995) (noting in an opinion invalidating a federal law purportedly authorized by the Commerce Clause that “the Court has . . . undertaken to decide whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce”).

acts fail to pass constitutional muster.

To be sure, the Court has neither explained with certainty the boundaries of what constitutes impermissible arbitrary legislative action, nor applied any standard with consistency. Nevertheless, the clear import of these cases is that preventing arbitrary congressional action stands as one of the primary concerns of the federal judiciary.

The analytic foundation rests not just on the fact that courts already invalidate arbitrary congressional enactments. Many scholars have also proposed reforms to congressional procedures to make Congress function in a less arbitrary way. The primary mechanisms for achieving such an end are procedural requirements for lawmaking. Laurence Tribe referred to the concept as “structural due process,” and asserted that legislative policymaking is “constitutionally required to take a certain form, to follow a process with certain features, or to display a particular sort of structure.”¹⁰³ Hans Linde offered a similar take on the issue, styling it as “Due Process of Lawmaking.”¹⁰⁴ And more recently, Ittai Bar-Siman-Tov has forcefully argued that courts should “examine the legislature’s enactment process and strike down statutes enacted contrary to procedural lawmaking requirements.”¹⁰⁵

Harold J. Krent has suggested that, rather than imposing procedural requirements on the legislature, we should expect Congress to make findings sufficient to support its lawmaking decisions.¹⁰⁶ Such an approach, he argues, will open up the legislative process to greater public scrutiny, allowing for increased accountability.¹⁰⁷

These scholarly proposals even enjoy some support in case law. Justice John Paul Stevens, for example, famously wrote in dissent in *Fullilove v. Klutznick*,¹⁰⁸

Although it is traditional for judges to accord the same presumption of regularity to the legislative process no matter how obvious it may be that a busy Congress has acted precipitately, I see no reason why the character of their procedures may not be considered relevant to the decision whether the legislative product has caused a deprivation of liberty or property without due process of law A holding that the

103. Laurence H. Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 291 (1975).

104. Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1976).

105. Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 B.U. L. REV. 1915, 1916 (2011).

106. Krent, *supra* note 93, at 733–34.

107. *Id.* at 746.

108. *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

classification was not adequately preceded by a consideration of less drastic alternatives or adequately explained by a statement of legislative purpose would be far less intrusive than a final determination that the substance of the decision is not “narrowly tailored to the achievement of that goal.”¹⁰⁹

In fact, the Court has imposed some requirements on Congress to support its decisions with relevant findings, particularly in the context of abrogating state sovereign immunity,¹¹⁰ as well as when determining whether Congress could reasonably conclude that individual activities had a substantial effect on interstate commerce.¹¹¹ Fortunately, it is not necessary to debate the merits of these holdings, which certainly involve multiple problems that extend well beyond the issue of reviewing the congressional record for rationality. Instead, the point is simply that Justices and scholars alike recognize that Congress should not operate in an arbitrary fashion and that it is possible to assess the rationality of congressional behavior.

The final underlying analytic principle is that courts have recognized that arbitrary governmental inaction can raise the same concerns as arbitrary action. Indeed, it is precisely for this reason that the Administrative Procedure Act (“APA”) defines agency action as including the “failure to act”¹¹² and makes it reviewable by courts.¹¹³ While courts have been cautious in exercising such review, the fact remains that judicial review of some forms of governmental inaction already exists.

Moreover, many administrative law scholars have pushed for greater scrutiny of administrative inaction. In the 1950s and 60s, in a series of articles, Raoul Berger made the case that the APA created a powerful tool to enforce an anti-arbitrariness principle against agency inaction as much as against agency action.¹¹⁴ Berger recognized that the primary evil was arbitrariness, regardless of whether it came in the form of agency action or an agency’s refusal to act.¹¹⁵

109. *Id.* at 550–51.

110. *E.g.*, *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 368–74 (2001) (holding that a federal law did not abrogate state sovereign immunity because “[t]he legislative record of the [law] . . . simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled”).

111. *E.g.*, *United States v. Lopez*, 514 U.S. 549, 557 (1995).

112. 5 U.S.C. § 551 (2012).

113. *Id.* § 706.

114. *E.g.*, Raoul Berger, *Administrative Arbitrariness: A Synthesis*, 78 *YALE L.J.* 965 (1969).

115. *See id.* at 966 (“[T]he Supreme Court declared again and again that there is no room for arbitrary action in our system . . .”).

More recently, scholars have faulted the Court for restricting the reach of the APA's call for judicial review of arbitrary inaction.¹¹⁶ In particular, Professor Bressman has taken up the call for a broader judicial role in policing agency inaction.¹¹⁷ Her arguments are straightforward. She begins by explaining how the federal judiciary and administrative law scholars have incorrectly sought to harmonize the concept of judicial review of agency inaction with agency legitimacy.¹¹⁸ By relying on a dubious—or, at least, tenuous—theory of administrative accountability, courts have limited their review of agency inaction.¹¹⁹ As Bressman states, “The cause of the problem relates to an erroneous belief that the constitutional structure is committed foremost to promoting political accountability.”¹²⁰ Working under this theory allows the courts to commit to the politically accountable branches the responsibility of addressing agency inaction.

The emphasis on agency legitimacy is misplaced, Bressman contends.¹²¹ Instead, the constitutional structure is at least equally devoted to preventing arbitrary government—particularly that which “reflects narrow interests rather than public purposes.”¹²² Once recast in this light, the case for judicial review of agency inaction becomes stronger. Bressman argues that arbitrary agency action and inaction stem from the same source—“improper influence.”¹²³ Beyond sharing identical roots, arbitrary action and inaction can also be inhibited in the same way: through reason-giving and standard-setting. In other words, when an agency is forced to explain its decisions, it “reduce[s] opportunities for covert, private-interested, or otherwise arbitrary ones.”¹²⁴ Similarly, if agency decisions are subject to clear standards, it is more difficult to depart from them based on improper pressure.¹²⁵ Importantly, as Bressman states, these concepts apply as much to agency inaction as they do to action.¹²⁶ When agencies explain their rationales for not acting and when there exist specific standards governing such inaction decisions, the likelihood of arbitrary inaction is greatly reduced.

116. *E.g.*, Bressman, *supra* note 92, at 1660–61.

117. *Id.* at 1687–97.

118. *Id.* at 1675–78.

119. *Id.*

120. *Id.* at 1658–59.

121. *Id.* at 1659–60.

122. *Id.* at 1660.

123. *Id.* at 1688.

124. *Id.* at 1690–91.

125. *Id.* at 1691.

126. *Id.*

Bressman also engages those who might suggest that because agency inaction is less coercive than action, arbitrariness in such inaction poses fewer, if any, concerns. Bressman dismisses such distinctions.¹²⁷ Quoting Justice Thurgood Marshall's concurrence in *Heckler v. Chaney*,¹²⁸ one of the premiere agency inaction cases, she responds that "one of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action."¹²⁹ From this understanding, it becomes much more difficult to accept that agency inaction decisions should be unreviewable by courts.

Importantly, nothing that Professor Bressman says about inaction is exclusive to agencies. The anti-arbitrariness principle rooted in our constitutional structure applies just as firmly to legislative outcomes as it does to administrative ones. Indeed, since the early 1800s, "the Supreme Court declared again and again that there is no room for arbitrary action in our system, that power to act arbitrarily is not delegated."¹³⁰ Furthermore, the concern over undue influences promoting private interests over the public good is certainly as applicable in the congressional context as it is in the administrative setting. Additionally, political checks have failed to root out arbitrary congressional inaction. Finally, and perhaps most clearly, congressional inaction can be just as coercive, as harmful, and as consequential as legislative action. Thus, the arguments that Bressman advances for judicial review of agency inaction apply with equal force to arbitrary congressional inaction.

B. THE FOUNDATIONAL PRINCIPLES THAT MUST BE OVERCOME TO ADVANCE JUDICIAL REVIEW OF CONGRESSIONAL INACTION

Putting the above analytic framework together shows that courts and scholars have created the necessary precedent and reasoning to justify judicial review of arbitrary congressional inaction. Why, then, have there been no calls for such scrutiny? Put differently, if we are so concerned about governmental arbitrariness that courts subject congressional actions and executive branch inaction to arbitrariness review, why has congressional inaction escaped our attention?

The answer, I believe, is that on its face, the notion that the judiciary

127. *Id.* at 1694–95.

128. *Heckler v. Chaney*, 470 U.S. 821 (1985).

129. Bressman, *supra* note 92, at 1694 (quoting *Heckler*, 470 U.S. at 851 (Marshall, J., concurring in the judgment)).

130. Berger, *supra* note 114, at 966.

should review congressional inaction for arbitrariness butts up against some of the most basic foundational values of United States government—principles such as legislative supremacy, democratic accountability, and separation of powers. Additionally, there exists the commonly held view that congressional inaction is part of the deliberate constitutional design. None of these principles or beliefs, however, should stand in the way of judicial review of congressional inaction. And, in fact, as I will show in turn, judicial review of congressional inaction poses no threat to these values. In fact, it bolsters them.

1. Legislative Supremacy and Due Respect for a Coequal Branch

Legislative supremacy rests “at the heart of the American tradition.”¹³¹ Still, the American concept of legislative supremacy takes many forms. In constitutional structuralism, it means accepting Congress as the premiere lawmaking body of the United States government.¹³² It also forms the basis of various principles, from the anti-entrenchment norm, which provides that one Congress cannot bind future legislatures, to the guiding notion of statutory interpretation that courts should act as Congress’s “faithful agents.”¹³³ Thus, the idea of legislative supremacy is an amorphous, but important, constitutional principle.

But, as central as the principle is to American governance, it is important to note the limits of the doctrine’s reach. To do so, it is useful to understand the difference between the American version of congressional supremacy and the English concept, which treats Parliament as sovereign—as the source of all law.¹³⁴ Under the English notion, courts lack any legitimate basis for calling into question the validity of Parliament’s enactment.¹³⁵

The Framers dispensed with the idea that Congress was sovereign—that it enjoyed supremacy in all fields—when they settled on a written Constitution and vested Congress with only those powers enumerated in

131. Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 372 (1976).

132. See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1349 (2006) (“In liberal political theory, legislative supremacy is often associated with popular self-government . . .”).

133. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 110 (2010).

134. Ittai Bar-Siman-Tov, *Legislative Supremacy in the United States?: Rethinking the “Enrolled Bill” Doctrine*, 97 GEO. L.J. 323, 365 (2009).

135. *Id.*

the document.¹³⁶ Moreover, our entire constitutional framework, discussed in the Federalist Papers and concretely established over the course of over two hundred years of history (since at least *Marbury v. Madison*¹³⁷) rests in significant part on the fallibility of Congress—and the other branches’ responsibility to correct the legislature when it violates our constitutional order.

Nevertheless, scholars proposing something akin to legislative due process have been met with a standard critique that rests on concerns over legislative supremacy.¹³⁸ To generalize, the complaint is that by scrutinizing legislative process, the courts would be interfering with congressional prerogatives and would not be affording Congress its due respect.¹³⁹

Indeed, the charge is often that subjecting congressional process to judicial review is to treat Congress like an administrative agency,¹⁴⁰ and that such an approach is an improper “importation” from the world of administrative law.¹⁴¹ The argument that it is “inappropriate”¹⁴² to subject congressional procedures to judicial review rests on two lines of reasoning. First, critics correctly note that Congress does not operate like an agency.¹⁴³ Second, they argue that reviewing administrative action is “justified primarily as a means to further legislative supremacy and political accountability.”¹⁴⁴ In other words, the point of subjecting agency decisions to judicial scrutiny is to ensure that the agencies are abiding by

136. U.S. CONST. art. I, § 1. (referring to “[a]ll legislative power *herein granted*” (emphasis added)).

137. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

138. See, e.g., A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court’s New “On the Record” Constitutional Review of Federal Statutes*, 86 CORNELL L. REV. 328, 373 (2001) (“[T]he Constitution itself both expressly and implicitly imposes limits on judicial intrusion into the workings of Congress.”); William W. Buzbee & Robert A. Schapiro, *Legislative Record Review*, 54 STAN. L. REV. 87, 140–41 (2001) (“[Congress] need not legitimate its authority by reliance on only a certain set of approved factors.”); Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 115–17 (2001) (“[W]e do not believe the Court should be micromanaging when and how [the legislative] record is developed.”); Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1746–50 (2002) (arguing that the Court should be cautious and “impose whatever substantive, not procedural, limitations that [it] finds mandated by the Constitution”).

139. Bar-Siman-Tov, *supra* note 105, at 1925, 1927; Bryant & Simeone, *supra* note 138, at 376; Colker & Brudney, *supra* note 138, at 83.

140. E.g., Bryant & Simeone, *supra* note 138, at 331; Buzbee & Schapiro, *supra* note 138, at 119–135; Colker & Brudney, *supra* note 138, at 83.

141. Buzbee & Schapiro, *supra* note 138, at 90.

142. *Id.*

143. Colker & Brudney, *supra* note 138, at 119–121.

144. Buzbee & Schapiro, *supra* note 138, at 120.

the will of Congress—which is the most politically accountable branch.¹⁴⁵

It is safe to assume that scholars and judges who express skepticism over reviewing statutes to ensure Congress followed its procedures will find equal, if not greater, fault with what I am promoting here. To the extent that the misgivings rest on concerns about legislative supremacy or affording Congress its proper respect, they are misplaced.

To understand why, it is important to keep in mind the fundamental difference between congressional action and inaction. With action, the branch has spoken—it has fulfilled its constitutional obligation to debate and vote on laws and confirm or reject nominees. We have a clear picture of what Congress, as an institution, desired. Moreover, a statute has gone through the constitutionally prescribed process—the “finely wrought”¹⁴⁶ requirements of Article I, Section 7, which adds a much greater sense of legitimacy to congressional action that does not exist with inaction. To replace that congressional intent with a judicial determination that undermines that preference, or overrules it entirely, raises concerns over legislative supremacy. Congress’s decisions regarding policy preferences should be respected.

Congressional inaction, however, is markedly different. While the inaction is Congress’s, it is often attributable to a single individual or a handful of members who refuse to let Congress proceed. Congress as an institution has not made a deliberate decision on a policy matter or nomination.

Therefore, congressional inaction review does not implicate concerns over legislative supremacy in the same way that does judicial review of statutes. In fact, the opposite is true. Just as judicial review of administrative agencies can be said to reinforce principles of legislative supremacy by ensuring that the agencies are faithfully carrying out their delegated functions, so, too, can review of congressional inaction be said to aid the goal of allowing Congress’s prerogatives—as expressed by the majority in the institution—to be fulfilled.

2. Democratic Accountability and the Counter-majoritarian Difficulty

Related to the legislative supremacy critique is the well-worn concern that judicial review of Congress undermines democratic accountability.¹⁴⁷ Indeed, the counter-majoritarian difficulty has become so embedded in

145. I will discuss the issue of accountability in greater detail below. *See infra* Part IV.B.2.b.

146. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

147. *See Bressman, supra* note 30, at 480 (questioning the “very existence of judicial review”).

constitutional theory that whenever someone advocates for increased judicial scrutiny of the two political branches, the proposal is “automatically on the defensive.”¹⁴⁸

Though hardly the originator of the concern of unelected judges overseeing the politically accountable branches, Alexander Bickel gave life to the legal world’s modern obsession with the topic.¹⁴⁹ Bickel developed and nurtured the idea of the countermajoritarian difficulty, calling judicial review a “deviant” institution because “it thwarts the will of representatives of the actual people of the here and now.”¹⁵⁰

This critique became the all-consuming emphasis of many constitutional scholars and judges.¹⁵¹ It rests, however, on a number of debatable premises. First, that when designing our governmental structure, the Framers were most concerned with majoritarianism; second, that ensuring a majoritarian government requires accountability; and, third, that the only way of ensuring accountability is through elections. Bickel’s countermajoritarian difficulty is a syllogism on steroids. And, as I will discuss, each of these three premises is strongly contested. Nevertheless, because the Bickelian vision has embedded itself in contemporary constitutional theory, it is necessary to address both Bickel’s vision, as well as the more recent critiques of his assumptions.

a. Majoritarianism

The principle of majority rule is an important element of our constitutional structure, and to the extent that judicial review may overturn statutes enacted through majority votes of Congress and signed by the president, Bickel’s majoritarian concern may be valid. After all, as Bickel says, “when the Supreme Court declares unconstitutional a legislative . . . action . . . it exercises control, not in behalf of the prevailing majority, but against it.”¹⁵²

Once again, though, the distinction between reviewing congressionally enacted statutes and congressional inaction proves critical. Congressional inaction is only arbitrary when it defies the will of the majority in

148. Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1256–57 (2009).

149. Bressman, *supra* note 30, at 464–65.

150. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17–18 (1962).

151. Bressman, *supra* note 30, at 464–65; Rebecca L. Brown, *Accountability, Liberty, and the Constitution*, 98 COLUM. L. REV. 531, 531–33 (1998).

152. BICKEL, *supra* note 150, at 16–17.

Congress. It is not the product of a “finely wrought”¹⁵³ process; it is not “the will of representatives of the actual people of the here and now.”¹⁵⁴ Furthermore, Bickel relied heavily on the writings of James Bradley Thayer,¹⁵⁵ who suggested as a basis for limited judicial review that every enactment by the legislature include a conscious determination of its constitutionality.¹⁵⁶ Inaction lacks anything remotely close to an ascertainable, conscious determination by Congress. Moreover, Senate inaction on executive and judicial branch nominations serves to frustrate the will of the president—a majoritarian player as much as Congress, as Bickel, himself, suggested.¹⁵⁷ Finally, inaction is increasingly aimed at undermining democratically enacted statutes.¹⁵⁸ In Bickel’s vision, an unelected judiciary striking down statutes poses a threat to democratic accountability.¹⁵⁹ The greater threat, it now seems, to democratically-enacted statutes is a desire on the part of a minority group of legislators to prevent the majoritarian will from being enacted or implemented if they disagree with it. Thus, judicial review of congressional inaction may serve to bolster majoritarian principles.¹⁶⁰

b. Accountability

In Bickel’s view, majoritarianism requires electoral accountability, and one of the primary problems with judicial review is that we cannot “call to account”¹⁶¹ the judges who act against the majoritarian view. Indeed, “[m]odern public law is strongly devoted to the notion that public officials should be held ‘accountable’ for their decisions.”¹⁶² If Congress does something that the citizenry dislikes, it can refuse to reelect those responsible.

Proposals to expand judicial review to the legislative process or to impose requirements of “deliberate lawmaking” are greeted by the law review equivalent of a chorus of boos.¹⁶³ Suggesting that courts scrutinize

153. *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

154. BICKEL, *supra* note 150, at 17.

155. *E.g., id.* at 35.

156. *Id.*

157. *See id.* at 17 (comparing legislative acts with those of elected executives).

158. *See, e.g., supra* notes 80–82 and accompanying text.

159. BICKEL, *supra* note 150, at 16–18.

160. Many scholars, however, have begun to take a more critical view of Bickel’s basic assertions. *E.g., Bressman, supra* note 30, at 467; *Brown, supra* note 151, at 533–34; James E. Fleming, *Securing Deliberative Autonomy*, 48 *STAN. L. REV.* 1, 26–27, 61 (1995).

161. BICKEL, *supra* note 150, at 20.

162. Staszewski, *supra* note 148, at 1254.

163. *See, e.g., Bryant & Simeone, supra* note 138, at 390–93 (arguing that Congress’s lack of self-restraint cannot justify increased judicial review).

congressional inaction for arbitrariness is prone to the same accountability critique. If Congress fails to act for arbitrary reasons, voters can punish members accordingly. But if courts are responsible for reviewing congressional inaction for arbitrariness, the accountability link is lost. At least, so the argument would likely go.

Assuming, for the moment, the efficacy of the accountability argument, voters can still hold their representatives accountable for arbitrary inaction, regardless of what a court does. There does remain the everlasting fact that the federal judiciary is not accountable directly to the people. But that concern is significantly weakened here because of the nature of the inquiry. In the context of congressional inaction, courts would not be saying to Congress, “You cannot do that,” but instead would be empowering Congress to act. Courts would not be usurping power, but bestowing it. Courts would not be second-guessing Congress’s policy pronouncements, but rather Congress’s inability to fulfill its constitutional duties. In striking down a statute, the judiciary is denying Congress a desired policy outcome or its preferred method of achieving that objective. In reviewing inaction, a court is denying Congress neither the ends nor the means to get there.

Imagining judicial review in this context illustrates the point. Consider a challenge to the House’s failure to vote on immigration reform. If a court were to rule that such inaction were arbitrary—because the lack of a vote was due to an arbitrary application of an arbitrary rule, perhaps—and the court ordered a vote, wouldn’t this serve the interests of accountability? How does requiring members of Congress to vote on a piece of legislation disrupt political accountability? The same is true for a judicial ruling that the Senate must hold a vote on a particular executive branch nomination. The House and the Senate remain free to reject or approve the bill or nominee.

Additionally, by requiring such a vote, the public’s ability to hold lawmakers accountable is improved, not weakened. This is true because for Bickel’s theory of accountability to work, two necessary conditions must be met. First, voters must be aware of congressional decisions, and, second, the electorate must be able to identify the person responsible for the decision.¹⁶⁴ This is difficult enough when the matter involves actual decisions—votes—by Congress.¹⁶⁵ It borders on the impossible when the subject is non-votes. If fewer than 20 percent of the electorate can identify

164. Staszewski, *supra* note 148, at 1266.

165. *Id.* at 1267–70.

a single vote by their representatives in the House,¹⁶⁶ the number of voters who would be able to hold a member of Congress accountable for the lack of a congressional vote would be negligible.

Furthermore, the “collective nature of an ongoing, multimember institution that is subject to the requirements of bicameralism and presentment can make it difficult to ascertain who, if anyone, was responsible for any particular outcome.”¹⁶⁷ If this is true of action, it is even more true of inaction, especially when factoring in the degree to which procedural tactics drive inaction.

To the extent that voters are interested in holding elected officials accountable for inaction on a bill or nomination, those voters likely are not able to hold the responsible individual accountable. This is not true for congressional action. For example, many Americans sought to hold members of Congress accountable for enacting the Affordable Care Act in 2010. They did this, for the most part, by voting against those members who supported the law. Voters could do that because of a legislative record conclusively showing how each member voted. With arbitrary inaction, the task of holding the guilty parties accountable proves nearly impossible. How can a voter in California hold her representative accountable for an arbitrary decision by the Speaker of the House not to allow a vote on a bill? How can a constituent of a Democratic senator hold her accountable for the Senate’s failure to vote on the nomination of someone the senator supports? Any effort to hold a member of Congress responsible for inaction likely means that the voter is holding the wrong person accountable.

All of that, of course, assumes that Bickel was correct that accountability is the sine qua non of our political system and that elections are the only mechanism for ensuring such constitutional accountability.

Lisa Schultz Bressman has focused considerable energy on explaining why the Bickelian attention to accountability is misplaced.¹⁶⁸ While accountability was important to the Framers, another, equally critical consideration was in preventing arbitrary government.¹⁶⁹ As discussed above, Professor Bressman links the constitutional structure the Framers developed to a desire to ensure “good government,” not just majoritarian government.¹⁷⁰ To Bressman, and to the Framers whom she channels, the

166. *Id.* at 1272.

167. *Id.* at 1270.

168. Bressman, *supra* note 30, at 493–96.

169. *Id.* at 468.

170. *Id.* at 495.

constitutional framework is intended to promote policy decisions that serve public purposes, rather than “private interest and governmental self-interest.”¹⁷¹ Indeed, according to Bressman, “[t]he concern for arbitrariness can be seen as one of the primary evils at which our traditional checks and balances are aimed.”¹⁷²

In addition to separating governmental functions to ensure that Congress and the president “act in a nonarbitrary, public-regarding manner,”¹⁷³ Bressman argues that the Framers also placed procedural requirements on lawmaking—bicameralism and presentment, in particular—as a means of fostering nonarbitrary governmental decisions.¹⁷⁴ One of the primary tools the Framers relied on to meet this objective was the electoral check placed on Congress and the president.¹⁷⁵ Thus, Bressman turns Bickel’s argument against him. Political accountability, she contends, is less a means toward promoting majoritarianism than it is a way of ensuring non-arbitrary government.

To the extent that accountability remains a core aspect of our constitutional system of governance, Bickel’s limited view of accountability—as being exclusively tied to electoral contests—is also susceptible to challenge. Indeed, his assumption that the Framers focused on accountability through an electoral lens is belied by the Framers’ words and deeds.

The Constitution itself shows the importance the Framers placed on institutional, rather than electoral, accountability. That is to say, the Constitution makes the branches accountable to each other through the system of checks and balances. Nearly every power granted to one branch of the federal government is checked by one of the other branches’ powers. The Executive can hold Congress accountable through the veto, for example, while Congress’s control of the purse gives it significant power to hold the other two branches accountable. These checks create moments of institutional accountability. Judicial review is a central mechanism for ensuring the efficacy of such accountability.

Congressional inaction frustrates this form of institutional accountability. The president cannot veto congressional inaction; the executive branch cannot enforce a law that is not enacted. Only in the area

171. *Id.* at 496.

172. *Id.* at 468.

173. *Id.* at 499–500.

174. *Id.* at 500.

175. *Id.* at 500–01.

of nominations can one of the branches check congressional inaction—through the president’s power to make recess appointments.¹⁷⁶ That power, however, is limited by tenure restrictions placed on such appointees, by the ability of Congress to avoid adjourning, and by recent court decisions.¹⁷⁷

All of this is to say that while accountability is undoubtedly important to our governmental system, there is more to it than the simple electoral connection that formed Bickel’s focus. Institutional accountability is just as important, if not moreso, to our constitutional order. And with congressional inaction, the federal judiciary—through the power of judicial review—is the proper branch for enforcing the institutional accountability the Framers envisioned.¹⁷⁸

3. Separation of Powers

Entangled within the legislative supremacy and countermajoritarian critiques is the concern that judicial review of congressional processes upsets the constitutional separation of powers. I have already discussed the two elements of the “uniquely American”¹⁷⁹ version of the doctrine: each branch serves distinct functions and acts as a check against encroachments by the other two. The central separation of powers argument against a judiciary that scrutinizes the process by which Congress enacts a law or against requirements that Congress provide sufficient rationale for its policy decisions is that such review diminishes legislative power.¹⁸⁰

The other prominent separation of powers critique of judicial review of congressional processes rests on concerns that it forces Congress to behave in ways ill-suited to the chamber.¹⁸¹ Or, put differently, such review places demands on Congress that are incompatible with how a legislative body functions. For example, the many critics of the Supreme Court’s

176. U.S. CONST. art. II, § 2, cl. 3.

177. *E.g.*, *Nat’l Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014) (holding that President Obama’s recess appointments made during three-day breaks between pro forma sessions of the Senate were invalid).

178. The countermajoritarian critique also loses its force when one considers how untrustworthy the electoral process is for ensuring accountability.

179. M. J. C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 134 (1967).

180. The inverse of that is also potentially true. Given the “careful” balance that the Framers sought to create, the judiciary expands its own powers beyond its constitutional limits when it scrutinizes congressional processes. This zero-sum notion of federal power finds support in the separation of powers case law. *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010) (“[O]ne branch’s handicap is another’s strength”).

181. *See, e.g.*, Colker & Brudney, *supra* note 138, at 83–87 (“[B]y demanding a level of legislative factfinding that for practical purposes may be unattainable, the Court signaled that it is reserving the exclusive authority to determine when Congress has acted properly . . .”).

jurisprudence limiting Congress's ability to abrogate state sovereign immunity argue that these efforts intrude on the legislative sphere, treat Congress too much like an agency, and fail to respect that Congress has its own form and method of factfinding that is different from the judiciary's.¹⁸²

These last concerns are well-founded. The Court has, in many instances, unduly checked the scope of congressional power by inquiring into the legislative record like an appellate court would a lower court's decision and by imposing constraints on Congress that lack a historical basis.¹⁸³ And this may very well serve to strengthen the judiciary beyond the Framers' intentions, all at the legislature's expense—thereby posing a challenge to the separation of powers. Perhaps the most problematic feature of these decisions was their retrospective reach. The Court attached new process requirements to statutes enacted years—sometimes decades—earlier. It is one thing for the Court to tell Congress that going forward, Congress needs to clearly state its intent to abrogate sovereign immunity. It is quite another to require already-enacted statutes to meet those clear statement standards. This, too, frustrates separation of powers by interfering with Congress's express decisions on matters of public policy, while also corrupting the check the judiciary enjoys on legislative action by abusing the Court's power.

This is all to say that it is a valid concern that the introduction of judicial review of congressional inaction would disrupt the constitutional principle of separation of powers. These fears, however, can be overcome for a number of reasons. First, and most importantly, arbitrary congressional inaction poses a far greater threat to separation of powers.¹⁸⁴ As discussed earlier, congressional inaction means that the legislature is not legislating. Moreover, the inaction on nominations stymies executive and judicial branch efforts to fulfill their constitutional responsibilities.¹⁸⁵ Additionally, when these two other branches do act in a way that pushes the boundaries of their prescribed powers, congressional gridlock prevents Congress from serving as a forceful check.¹⁸⁶ These concerns are becoming

182. *Id.* at 83, 87, 119.

183. *See, e.g.,* *United States v. Morrison*, 529 U.S. 598, 614 (2000) (“[T]he existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation.”); *United States v. Lopez*, 514 U.S. 549, 557 (1995) (invalidating federal law purportedly authorized by the Commerce Clause because the Court found that no “rational basis existed for concluding that [the] regulated activity sufficiently affected interstate commerce”).

184. Teter, *supra* note 15, at 1135–49.

185. *See supra* text accompanying notes 73–77.

186. Teter, *supra* note 15, at 1138–40.

all the more real, as presidents become emboldened to encroach on Congress's functions, knowing full well that no institutional conflict will arise. The courts, too, are well aware that despite being engaged in a "dialogue"¹⁸⁷ with Congress when interpreting statutes, the judiciary's word is much more likely to be final in a world of gridlock and congressional inaction.

Thus, congressional inaction poses a real and substantial threat to separation of powers. At the same time, the dangers associated with judicial review of legislative inaction are minimal. To add congressional inaction to the existing spectrum of judicially reviewable matters represents a small step. Again, courts already review congressional enactments for arbitrariness, and courts already review executive branch inaction, too. Judicial review, exercised in this way, is a part of the Framers' constitutional intentions and has been developed and supported over two hundred years.¹⁸⁸ Contrast that with the form and degree of congressional inaction that we see today, which is a recent phenomenon that poses much more pronounced threats than ever before.

Finally, the separation of powers critique is further weakened by consequence of the nature of congressional inaction. Separation of powers is concerned with institutional powers, functions, and checks—not individual power dynamics or influence. Judicial review of congressional inaction will reduce the power of individuals within Congress—the Speaker cannot apply rules arbitrarily to keep a majority from voting on legislation it supports; a senator cannot place a hold on a judicial nomination. The institution itself will retain its full influence, if not regain some of its power ceded to the other branches precisely because of gridlock.

In this way, then, the zero-sum notion of federal power is incorrect. By "aggrandizing" power through the review of legislative inaction, the judiciary would also be empowering Congress.

4. Legislative Inaction as Part of the Constitutional Design

The Framers certainly feared too much government. They created a governmental structure designed, in part, to prevent excessive lawmaking and to make the process for enacting law more difficult.¹⁸⁹ This historical

187. Carlos E. González, *Reinterpreting Statutory Interpretation*, 74 N.C. L. REV. 585, 591 (1996).

188. See Berger, *supra* note 114, at 966.

189. Frederick Schauer, *The Constitution of Fear*, 12 CONST. COMMENT. 203, 204 (1995) ("[A]n underlying theme of the Constitution has always been that the dangers of mistaken governmental action

fact, however, has transformed into a justification for any legislative inaction—stretching too far the Framers’ worries.

The concerns over excessive lawmaking centered on popular passions producing a groundswell of support for ill-advised and oppressive laws.¹⁹⁰ Moreover, while the narrative of the Framers being worried about creating too strong of a national government does have historical roots, it must be remembered that the Framers met in Philadelphia in 1787 to address the exact opposite problem: arbitrary governmental inaction.¹⁹¹ In describing the difficulties of lawmaking under the Articles of Confederation, Alexander Hamilton stated:

Congress . . . have been frequently in the situation . . . where a single veto has been sufficient to put a stop to all their movements [I]ts real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junto, to the regular deliberations and decisions of a respectable majority If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings And yet in such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border upon anarchy.¹⁹²

Thus, the Framers sought to create a government with “sufficient energy”¹⁹³ to use the powers they gave it effectively and well. In other words, the Framers established a new government precisely because of the problems associated with arbitrary legislative inaction.

are more to be feared than the dangers of mistaken governmental inaction.”).

190. See, e.g., THE FEDERALIST NO. 63, at 424–25 (Alexander Hamilton or James Madison) (Jacob E. Cooke ed., 1961) (“[A]n institution [such as the Senate] may be sometimes necessary, as a defence to the people against their own temporary errors and delusions.”).

191. James Wilson reminded his fellow delegates:

“Bad Governnts. are of two sorts. 1. that which does too little. 2. that which does too much: that which fails thro’ weakness; and that which destroys thro’ oppression. Under which of these evils do the U. States at present groan? under the weakness and inefficiency of its Governnt. To remedy this weakness we have been sent to this Convention.”

1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 483–84 (Max Farrand ed., rev. ed. 1966).

192. THE FEDERALIST NO. 22, at 140–41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

193. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 449 (Max Farrand ed., rev. ed. 1966) (quoting James Madison).

Furthermore, the Framers addressed their concerns over excessive lawmaking in deliberate and specific ways. They created a bicameral legislature, gave each state equal representation in the Senate to counterbalance the more democratic House, specified the set of procedures to follow to enact law, and devised a set of checks and balances. In other words, while a goal of the Framers certainly might have been to limit the amount of lawmaking Congress engaged in, there were specific means that the Framers employed to achieve that purpose. This is so precisely because the fear was not one of lawmaking *per se*, but lawmaking that served factional or temporary whims.¹⁹⁴

Today, inaction is just as likely to stem from those same popular pressures that worried the Framers about action. The separation of powers is designed, in part, to avoid arbitrary governmental action. Arbitrary inaction is now as great a concern.

V. ESTABLISHING THE PRACTICAL FOUNDATIONS: WHAT JUDICIAL REVIEW OF CONGRESSIONAL INACTION WOULD LOOK LIKE

Up until this part, the argument that courts should review congressional inaction for arbitrariness has centered on explaining why such a recalibration of the judiciary's relationship with Congress is important and on responding to anticipated critiques. It is necessary now to flesh out the details of what such review would look like. How would the judiciary examine congressional inaction to see whether arbitrariness lay at its roots? At first, such a question may seem daunting, suggesting that the proposal itself is unworkable. In fact, however, it is possible to build off well-established approaches to construct, at the very least, a foundation from which courts could scrutinize congressional inaction. Below, I draw upon these existing structures to offer several features of judicial review of legislative inaction. I then briefly walk through two recent examples of inaction to show how a challenge might proceed.

A. OVERCOMING THRESHOLD CONCERNS

Constructing a proposal for judicial review of congressional inaction begins with questions common to all litigation: who can sue, and whether courts will be willing to hear the matter. To be more specific, the first issues warranting discussion are how to address concerns over standing and the political question doctrine.

194. See, e.g., THE FEDERALIST NO. 63, *supra* note 190, at 424–25.

1. Standing

A plaintiff seeking to pursue a claim in federal court must have standing. Specifically,

First, the plaintiff must have suffered an ‘injury in fact’—an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of. . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.¹⁹⁵

The requirement that a party enjoy standing to bring an action has prevented many potentially meritorious claims from being heard. Moreover, efforts to challenge various congressional rules and procedures, some very recent, have failed to survive a court’s initial standing inquiry.¹⁹⁶ For example, based on standing, the D.C. Circuit dismissed a private citizen’s suit challenging the constitutionality of the Senate’s filibuster of President Bill Clinton’s economic stimulus package in 1993.¹⁹⁷ More recently, the campaign finance reform advocacy group Common Cause joined with four members of the House of Representatives and several individuals to challenge the Senate’s filibuster of the DISCLOSE Act and DREAM Act.¹⁹⁸ Common Cause claimed as its injury the need to “divert[] staff, time, and resources to combatting the effects of secret expenditures . . . that would have been prohibited by the DISCLOSE Act.”¹⁹⁹ The House members claimed injuries based on the undisclosed attack ads that they would face during the reelection campaigns, as well as the fact that the Senate’s filibuster rules served to nullify their votes.²⁰⁰ Finally, the “DREAM Act Plaintiffs” were individuals denied a path to citizenship and subject to deportation because of the Senate’s failure to enact that legislation.²⁰¹

The district court dismissed the suit for lack of standing.²⁰² The court concluded that none of the plaintiffs asserted a particularized injury that

195. *United States v. Hays*, 515 U.S. 737, 742–43 (1995) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)) (omission in original).

196. *E.g.*, *Page v. Dole*, No. 94-5292, 1996 U.S. App. LEXIS 15491, at *1 (D.C. Cir. 1996) (per curiam); *Common Cause v. Biden*, 909 F. Supp. 2d 9, 12–13 (D.D.C. 2012).

197. *Page v. Shelby*, 995 F. Supp. 23, 24 (D.D.C. 1998).

198. *Common Cause*, 909 F. Supp. 2d at 12.

199. *Id.* at 21.

200. *Id.* at 23–24.

201. *Id.* at 23.

202. *Id.* at 12–13.

was redressable by a favorable decision.²⁰³

Standing, therefore, poses an obstacle to judicial review of congressional inaction, but not an insurmountable one. First, it is possible to distinguish these lawsuits in ways that directly affect the standing question. The injuries asserted by the Common Cause plaintiffs were premised on the successful enactment and signing of the DISCLOSE Act and DREAM Act.²⁰⁴ The plaintiffs implicitly equated an up-or-down vote on the legislation with Senate passage of the bills. While this may well have been true, the link between the injury (the failure to enact) and the remedy (removing the filibuster) was too tenuous. In other words, nothing guaranteed that if a court were to strike down the cloture rules that the legislation would have been enacted in the form passed by the House and benefitting the plaintiffs.

Based on these constitutional requirements of standing, it is necessary to identify the individuals or entities that can claim an injury in fact, as well as the possibility that a judicial decision could redress the harm. The injury, as discussed at the outset of this Article, rests on the failure of Congress to fulfill its constitutional role—to decide public policy and to confirm or reject nominations. Still, determining who, specifically, has suffered the injury is paramount. In the context of legislation, the failure by the House or Senate to vote on a measure creates an injury for legislators who desire a vote. This is unlike the claims put forward by the Common Cause plaintiffs, who asserted injuries amounting to a desire for a determinative legislative victory. By focusing on a desired legislative outcome—and claiming a right to it—the Common Cause plaintiffs doomed their chances. Indeed, one of the weaknesses of those plaintiffs' complaint was that no senators joined the effort, seeking a vote on the merits of the underlying legislation.

A sitting member contesting the arbitrary application of a House or Senate rule poses an entirely different standing question. This is an uncontroversial point. Standing, after all, is not a determination of the lawsuit's merits—it is instead the recognition that some people are better suited than others to raise the claim. A public school teacher fired for arbitrary reasons may sue; her students may not. A citizen arbitrarily removed from a state's voter rolls may challenge the action; a candidate may not. It is critical to the standing inquiry to find the individuals directly affected by the arbitrary action.

203. *Id.* at 17–27.

204. *Id.* at 22.

This is all to say that simply because courts have held that outside individuals and groups lack the standing to challenge congressional rules, sitting members of Congress are not foreclosed from obtaining standing to challenge the arbitrary application of rules that deprive the members of the ability to vote on legislation. The D.C. Circuit's decision in *Michel v. Anderson*²⁰⁵ bolsters the argument that a representative or senator would enjoy standing to challenge the arbitrary application of the chamber rules. In *Michel*, the court permitted twelve House members to proceed with their claim against a rule that allowed delegates from the District of Columbia and U.S. territories to vote in the Committee of the Whole, even though they were otherwise nonvoting members of the chamber.²⁰⁶ The plaintiffs claimed that the House rule allowing the vote unconstitutionally diluted their own votes.²⁰⁷ The court held that such a claim stated a cognizable injury and that the remedy sought—judicial invalidation of the rule—would redress the claimed injuries.²⁰⁸

Senators would have a similarly concrete injury in the context of nominations, since the failure to vote on the merits of a judicial or executive nominee deprives each senator of the constitutional right to vote, advise, and consent. Moreover, there is a case to be made that the president and the nominee also suffer concrete, cognizable injuries. The Constitution, after all, grants the president the power to “nominate . . . [o]fficers of the United States” and to “require the [o]pinion, in writing, of the principal [o]fficer in each of the executive [d]epartments.”²⁰⁹ The failure to vote on a president's nominees interferes with the president's right to appoint and receive advice from executive branch officers.²¹⁰

The causation and redressability requirements—if they really are distinct—do not pose a significant obstacle to lawmakers, a president, or even a nominee enjoying standing to litigate over congressional inaction. Unlike in the filibuster cases described above, where the plaintiffs were, in effect, seeking an alternative outcome, challengers to legislative inaction would only be asking a court to scrutinize for arbitrariness the decision that prevented a vote on a bill or nomination. I will discuss possible remedies

205. *Michel v. Anderson*, 14 F.3d. 623 (D.C. Cir. 1994).

206. *Id.* at 625–26.

207. *Id.* at 625.

208. *Id.* at 626–28.

209. U.S. CONST. art. II, § 2.

210. Others have also argued that the nominee has a right to an up-or-down confirmation vote. See, e.g., John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L. & PUB. POL'Y 181, 207–11 (2003) (quoting several senators who have indicated their belief that a nominee is entitled to a vote).

later in this part, but it suffices here to say that if a court determines that the inaction was due to arbitrary reasoning, it could order a vote. That remedy would be sufficient to address the claimed injury.

Standing doctrine, therefore, should not pose an exceedingly high hurdle for the right set of plaintiffs.

2. Political Question Doctrine

The political question doctrine poses less of a substantive obstacle, but more of a linguistic one, than does the standing inquiry. The political question doctrine prevents a court from hearing a matter that is otherwise justiciable if the claim presents a “political question.” Of course, as Justice Brennan stated in *Baker v. Carr*,²¹¹ “political question doctrine” is something of a misnomer, as “the mere fact that the suit seeks protection of a political right does not mean it presents a political question.”²¹² Instead, the Court has identified six characteristics of a political question: (1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department;” (2) “a lack of judicially discoverable and manageable standards for resolving it;” (3) “the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;” (4) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government;” (5) “an unusual need for unquestioning adherence to a political decision already made;” or (6) “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.”²¹³

One can debate the usefulness of these criteria, but, nevertheless, nearly every political question doctrine case seeks to apply them. Additionally, it is possible to discern from the cases various categories of areas with heightened political question concerns. One of those categories, congressional self-governance, is most applicable here. In those cases, the record is mixed. In *Marshall Field & Co. v. Clark*,²¹⁴ the Court dismissed a challenge to a statute that was brought because the final, signed, and enrolled version failed to contain a section that was in the legislation as voted on by the House and Senate.²¹⁵ The enrolled version of the law had been authenticated by the Speaker of the House and the vice president

211. *Baker v. Carr*, 369 U.S. 186 (1962).

212. *Id.* at 209.

213. *Id.* at 217.

214. *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

215. *Id.* at 668–69.

before being signed by the president.²¹⁶ The Court refused to look to the congressional record to ascertain whether there indeed was a discrepancy between the legislation as approved by Congress and the version enrolled and being enforced.²¹⁷ Instead, the Court emphasized that Congress could protect its own interests if such a discrepancy occurred and that judicial review was therefore unnecessary and unwise.²¹⁸

While *Marshall Field* could be read as preventing judicial review of the self-governing determinations of Congress, subsequent cases suggest no such limitation exists. For example, in *Powell v. McCormack*,²¹⁹ the Court refused to dismiss a case under the political question doctrine despite the fact that the matter related to the House's refusal to seat duly elected representative Adam Clayton Powell because of his past ethical missteps.²²⁰ The House insisted that Powell's suit presented a political question because Article I, Section 5 committed to that chamber the power to determine Powell's qualifications.²²¹ The Court concluded that Section 5 conferred no such commitment and instead had to be read in conjunction with Article I, Section 2, which established the requirements for membership in the House.²²²

The Court also rejected the argument that the case posed a political question because resolving the matter may "produce a potentially embarrassing confrontation between coordinate branches."²²³ Instead, the Court said, our system of government requires that "federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch."²²⁴

The Court relied on similar reasoning in *United States v. Munoz-Flores*.²²⁵ There, Munoz-Flores challenged the validity of a federal assessment, claiming that it violated the constitutional requirement that revenue bills originate in the House.²²⁶ The government argued that the matter presented a political question and that by enacting and signing the legislation, the House, Senate, and president made a determination that the

216. *Id.* at 669.

217. *Id.* at 679–80.

218. *Id.* at 672–73.

219. *Powell v. McCormack*, 395 U.S. 486 (1969).

220. *Id.* at 489.

221. *Id.* at 519.

222. *Id.* at 489, 547–48.

223. *Id.* at 548 (internal quotation marks omitted).

224. *Id.* at 549.

225. *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

226. *Id.* at 388.

bill satisfied the Origination Clause.²²⁷ The government also suggested that the case posed a political question because no standards existed for determining whether a bill's purpose is raising revenue, or for determining from where a bill originates.²²⁸

In “brush[ing] aside”²²⁹ these concerns, the Court recited the need for the judiciary to decide constitutional questions.²³⁰ Additionally, in direct response to the concern over a lack of judicially manageable standards, the Court stated, “[t]o be sure, the courts must develop standards for making the revenue and origination determinations, but the Government suggests no reason that developing such standards will be more difficult in this context than in any other.”²³¹

Taken together, these cases show that the political question doctrine should not prevent a court from hearing a challenge to arbitrary congressional inaction. First, the Court made clear in *Marshall Field* that a key consideration was the fact that Congress could protect its own interests if a provision of a bill approved by the House and Senate failed to be included in the enrolled version signed by the president.²³² Moreover, the Court in *Munoz-Flores* expressly rejected a similar argument—that the House could protect its institutional interests in originating revenue bills—as a basis for invoking the political question doctrine.²³³ Therefore, even though it could be argued that the House and Senate could protect their interests by revising rules that give individual members the power to arbitrarily halt congressional action, that fact alone does not render the issue nonjusticiable.

Nor does any constitutional text specifically commit to Congress the responsibility for determining when congressional inaction is or is not arbitrary. The closest provision one may find is Article I, Section 5's clause granting each chamber the power to “determine the rules of its [p]roceedings.”²³⁴ In *United States v. Ballin*,²³⁵ the Court relied on this section to dismiss a challenge to a statute enacted in accordance with rules that permitted the House to determine what constituted a quorum sufficient

227. *Id.* at 390.

228. *Id.* at 395.

229. CHEMERINSKY, *supra* note 56, at 147.

230. *Munoz-Flores*, 495 U.S. at 390–91.

231. *Id.* at 395–96.

232. CHEMERINSKY, *supra* note 56, at 145–46.

233. *Munoz-Flores*, 495 U.S. at 392–93.

234. U.S. CONST. art. I, § 5, cl. 2.

235. *United States v. Ballin*, 144 U.S. 1 (1892).

to do business.²³⁶ The Court concluded that the House enjoyed the right to set its own rules and refused to rule on the merits. Nevertheless, even in *Ballin*, the Court stated that

The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained.²³⁷

Many times, congressional inaction specifically violates constitutionally derived anti-arbitrariness principles. Congress cannot rely on its power to set its own rules to ignore these constitutional constraints on the exercise of arbitrary power any more than it could rely on a similar provision to exclude Representative Powell.

Finally, to the extent that some may argue that there are no standards for assessing when congressional inaction is unconstitutionally arbitrary, that is not a sufficient basis for invoking the political question doctrine, as the Court made clear in *Munoz-Flores*. Moreover, as discussed in Part V.B., courts have significant precedent for establishing standards to assess the arbitrariness of inaction.

For all of these reasons, a challenge to congressional inaction should be justiciable.

B. ESTABLISHING ARBITRARINESS

Simply satisfying standing requirements and a court's concerns over political questions does not make the task of a plaintiff challenging congressional inaction significantly easier. The next step is to sufficiently establish that congressional inaction is arbitrary, an admittedly difficult prospect because the bounds for determining what may constitute improper arbitrariness are ill-defined. That said, and as discussed earlier, courts are already accustomed to reviewing governmental action—and inaction—for arbitrariness.²³⁸ Indeed, federal courts apply an arbitrariness test to virtually every form of governmental action. From these cases emerges a clear offering of the factors the courts consider most indicative of arbitrary decision-making. Focusing on these elements in the context of arbitrary congressional inaction provides a solid foundation for judicial review. Before discussing the relevant cases and factors, let me concede that for

236. *Id.* at 4.

237. *Id.* at 5.

238. *See supra* notes 98–102, 110–113 and accompanying text.

each case in which a court has found an arbitrary exercise of governmental power, there exist probably dozens of examples of courts rejecting such arbitrariness claims. That is how it should be. It is not, therefore, a weakness of my argument to rely in part on the following arbitrariness principles to provide a baseline for assessing congressional inaction. Courts *should* look skeptically at claims challenging congressional inaction and *should* be demanding in the requirement that plaintiffs demonstrate arbitrariness. That said, when a plaintiff does make out a case that congressional inaction is arbitrary, the courts should respond, just as they do in countless other contexts. For this reason, it is helpful to review the factors most relevant to finding governmental action arbitrary.

1. Improper Motivation

The Fifth and Fourteenth Amendment Due Process Clauses,²³⁹ along with the latter's Equal Protection Clause,²⁴⁰ provide fertile ground for uncovering judicial standards to enforce an anti-arbitrariness principle against congressional inaction. In fact, courts have gone so far as to say that the primary purpose behind these clauses is to guard against arbitrary action.²⁴¹ Emerging from these cases is the judiciary's concern over ensuring that improper motives do not form the basis for the government's actions. Though a number of cases could be offered to prove this point, perhaps the two most illuminating are *United States Department of Agriculture v. Moreno*²⁴² and *City of Cleburne v. Cleburne Living Center, Inc.*²⁴³

In *Moreno*, the Court reviewed a provision of the Food Stamp Act that prevented households with unrelated individuals from participating in the program.²⁴⁴ The Court held that the statute violated the Due Process Clause because the unequal treatment was not rationally related to a legitimate purpose.²⁴⁵ First, the Court concluded that the "desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."²⁴⁶ As the Court would clarify in subsequent decisions, government action driven by animus is arbitrary and illegitimate.

The government argued that the statute's eligibility restriction was

239. U.S. CONST. amends. V, XIV.

240. U.S. CONST. amend. XIV.

241. *E.g.*, *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000).

242. *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973).

243. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).

244. *Moreno*, 413 U.S. at 529.

245. *Id.* at 538.

246. *Id.* at 534.

“rationally related to the clearly legitimate governmental interest in minimizing fraud in the administration of the food stamp program.”²⁴⁷ Specifically, the government suggested that Congress enacted the restriction because it believed that households with unrelated individuals are more likely to commit fraud by failing to report all household income, and that because those households were less stable, the government would not be able to detect such fraud.²⁴⁸ In rejecting the government’s reasoning, the Court determined that such logic did not evince the constitutionally required degree of rationality.²⁴⁹ If the end is to root out fraud in the food stamp program, the Court held, the challenged statutory provisions were arbitrary means by which to reach that end.²⁵⁰ The Court noted that the Food Stamp Act included other provisions “aimed specifically at the problem[] of fraud.”²⁵¹ Additionally, the Court questioned the effects of the statute. The Court relied on expert opinions to conclude that while those committing fraud could alter their household arrangements to continue to receive benefits, the statute would end aid for those “so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.”²⁵² In other words, the congressional enactment was arbitrary because the means employed by Congress were not sufficiently related to its objective. This led back to the first problem: it suggested to the Court an improper motivation underlying the statute’s restrictive provisions.

The decision in *City of Cleburne* also reveals the Court’s belief that when the relationship between the government’s action and its asserted goal is too attenuated, the act is unconstitutionally arbitrary. There, the City of Cleburne, acting pursuant to an ordinance, denied a special use permit to Cleburne Living Center, which sought to open a group home for people with mental disabilities.²⁵³ The Court struck down the ordinance, which distinguished between such group homes and other buildings, because, “the record does not reveal any rational basis for believing that the . . . home would pose any special threat to the city’s legitimate interests.”²⁵⁴ The Justices rejected each of the city’s proffered reasons for the zoning restriction, concluding that, in reality, the city was acting based on

247. *Id.* at 535.

248. *Id.*

249. *Id.* at 535–36.

250. *Id.* at 536–37.

251. *Id.* at 536.

252. *Id.* at 538.

253. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 435–37 (1985).

254. *Id.* at 448.

“irrational prejudice”²⁵⁵ against individuals with mental disabilities—an illegitimate end.

These two cases offer important insights into how courts view the concept of arbitrariness, as well as how future courts may review congressional inaction. The Court in both holdings focused on the relationship between the stated objective and the means employed to achieve that end. It is possible to draw two key lessons from these cases. First, a government action motivated by animus or prejudice will be viewed by courts as arbitrary and irrational. Second, even absent clear evidence of animus, a court will take a skeptical look at the relationship between the stated objective and the means used to reach that end if the court believes an improper motivation was behind the action. In such instances, the court is conducting something beyond traditional rational basis review, though the interest remains the same: protection against arbitrary governmental action.

2. Treating Those Similarly-Situated Differently

In addition to using the Equal Protection Clause to link arbitrariness with improper governmental motivations, courts have also used the Fourteenth Amendment to root out arbitrariness by invalidating actions that treat similarly situated individuals differently. As the Court has stated, “[t]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the [s]tate’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.”²⁵⁶ Therefore, the Court overturned a local government’s demand that in order to connect to the municipal water line, a resident grant the town an easement that was more than twice as long as that required of other residents.²⁵⁷ In two later cases, the Court struck down Alaska’s dividend distribution scheme that favored longstanding residents over newer residents,²⁵⁸ as well as New Mexico’s property tax law that favored individuals who were residents before a particular date.²⁵⁹ The Court concluded that the states lacked a rational basis for distinguishing between residents based on the duration of residency.²⁶⁰

255. *Id.* at 450.

256. *Sunday Lake Iron Co. v. Twp. of Wakefield*, 247 U.S. 350, 352 (1918).

257. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000).

258. *Zobel v. Williams*, 457 U.S. 55, 56 (1982).

259. *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 614–16 (1985).

260. *Id.* at 622–23; *Zobel*, 457 U.S. at 63.

Thus, a key factor in assessing the arbitrariness of governmental action is whether similarly situated individuals are being treated differently. If so, it raises the specter of power exercised arbitrarily.

3. Unbridled Discretion

The Framers, revolting against a king, knew that granting a governmental official (or small group of officials) ill-defined, discretionary power is a recipe for arbitrary government decision-making. The Court has given voice to this concern in a variety of contexts. For example, much of the Court's free speech jurisprudence centers on guarding against arbitrary acts stemming from too much discretion granted to a limited number of officials.²⁶¹ Licensing and permitting schemes have been struck down if they lack standards sufficient to limit official discretion.²⁶² In *Forsyth County v. Nationalist Movement*,²⁶³ the Court invalidated an ordinance that granted a county official the discretion to set the fee required for a demonstration permit.²⁶⁴ The Court found that the lack of "articulated standards" and the absence of a need by the administrator to explain her decision created the possibility that the fees would be imposed arbitrarily.²⁶⁵ "The First Amendment prohibits the vesting of such unbridled discretion in a government official."²⁶⁶ Similarly, the Court looks unfavorably on prior restraints and content-based restrictions largely out of a fear of granting officials broad, unchecked discretion to act in an arbitrary fashion.²⁶⁷

The concerns over vesting a single individual with ill-defined discretion can be seen in cases outside of the First Amendment context. In *City of Chicago v. Morales*,²⁶⁸ the Court struck down Chicago's gang loitering ordinance. Though the rationales advanced by the Justices differed, considerable attention focused on the discretion given to police officers because of the law's vagueness.²⁶⁹ A similar concern led the Court to invalidate a California statute that required people who loitered or wandered on streets to provide "credible and reliable" identification when

261. Cimini, *supra* note 31, at 500–01.

262. *E.g.*, *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 772 (1988); *Saia v. New York*, 334 U.S. 558, 558–60 (1948); *Kunz v. New York*, 340 U.S. 290, 295 (1951).

263. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123 (1992).

264. *Id.* at 133.

265. *Id.*

266. *Id.*

267. *E.g.*, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225–26 (1990) (plurality opinion).

268. *City of Chicago v. Morales*, 527 U.S. 41 (1999).

269. *Id.* at 61–64; *id.* at 64–70 (O'Connor, J., concurring in part and concurring in the judgment); *id.* at 70–72 (Breyer, J., same).

requested by a police officer.²⁷⁰ As with the Chicago ordinance, the Court's primary concern with such a vague law is of the unbridled discretion given to police officers, which the Court fears encourages "arbitrary and discriminatory enforcement."²⁷¹

Demonstrating a similar concern over unbridled discretion, courts have struck down statutes granting an official broad power to disburse benefits,²⁷² establish property valuations,²⁷³ and determine whether nonpublic secondary schools should be allowed to join a state's athletic association.²⁷⁴ In all of these cases, the courts acted out of a concern that granting too much discretion to governmental officials results in arbitrary decision-making.

4. Actions Affecting Foundational Constitutional Principles

Recent efforts by the Court to impose clear statement rules on Congress suggest another factor that may be relevant to assessing the arbitrariness of congressional inaction. In these cases, the Court gives effect to various constitutional values even absent a textual command in the document.²⁷⁵ For example, in *Gregory v. Ashcroft*,²⁷⁶ the Court held that if Congress seeks to "alter the 'usual constitutional balance between the [s]tates and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute."²⁷⁷ Thus, before Congress could apply the Age Discrimination in Employment Act to state judges, and, more generally, before Congress can abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment, Congress must clearly state its desire to do so.²⁷⁸ The purpose is to ensure "that the legislature has in fact faced, and intended to bring into issue, the critical matters involved."²⁷⁹ In this way, the Court has imposed on Congress both substantive and procedural requirements, all with the objective of preserving the constitutional principle of federalism.²⁸⁰

270. *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983).

271. *Id.* at 357.

272. *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140–41 (D.N.H. 1976).

273. *Allegheny Pittsburgh Coal Co. v. Cnty. Comm'n*, 488 U.S. 336, 342–43 (1989).

274. *Christian Heritage Acad. v. Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1036–37 (10th Cir. 2007).

275. John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 400–02 (2010).

276. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

277. *Id.* at 460 (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)).

278. *Id.* at 469–70.

279. *Id.* at 461.

280. Manning, *supra* note 275, at 407–10.

Additionally, to protect the constitutional value of the rule of law, the Court requires Congress to explicitly state its intent to make a law retroactive.²⁸¹ This is despite any specific constitutional text precluding retroactivity.²⁸²

Finally, as a way of preserving the appropriate level of institutional checks and balances, and of avoiding arbitrary governmental action, the Court has erected a “strong presumption” in favor of judicial review of agency actions.²⁸³ A party seeking to avoid such review “bears the heavy burden” and must provide “clear and convincing” evidence that Congress intended to preclude judicial review.²⁸⁴

The Court imposes these clear statement requirements on Congress “even when no particular constitutional provision would be violated by the outcome avoided by the clear statement rule.”²⁸⁵ In other words, the Court uses these rules to “safeguard constitutional values,” rather than to enforce constitutional text.²⁸⁶

The shared concern in these cases is that Congress will not have given sufficient consideration to the important values it is disrupting—that it will be acting arbitrarily, at the expense of foundational constitutional principles.

5. Unreasonable Delay

As discussed earlier, the notion of reviewing congressional inaction has an antecedent in judicial scrutiny of agency inaction under the Administrative Procedure Act.²⁸⁷ As such, how courts approach the task of assessing the arbitrariness of such inaction provides valuable insights into how to evaluate a challenge to congressional inaction. As a starting point, it is important to note that I am not suggesting that the bases for reviewing inaction of agencies and Congress are the same. Agency inaction is reviewable in large part because the APA defines agency “action” to include “failure to act.”²⁸⁸ No similar constitutional or statutory provision exists to equate congressional inaction with action. Instead, I rely on the

281. *Id.* at 410–12.

282. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 266–68 (1994) (stating that the anti-retroactivity principle “require[s] that Congress first make its intention clear”).

283. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

284. *Id.*

285. Manning, *supra* note 275, at 413.

286. *Id.* at 402.

287. Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2012)).

288. 5 U.S.C. § 551(13).

arguments offered earlier—about constitutional design, structure, concerns about arbitrary government, and the harms posed by inaction—to explain why congressional inaction is reviewable. The purpose, then, of invoking the case law surrounding review of agency inaction is to provide a framework for judicial scrutiny of congressional inaction. In other words, what considerations go into a court determining that an agency's failure to act constitutes arbitrary governmental inaction?

Courts reviewing agency inaction for arbitrariness focus on several factors, with some more readily applicable to review of congressional inaction.²⁸⁹ Courts are most troubled by agency inaction when the amount of time an agency takes to complete an act is unreasonable or when the interests at stake are too great to countenance delay.²⁹⁰

In discussing these concerns, the D.C. Circuit has explained that, “excessive delay saps the public confidence in an agency's ability to discharge its responsibilities and creates uncertainty for the parties.”²⁹¹ Moreover, in focusing on the interests involved, reviewing courts have demonstrated a deep concern with agency delays that may have serious consequences to people's health and welfare.²⁹²

Finally, it is additionally informative to look at the remedies that courts impose on agencies for arbitrary inaction. Mindful of the fact that courts cannot “compel solutions where none exist,”²⁹³ the D.C. Circuit has nevertheless acted to “make certain that what can be done is done.”²⁹⁴ Courts, therefore, have ordered agencies to establish expedited schedules for completing action²⁹⁵ or have even imposed the schedule themselves.²⁹⁶ Thus, courts have been willing to force the agency's hand to require action—without mandating the substantive content of the action.

289. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79–80 (D.C. Cir. 1984) (discussing the several factors).

290. *Id.* at 80–81.

291. *Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987).

292. *Pub. Citizen Health Research Grp. v. Comm'r, FDA*, 740 F.2d 21, 34 (D.C. Cir. 1984); *Blankenship v. Sec'y of Health, Educ. & Welfare*, 587 F.2d 329, 334 (6th Cir. 1978).

293. *Am. Broad. Co. v. FCC*, 191 F.2d 492, 501 (D.C. Cir. 1951).

294. *Id.*

295. *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 81 (D.C. Cir. 1984).

296. *E.g., Blankenship*, 587 F.2d at 336.

C. APPLYING THE ARBITRARINESS PRECEDENTS TO CONGRESSIONAL
INACTION

1. General Lessons

It is possible to draw many lessons from the Court's approach to arbitrariness in other contexts in the hope of establishing a framework for judicial review of arbitrary congressional inaction.

The Court's linking of arbitrariness with unbridled discretion in the hands of a few government officials directly implicates congressional inaction. As discussed earlier, often stalemate is a result of the decisions of a single senator or representative, rather than a collective action.²⁹⁷ Moreover, the basis for the inaction frequently lacks any connection to the merits of the legislation or nomination.²⁹⁸ Additionally, the motivation underlying the decision to impose gridlock on the chamber stems from improper bases—concerns about personal benefits, or animus—rather than from a concern for the public good.²⁹⁹

Of course, the Court has also focused attention on lack of standards,³⁰⁰ differentiated treatment,³⁰¹ and the undermining of core constitutional values.³⁰² These considerations are applicable in the congressional context as much as any other. Perhaps in the past, members of Congress played by a set of norms that dictated the extent to which they would delay votes on legislation and nominations that enjoyed majority support.³⁰³ No longer. Senators pursue extreme ideologies and idiosyncratic objectives through the use of their institutionalized prerogatives to block action.³⁰⁴ With no standards governing the use of such tactics, it is impossible to know in advance whether a bill or nomination will be subjected to tyrannical delay. Moreover, one nominee might easily proceed, while another, equally qualified nominee might be caught in the gridlock. Finally, as stalemate prevents Congress from making policy, disrupts the ability of the judiciary and executive branches to perform their constitutionally prescribed responsibilities, and hinders Congress's ability to check the other branches when they exceed their constitutional limits, the threat to separation of powers becomes more acute. All of this has the markings of arbitrary

297. *See supra* text accompanying notes 59–63.

298. *See supra* text accompanying notes 61–63.

299. *See supra* text accompanying notes 61–63.

300. *See supra* text accompanying notes 52–53.

301. *See supra* Part V.B.2.

302. *See supra* Part V.B.4.

303. SINCLAIR, *supra* note 21, at 108–10.

304. *See id.*

government.

Further, as the courts note in the agency inaction context, one of the chief concerns with such delay is the threat it poses to agency legitimacy and public support for the governing institution.³⁰⁵ That problem is easily apparent in the context of congressional inaction. The gridlock and stalemate that currently grips Congress has rendered that institution—the preeminent branch of our government—incredibly unpopular.³⁰⁶

The agency inaction cases suggest that courts should measure the reasonableness of delay, but such an undertaking is difficult and there is no answer within the agency inaction cases as to what, specifically, constitutes unreasonable delay. That said, simply focusing the inquiry in this way is valuable. It forces the party responsible for the inaction to explain its reasonableness. Why should it take years to confirm a judicial nominee who receives overwhelming support once a vote is held? Why is it reasonable to risk the United States' economy to maintain a “majority of the majority” rule in the House? If judicial review of congressional inaction could force litigants to answer this type of inquiry—to defend inaction—it would serve the interests of non-arbitrary governance well.

More concretely, the cases involving agency inaction also show the importance of considering the consequences of inaction as part of the judicial review for arbitrariness. Simply put, the more pronounced the negative effects of delay, the more arbitrary the withholding of action. I have already detailed the consequences of congressional inaction—delayed justice, economic meltdowns, the reduction of the United States credit rating, and a weakening of the system of separation of powers.³⁰⁷ Courts, therefore, should scrutinize even more closely that congressional delay resulting in such severe consequences.

2. Specific Application

Putting all of this together into a coherent approach to reviewing congressional inaction is something of a challenge. There are different ways to prove or measure arbitrariness and a variety of considerations at play depending on the type of inaction at issue. For that reason, it is perhaps best to illustrate one possible approach through two examples—House Speaker Boehner's decision to employ the Hastert Rule in the budget battle that led to the government shutdown in October 2013, and

305. Cutler v. Hayes, 818 F.2d 879, 896–97 (D.C. Cir. 1987).

306. Blake, *supra* note 1.

307. See *supra* text accompanying notes 65–68.

Senator Mary Landrieu's hold placed on the nomination of Jack Lew to serve as Director of the Office of Management and Budget ("OMB") in the fall of 2010. What would legal challenges to these two examples look like? What factors would a court consider in reaching the merits of the question whether they represented arbitrary inaction? I attempt to answer those questions next.

In October 2013, the United States government shut down for over two weeks as House Republicans, Senate Democrats, and the Obama administration failed to reach agreement on a budget.³⁰⁸ The shutdown was prompted largely by the House Republicans' refusal to pass a "clean" continuing resolution ("CR") to fund the government.³⁰⁹ Rather, they sought to further various policy objectives—most notably defunding the Affordable Care Act—with any CR. Senate Democrats and the White House balked at such efforts.³¹⁰ In advance of the shutdown, the Senate instead passed a clean CR, but Speaker Boehner refused to allow a vote on the Senate version.³¹¹ He insisted in the days leading up to the October 1 deadline, and during the shutdown itself, that there were not enough votes in the House to pass the clean CR.³¹² He made these claims despite the fact that enough Republicans had publicly declared their support for a clean CR so that it could have passed with those Republicans joining with House Democrats.³¹³ Additionally, on the very first day of the government shutdown, at Speaker Boehner's urging, House Republicans quickly and quietly amended a standing rule of the chamber that it made it impossible for all practicable purposes for a supporter of the Senate version of the CR to force a vote on the measure.³¹⁴ Thus, by using his discretion to refuse to bring the Senate's clean CR to the floor for a vote and by altering the

308. Tom Cohen, Greg Botelho & Holly Yan, *Obama Signs Bill to End Partial Shutdown, Stave Off Debt Ceiling Crisis*, CNN (Oct. 17, 2013, 12:51 AM), <http://www.cnn.com/2013/10/16/politics/shutdown-showdown>.

309. Jackie Calmes & Jeremy W. Peters, *Boehner Hews to Hard Line in Demanding Concessions from Obama*, N.Y. TIMES (Oct. 6, 2013), <http://www.nytimes.com/2013/10/07/us/politics/obama-aide-urges-lawmakers-to-raise-debt-ceiling.html>.

310. *Id.*

311. Mollie Reilly, *John Boehner Claims He Doesn't Have Votes for Clean Continuing Resolution*, HUFFINGTON POST (Oct. 8, 2013, 10:39 AM), http://www.huffingtonpost.com/2013/10/06/john-boehner-continuing-resolution_n_4053175.html.

312. *Id.*

313. Jennifer Bendery, *Here's a Tally of Which House Republicans Are Ready to Fund the Government, No Strings Attached*, HUFFINGTON POST (Oct. 15, 2013, 6:22 PM), http://www.huffingtonpost.com/2013/10/01/house-republicans-clean-cr_n_4024755.html.

314. Juliet Eilperin, *As Democrats Seethe over GOP Tactics, Video Over Rules Change Goes Viral*, WASH. POST (Oct. 14, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/10/14/as-democrats-seethe-over-gop-tactics-video-over-rules-change-goes-viral>.

House's standing rules, Speaker Boehner guaranteed a government shutdown.

The consequences of the shutdown were enormous, including a significant toll on the United States economy.³¹⁵ Given these consequences, and the general perception that Speaker Boehner is a legislator known for his willingness to make deals,³¹⁶ why did he exercise his power in the fashion he did? No one knows for certain, of course, except the speaker, but significant and credible accounts suggest that Speaker Boehner had no choice but to force a shutdown if he hoped to retain his speakership.³¹⁷

That is the setup. Now, how would a challenge to this congressional inaction proceed? The starting point is to identify the claim. The basis for a challenge is *not* the shutdown, it is *not* the consequences to the United States' economy or to its citizens, and it is *not* the House's change of rules leading up to the shutdown—though all of these might be factors in deciding whether the inaction was unconstitutionally arbitrary. Instead, the arbitrary decision—the inaction being challenged—is the *failure to vote* on the Senate's clean CR. A House member who would have liked to vote on the measure could bring such a challenge. Clearly, the speaker's decision not to bring the Senate's CR to the floor created the injury, and if a court were to order a vote, the injury would be redressed.

Could a court conclude that the inaction in this case was unconstitutionally arbitrary? Drawing from the case law discussed above, a colorable argument certainly exists. We have power exercised by a single individual with unbridled discretion, coupled with the failure to abide by previously established rules and standards that could have served as a check on the speaker's decision. In addition, the motivation underlying the decision appears to be centered on Speaker Boehner's political future, rather than on the public good, and, despite enormous consequences to the nation, the speaker still refused to allow a vote.

Thus, we have unbridled discretion being exercised in pursuit of private interests and without governing standards, with serious consequences to people's health and welfare, as well as to our economy,

315. Annie Lowrey & Michael D. Shear, *Shutdown to Cost U.S. Billions, Analysts Say, While Eroding Confidence*, N.Y. TIMES (Oct. 18, 2013), <http://www.nytimes.com/2013/10/19/us/shutdown-to-cost-us-billions-analysts-say-while-eroding-confidence.html>.

316. Elaine S. Povich, *Boehner: Hard-Edged Partisan or Deal Maker?*, FISCAL TIMES (Oct. 13, 2010), <http://www.thefiscaltimes.com/Articles/2010/10/13/Boehner-Hard-Edged-Partisan-or-Deal-Maker>.

317. See Kane, *supra* note 64 (noting that, according to some sources, Speaker Boehner could not "afford to defy those on his right flank by ending the shutdown with largely Democratic votes").

the public's confidence in government, and to the constitutional principle of separation of powers. Each of these represents an important factor in a court's finding that government *action* is arbitrary. The inaction here, therefore, should be considered equally arbitrary.

The analysis looks much the same in the nomination context. President Obama nominated Jack Lew to serve as OMB Director on July 13, 2010.³¹⁸ Senator Mary Landrieu, a Democratic senator from Louisiana, announced that she would block Lew's nomination "until the moratorium on deepwater oil and gas drilling is lifted or significantly modified."³¹⁹ Senator Landrieu's decision to prevent her colleagues from debating and voting on Lew's nomination stemmed not from concerns over Lew's qualifications, not even from a policy dispute with the OMB, but instead from a desire to serve her constituents' interest. It is one thing for a member of Congress to pursue her district's or state's interests through policy-setting, and by influencing legislative substance. Indeed, Senator Landrieu did just that when she negotiated an increase in Medicaid payments for Louisiana as part of the Affordable Care Act.³²⁰ Blocking a vote on a nominee that enjoys significant support is different, however, because it directly interferes with every other member's legislative responsibilities.³²¹

A challenge to Senator Landrieu's hold on Lew's nomination would emphasize the unbridled discretion she was exercising, affecting the underlying constitutional expectation that a president will be able to appoint members of the executive branch without the brinkmanship and political maneuvering generally associated with the legislative process. Moreover, Senator Landrieu blocked Lew's nomination because of unrelated concerns regarding the Gulf Coast drilling moratorium, increasing the arbitrariness concern because of the mismatch between the legitimate ends Senator Landrieu was pursuing and the means by which she sought to obtain her objective.

In both the legislative and nomination contexts, the remedy is straightforward: an order requiring a vote. At first blush, this may strike

318. Anne E. Kornblut & Ed O'Keefe, *Obama Nominates Lew to Head Office of Management and Budget*, WASH. POST (July 14, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/13/AR2010071302611.html>.

319. Landrieu Press Release, *supra* note 63.

320. Katharine Q. Seelye, *Senators Add the Ornaments and Trimmings*, N.Y. TIMES (Dec. 20, 2009), <http://www.nytimes.com/2009/12/20/health/policy/20prescriptions.html>.

321. In fact, the Senate confirmed Lew in a voice vote, after Senator Landrieu dropped her hold. Ed O'Keefe, *Senate Confirms Jack Lew as OMB Director*, WASH. POST (Nov. 19, 2010, 7:00 AM), http://voices.washingtonpost.com/federal-eye/2010/11/senate_confirms_jack_lew_for_o.html.

some as anathema to our constitutional system—a federal court telling Congress to hold a vote! But courts issue orders to the other branches of government frequently. Why was the Court's order requiring Congress to seat Adam Clayton Powell different? Why is an order requiring an executive branch official to promulgate an agency rule or to release a person in custody any different? Like in the context of agency inaction, a court would not be directing or mandating a substantive outcome, but rather simply requiring the legislature to take a procedural step and hold a vote—to require, or really to allow, Congress to meet its institutional obligations.

VI. CONCLUSION

Anti-arbitrariness is a long-established governing constitutional principle. For the most part, the concern over arbitrariness has focused exclusively on governmental action. In a time of increasing congressional dysfunction, however, this narrow view requires broadening. The problem of arbitrary congressional inaction is very real, with consequences similar, if not greater, in scope to those related to arbitrary action.

We rely on the judiciary to enforce anti-arbitrariness requirements against congressional enactments, executive actions, and administrative agency inaction. In other words, well-developed jurisprudence already exists surrounding the concept of anti-arbitrariness. Moreover, worries that judicial review of congressional inaction would upset other framework values are overstated, if not misplaced. Indeed, it is arbitrary congressional inaction that threatens legislative supremacy, democratic legitimacy, and separation of powers.

For these reasons, holding legislators accountable for inaction would not only have a salutary effect on the political process, but might also serve to stave off an approaching constitutional crisis.