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THE PROTEAN TAKE CARE CLAUSE

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INTRODUCTION

Most of Article II, Section 3 of the Constitution sets forth mundane presidential responsibilities or powers. Section 3 prescribes the President’s duty “from time to time” to report to Congress on “the State of the Union” and to recommend to that body “such Measures as he shall judge necessary and

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expedient.”<sup>1</sup> It also gives the President discretion to call an adjourned Congress back into session and, when the Houses cannot agree about adjournment, to “adjourn them to such Time as he shall think proper.”<sup>2</sup> And while one must go to the Appointments Clause in Section 2 in order to find the power actually to appoint “Officers of the United States,”<sup>3</sup> Section 3 makes clear that it is the President who must sign their commissions.<sup>4</sup> That latter section also prescribes the presidential duty to “receive Ambassadors and other public Ministers,” which Hamilton described as a ministerial duty largely “without consequence.”<sup>5</sup>

Nestled amidst this set of largely technical provisions is one that has become an “elephant[] in [a] mousehole”<sup>6</sup>—the Take Care Clause.<sup>7</sup> In simple but delphic terms, the clause states that the President “shall take Care that the Laws be faithfully executed.”<sup>8</sup> Today, at least, no one can really know why the Framers included such language or placed it where they did.<sup>9</sup> Phrased in a passive voice, the clause seems to impose upon the President some sort of duty to exercise unspecified means to get those who execute the law, whoever they may be, to act with some sort of fidelity that the clause does not define.<sup>10</sup> Through a long and varied course of interpretation, however, the Court has read that vague but modest language, in the alternative, either as a source of vast presidential power or as a sharp limitation on the powers of both the President and the other branches of government.

Consider the following examples: First, and perhaps most prominently, the Court has relied on the President’s duty to “take Care that the Laws be faithfully executed” to establish the power to remove officers who do not follow

1 U.S. CONST. art. II, § 3.

2 *Id.*

3 *Id.* art. II, § 2, cl. 2.

4 *Id.* art. II, § 3.

5 THE FEDERALIST NO. 69, at 420 (Alexander Hamilton) (Clinton Rossiter ed., 1961). In contrast with that assessment, the Court in *Zivotofsky v. Kerry* relied on this clause in part to conclude that the President had the power to recognize foreign nations. 135 S. Ct. 2076, 2085 (2015).

6 We borrow the Court’s apt phrase for the presumption that a lawmaking body does not usually alter fundamental features of a legal regime through “vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

7 U.S. CONST. art. II, § 3.

8 *Id.*

9 It is possible, as others have done, to identify where in the drafting process the clause came into the document. *See, e.g.,* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 64-68 (1994) (noting the clause’s emergence in the Committee on Style and tracing the evolution of similar language which preceded it). But those in the constitutionmaking process said next to nothing about either the clause’s understood meaning or the purpose it was to serve in the constitutional scheme. *See id.* at 63 (“[A]t the founding, the clause received relatively little consideration by practically everyone in the debate. Hamilton devoted only a few lines in the Federalist Papers to discussion of this ‘minor’ executive power or responsibility.”).

10 *See* Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1875-78 (2015) (noting that the clause’s use of passive voice necessarily contemplates law administration by someone other than the President).

the President's directives.<sup>11</sup> Second, the Court has used the Take Care Clause to define the limits of Article III standing, holding that the constitutional requirements of injury, causation, and redressability help to ensure that the President rather than the federal judiciary retains primary responsibility for the legality of executive decisions.<sup>12</sup> Third, the Court has treated the Take Care Clause as the source of the President's prosecutorial discretion<sup>13</sup>—a power that, as recent events have shown us, may give the President room to reshape the effective reach of laws enacted by Congress.<sup>14</sup> Fourth, the Court has treated the Take Care Clause as the direct constitutional source of the President's obligation to respect legislative supremacy.<sup>15</sup> Indeed, the Court has read the clause as a negation of any presidential power to dispense with or suspend federal law.<sup>16</sup> Fifth, in at least one high profile case, the Court has read the Take Care Clause as the source of inherent presidential authority to take acts

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<sup>11</sup> See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”); *Myers v. United States*, 272 U.S. 52, 117 (1926) (“As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication . . . must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible.”).

<sup>12</sup> See, e.g., *Lujan v. Def. of Wildlife*, 504 U.S. 555, 577 (1992) (asserting that to allow Congress to “convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’”); *Allen v. Wright*, 468 U.S. 737, 761 (1984) (“The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed.’ We could not recognize respondents’ standing in this case without running afoul of that structural principle.” (citation omitted) (quoting U.S. CONST. art. II, § 3)).

<sup>13</sup> See, e.g., *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion “because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, § 3)); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[A]n agency’s refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

<sup>14</sup> See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 686 (2014) (discussing the Obama Administration’s reliance on prosecutorial discretion to justify categorical forbearance from prosecution under “federal marijuana laws,” “enforcement of [the Affordable Care Act’s] statutory penalties for employers,” and enforcement of “removal statutes and employment prohibitions against certain undocumented immigrants”).

<sup>15</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

<sup>16</sup> See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838) (rejecting the notion that “the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution”).

necessary to protect the operations of the federal government, even in cases in which no statute provides explicit authority to do so.<sup>17</sup>

Two things stand out about the Court's reliance on the Take Care Clause to serve so many ends simultaneously. The first is that, in each of these contexts, the Court treats the meaning of the clause as obvious when it is anything but that. The Court's decisions rely heavily on the Take Care Clause but almost never interpret it, at least not in any conventional way. The Court does not typically parse the text of the clause or try to situate it in the broader constitutional structure that gives it context. Nor does the Court typically examine the clause's historical provenance (except to invoke an almost equally conclusory set of interpretations by members of the First Congress in the Decision of 1789).<sup>18</sup>

The second striking element is that the functions that the Court ascribes to the Take Care Clause are often in unacknowledged tension with one another. For instance, deriving a strong prosecutorial discretion from the clause may collide with the scruple against dispensation that the Court also reads into it.<sup>19</sup> Similarly, the Court has said that the Take Care Clause precludes presidential lawmaking while also finding that the clause justifies the exercise of a presidential completion power—an implied presidential authority to prescribe extrastatutory means when necessary to execute a statute.<sup>20</sup> The internal tensions, moreover, often give rise to doctrines that ask for judgments of degree—line drawing that does not lend itself readily to judicially manageable standards.

A brief Article is no place to try to fill all the interpretive and analytical gaps in the Court's Take Care Clause jurisprudence or to wade into the rich debates that have engaged legal scholars, if not the Court. Instead, the Article brings together various doctrines in order to show that the Court uses the Take Care Clause as a placeholder for more abstract and generalized reasoning about the appropriate role of the President in a system of separation of powers. It also sketches lines of inquiry that the Court might pursue if it were ever to approach the Take Care Clause seriously on the clause's own terms.

Part I describes five of the Court's structural doctrines that rely on the Take Care Clause. In order to draw attention to the Court's methodological approach

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<sup>17</sup> See *Cunningham v. Neagle*, 135 U.S. 1, 67-68 (1890) (recognizing the President's inherent authority to provide a bodyguard to protect a federal judge despite the lack of any explicit statutory authority).

<sup>18</sup> See generally *Myers v. United States*, 272 U.S. 52, 111-15 (1926); see also *infra* text accompanying note 167.

<sup>19</sup> This past Term, in granting certiorari to review other questions arising out of a challenge by several states to the Obama Administration's program of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA), the Court propounded a question about whether the prosecutorial guidance issued by the Secretary of Homeland Security concerning certain classes of undocumented immigrants violated the Take Care Clause. See *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016). The Court, however, had no occasion to resolve the Take Care Clause question because it affirmed the lower court's judgment by an equally divided Court. See *United States v. Texas*, 136 S.Ct. 2271 (2106); see also *infra* text accompanying note 176.

<sup>20</sup> See *infra* Section I.E.

to the clause, it emphasizes the tools the Court does or does not bring to bear on construing the clause. Part II shows the high level of generality at which the Court reads the clause. If the Court wishes to use the clause as more than a marker for freestanding separation-of-powers analysis, this Article suggests several questions the Court must resolve about the clause's import.

## I. THE CASE LAW

### A. *The Removal Power*

The Court has repeatedly relied on the Take Care Clause to justify the idea that the President must retain at least some control over those who execute the laws, notwithstanding a statute limiting presidential authority over the law's administrators. Though the Court had adverted to the idea before,<sup>21</sup> Chief Justice Taft's opinion for the Court in *Myers v. United States* gave the fullest account of the notion that the presidential *duty* to oversee faithful execution of the laws implied a presidential *power* to remove those who executed them.<sup>22</sup> At issue was a statute that prohibited the President from removing a postmaster first class without first securing the advice and consent of the Senate. President Wilson had fired Myers, the postmaster in Portland, without the requisite Senate approval, and Myers sued for backpay.<sup>23</sup> The government defended on the ground that the President had a constitutional right to remove Myers without the Senate's approval.<sup>24</sup>

In a seventy-one page opinion for six members of the Court, Chief Justice Taft found illimitable presidential authority to remove an executive officer, at least one who was appointed by the President by and with the advice and consent of the Senate. His holding rested, in part, on the conclusion that the Vesting Clause of Article II<sup>25</sup> assigned the President the same "executive" removal authority that the common law had invested in the Crown and that the Articles of Confederation had given the old Congress.<sup>26</sup> The Court also invoked a course of governmental practice that stretched from 1789 until the

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21 See *Shurtleff v. United States*, 189 U.S. 311, 317 (1903) ("In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.")

22 272 U.S. 52, 106-178 (1926).

23 *Id.* at 106.

24 *Id.* at 108.

25 U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States . . .").

26 *Myers*, 272 U.S. at 110, 118.

enactment of the Tenure in Office Act during the struggle between President Andrew Johnson and the Republican Congress during Reconstruction.<sup>27</sup>

The Court's opinion also relied centrally on the Take Care Clause. Chief Justice Taft invoked that clause to hammer home the implication that a President charged with exercising all of the executive power must have the means to control subordinates through whom he or she would necessarily act:

As [the President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.<sup>28</sup>

Taft's opinion buttressed this structural reading of Article II by noting that the President can "fulfill the [take care] duty" only through subordinates who "aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called."<sup>29</sup> In matters of foreign relations, Chief Justice Taft thought it obvious that, because "the discretion to be exercised is that of the President in determining the national public interest . . . his cabinet officers must do his will" on pain of removal.<sup>30</sup> But he saw no basis for distinguishing between the President's power to remove an officer who "discharges a political duty of the President or exercises his discretion" and one who "engage[s] in the discharge of their other normal duties."<sup>31</sup> By virtue of Article II's assignment of the executive power to the President alone, he or she might "properly supervise and guide [officers'] construction of the statutes under which they act in order to secure . . . unitary and uniform execution of the laws."<sup>32</sup> And this meant that the President had to have the power to remove officers that he or she found to be "negligent and inefficient."<sup>33</sup>

To be sure, if a statute "specifically committed [a given set of decisions] to the discretion of a particular officer" or established a "quasi-judicial . . . executive tribunal[]" whose decisions after hearing affect [the] interests of individuals," then Congress might properly foreclose the President from

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<sup>27</sup> *Id.* at 111-64 (discussing the history of executive power during the three-quarters of a century after the Constitution's adoption).

<sup>28</sup> *Id.* at 117.

<sup>29</sup> *Id.* at 133 (quoting *Cunningham v. Neagle*, 135 U.S. 1, 63 (1890)).

<sup>30</sup> *Id.* at 134.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 135.

<sup>33</sup> *Id.*

intervening in the decision of a particular case.<sup>34</sup> Even then, however, the President could remove such an officer after the fact “on the ground that the discretion regularly entrusted to that officer by statute has not been on the whole intelligently or wisely exercised.”<sup>35</sup> Without the power to remove officers at some point, Taft reasoned, the President “does not discharge his own constitutional duty of seeing that the laws be faithfully executed.”<sup>36</sup> In short, reading a removal power into the grant of executive power was necessary to enable the President to fulfill the take care obligation also found in Article II.

In well-known later cases that blessed independent administrative agencies, the Court implicitly or explicitly backed away from Taft’s broad view of the “take care” obligation. Less than a decade after *Myers*, the Court in *Humphrey’s Executor v. United States* upheld restrictions on the President’s authority to remove Federal Trade Commissioners.<sup>37</sup> Declaring the classic regulatory functions of administrative agencies to be quasi-legislative and quasi-judicial rather than executive, the Court sustained the removal restrictions without so much as mentioning the Take Care Clause.<sup>38</sup> In *Wiener v. United States*,<sup>39</sup> which upheld restrictions on the President’s power to remove members of the War Claims Commission, the Court made it explicit that, contra Taft’s dicta, the Take Care Clause does not govern quasi-judicial functions but applies only to purely executive ones.<sup>40</sup>

The Take Care Clause reclaimed its pivotal place when the Court decided *Morrison v. Olson*,<sup>41</sup> which upheld a “good cause” restriction on the President’s power to remove independent counsels—special prosecutors appointed to investigate certain kinds of criminal wrongdoing by high-level government and party officials. *Morrison* started by rejecting *Humphrey’s Executor*’s distinction between quasi-legislative and quasi-judicial functions, on the one hand, and executive functions, on the other.<sup>42</sup> As a recent case had made clear, any federal official (other than an Article III judge) who interpreted the law to implement a statutory mandate was performing an executive function.<sup>43</sup> Hence, *Morrison* pegged the validity of the removal restriction on the simple question of whether it “interfere[d] with the President’s exercise of the ‘executive power’ and his

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> 295 U.S. 602, 630-32 (1935).

<sup>38</sup> *Id.* at 624.

<sup>39</sup> 357 U.S. 349 (1958).

<sup>40</sup> *See id.* at 352 (noting that the *Humphrey’s Executor* Court “narrowly confined the scope of the *Myers* decision”).

<sup>41</sup> 487 U.S. 654 (1988).

<sup>42</sup> *Id.* at 689.

<sup>43</sup> *See Bowsher v. Synar*, 478 U.S. 714, 733 (1986) (“Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of ‘execution’ of the law.”).

constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.”<sup>44</sup>

Despite the removal restriction in the independent counsel statute, the Court concluded that the statutory scheme did not “impermissibly burden” the President’s Article II powers.<sup>45</sup> In an oddly constructed sentence, the Court wrote, “[t]his is not a case in which the power to remove an executive official has been completely stripped from the President, thus providing no means for the President to ensure the ‘faithful execution’ of the laws.”<sup>46</sup> Because the Attorney General could fire an independent counsel for “good cause,” the President “retain[ed] ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [independent counsel statute].”<sup>47</sup> In addition, though the Court would not specify fully what counts as “good cause,” it noted that the legislative history made clear that the term at least covers “misconduct.”<sup>48</sup> Hence, the Court implied that the “take care” duty encompasses the duty to ensure competence, observance of law, and prevention of misconduct.

Finally, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*,<sup>49</sup> the Court again relied on the Take Care Clause to identify a novel limit on “good cause” removal—a prohibition against “two-tiered” good cause limitations. At issue was the Public Company Accounting Oversight Board (PCAOB)—an entity established by the Sarbanes-Oxley Act to regulate the accounting industry by exercising rulemaking, enforcement, and adjudication authority.<sup>50</sup> Congress placed the PCAOB under the supervision of the Securities and Exchange Commission (SEC) but authorized the SEC to remove PCAOB members only for carefully defined forms of “good cause.”<sup>51</sup> This created a difficulty because the Court assumed, based on party stipulations, that the President could remove SEC Commissioners only for good cause.<sup>52</sup> Whatever the validity of either removal restriction standing alone, two tiers proved too much:

The President cannot “take Care that the Laws be faithfully executed” if he cannot oversee the faithfulness of the officers who execute them. Here the President

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<sup>44</sup> *Morrison*, 487 U.S. at 690.

<sup>45</sup> *Id.* at 692.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* (quoting H.R. REP. NO. 100-452, at 37 (1987)).

<sup>49</sup> 561 U.S. 477 (2010).

<sup>50</sup> Sarbanes-Oxley Act of 2002, Pub L. No. 107-24, § 101, 116 Stat. 745, 750-53.

<sup>51</sup> The Act provided that the SEC had “good cause” to remove a PCAOB member only if such official “willfully violated” specified laws, “willfully abused” his or her authority, or failed to enforce the law “without reasonable justification or excuse.” 15 U.S.C. § 7217(d)(3) (2012).

<sup>52</sup> The Court assumed that the President could remove the SEC Commissioner only for “inefficiency, neglect of duty, or malfeasance in office.” *Free Enter. Fund*, 561 U.S. at 496 (quoting *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935)) (internal quotation marks omitted).



cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President's determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President's "constitutional obligation to ensure the faithful execution of the laws."<sup>53</sup>

In the Court's view, if the SEC could remove PCAOB members at will, then the SEC "would be fully responsible for what the Board does," and "[t]he President could . . . hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does."<sup>54</sup> Since the SEC could only remove PCAOB members for cause, the President could affect the PCAOB's decisions only if he or she could determine that the SEC "unreasonabl[y]" decided that it lacked good cause to fire members of the PCAOB.<sup>55</sup> Under that arrangement, the Court reasoned, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."<sup>56</sup>

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<sup>53</sup> *Free Enter. Fund*, 561 U.S. at 484 (quoting *Morrison*, 487 U.S. at 693).

<sup>54</sup> *Id.* at 495-96.

<sup>55</sup> *Id.* at 496.

<sup>56</sup> *Id.* Starting from similar premises, the Court in *Printz v. United States* relied in part on the Take Care Clause to reject congressional power to "commandeer" state officials to enforce federal law. 521 U.S. 898, 922 (1997). At issue was the validity of the Federal Brady Act, which required state law enforcement officers to conduct background checks of gun purchasers in order to determine whether the putative buyer's receipt or possession of a firearm would be unlawful. *Id.* at 903 (citing 18 U.S.C. § 922(s)(2) (1994)). After finding that such a requirement impermissibly intrudes upon state sovereignty, the Court further concluded that Congress's attempt to impress state executive officials into federal service violates "the separation and equilibration of powers between the three branches of the Federal Government itself." *Printz*, 521 U.S. at 922. In the Court's words,

The Constitution does not leave to speculation who is to administer the laws enacted by Congress; the President, it says, "shall take Care that the Laws be faithfully executed," Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the "Courts of Law" or by "the Heads of Departments" who are themselves Presidential appointees), Art. II, § 2. The Brady Act effectively transfers this responsibility to thousands of [state executive officers] in the 50 States, who are left to implement the program without meaningful Presidential control (if indeed meaningful Presidential control is possible without the power to appoint and remove). The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known. . . . That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.

*Printz*, 521 U.S. at 922-23 (citations omitted). Accordingly, the Take Care Clause not only constrains control over the execution of federal law within the federal government, but also the allocation of executive responsibilities between federal and state governments.

### B. *Standing Doctrine*

The Court has repeatedly relied on the Take Care Clause to define the scope of Article III standing to sue.<sup>57</sup> Standing doctrine, of course, defines what constitutes a “case” or “controversy” for Article III purposes.<sup>58</sup> In recent years, the Court has made clear that a plaintiff who wishes to invoke “[t]he judicial Power of the United States”<sup>59</sup> must assert a concrete factual injury,<sup>60</sup> a chain of causation that links the defendant’s action to the harm alleged,<sup>61</sup> and a reasonable probability that the relief sought will redress the harm alleged.<sup>62</sup> These criteria, as the Court has acknowledged, are too impressionistic to produce a predictable, formulaic body of judicial doctrine.<sup>63</sup> Instead, the Court treats standing doctrine as a rough metric for capturing the proper role of the federal courts—something “more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.”<sup>64</sup>

Defining the role of the federal courts has inevitably entailed efforts by the Court to define the boundaries between the judiciary and the political branches. In setting the line between the executive and the judiciary, the Court has put the Take Care Clause front and center. In perhaps the first prominent example of this—*Allen v. Wright*—the Court denied standing to the parents of African-American schoolchildren who alleged that the Internal Revenue Service had failed to enforce a federal policy denying a charitable tax exemption to private schools that discriminated based on race in their admissions.<sup>65</sup> The plaintiffs’ children had not applied to the private schools that engaged in the alleged discrimination.<sup>66</sup> Rather, the children went to

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<sup>57</sup> See, e.g., Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1297 (2015) (noting cases in which the Court has held that a nonexecutive actor may not advance an “undifferentiated public interest” in federal court because Article III “requires the President alone to execute federal law”).

<sup>58</sup> U.S. CONST. art. III, § 2, cl. 1.

<sup>59</sup> *Id.* art. III, § 1, cl. 1.

<sup>60</sup> See, e.g., *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (reiterating that to maintain Article III standing, an asserted injury must be “real and immediate, not conjectural or hypothetical” (internal quotation marks omitted)); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979) (requiring that a plaintiff have suffered “actual or threatened injury” to satisfy Article III).

<sup>61</sup> See, e.g., *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41 (1976) (limiting standing to only those “injur[ies] that fairly can be traced to the challenged action of the defendant”).

<sup>62</sup> See, e.g., *id.* at 45-46 (concluding that a complaint must demonstrate a “substantial likelihood that victory in [the] suit” would remedy the injury alleged).

<sup>63</sup> See, e.g., *Allen v. Wright*, 468 U.S. 737, 751 (1984) (“[S]tanding doctrine incorporates concepts concededly not susceptible of precise definition.”); *Valley Forge Christian Coll. v. Ams. United for the Separation of Church and State*, 454 U.S. 464, 475 (1982) (“The concept of ‘Art. III standing’ . . . cannot be reduced to a one-sentence or one-paragraph definition.”).

<sup>64</sup> *Allen*, 468 U.S. at 750 (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1179 (D.C. Cir. 1983) (Bork, J., concurring)).

<sup>65</sup> *Id.* at 752-53.

<sup>66</sup> *Id.* at 746.

public schools in school districts that were under desegregation orders, and the plaintiffs alleged that the IRS's nonenforcement (1) demeaned them and (2) impeded desegregation by making it cheaper for white children to go to discriminatory private schools in the plaintiffs' school districts.<sup>67</sup> The plaintiffs relied on the Internal Revenue Code, Title VI of the Civil Rights Act, and the Fifth and Fourteenth Amendments.<sup>68</sup>

The Court denied standing on the ground that the first claim of injury, which it described as "stigmatic," was too abstract and widely shared to satisfy the requirement of concrete and individualized injury.<sup>69</sup> On the second allegation of injury, the Court found that the plaintiffs' contention—that withdrawal of the subsidy would materially affect either the policies of, or attendance at, the private schools—was too speculative to satisfy Article III.<sup>70</sup> Of importance here, the Court's decision reflected a worry that recognizing standing in this case "would pave the way generally for suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations."<sup>71</sup> This possibility, in turn, implicated the separation of powers, in general, and the Take Care Clause, in particular. In the Court's words:

[The] principle [that an agency must have latitude to structure its own affairs], grounded as it is in the idea of separation of powers, counsels against recognizing standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties. The Constitution, after all, assigns to the Executive Branch, and not to the Judicial Branch, the duty to "take Care that the Laws be faithfully executed." We could not recognize respondents' standing in this case without running afoul of that structural principle.<sup>72</sup>

Hence, the Court's strict reading of injury and causation requirements was meant to filter out cases in which a plaintiff sought to vindicate the rule of law rather than adjudicate a concrete dispute whose resolution would remedy a particularized harm to him- or herself.<sup>73</sup>

In *Lujan v. Defenders of Wildlife*,<sup>74</sup> the Court went a step farther by suggesting that the Take Care Clause constrains Congress's authority to create

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<sup>67</sup> *Id.* at 752-53.

<sup>68</sup> *Id.* at 745 n.12 (citing U.S. CONST. amends. V, XIV; 26 U.S.C. § 501(c)(3) (1982); 42 U.S.C. §§ 1981, 2000d (1982)).

<sup>69</sup> *Id.* at 755-56.

<sup>70</sup> *Id.* at 756-61.

<sup>71</sup> *Id.* at 759.

<sup>72</sup> *Id.* at 761.

<sup>73</sup> *Id.* at 761 & n.26.

<sup>74</sup> 504 U.S. 555 (1992).

rights of action to be vindicated in federal courts. At issue was whether the plaintiffs—two individual members of the Defenders of Wildlife—had standing to challenge an Interior Department regulation stating that federal funding restrictions embodied in the Endangered Species Act (ESA)<sup>75</sup> do not apply to federally funded overseas projects.<sup>76</sup> To support their claims of injury, the individual plaintiffs filed affidavits stating that they had previously visited two overseas sites to see endangered species (the Nile crocodile and the Asian elephant), that they intended to return to those venues someday to see those animals, and that federally funded projects in those areas threatened the species the plaintiffs intended to go back to see.<sup>77</sup>

The Court in *Lujan* held that the plaintiffs lacked standing.<sup>78</sup> In the Court's view, the plaintiffs' stated intention to return to the sites in question was too speculative and remote: "Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of when the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."<sup>79</sup> It did not matter to the Court that Congress had included in the ESA a broad "citizen suit" provision that authorized "any person [to] commence a civil suit on his own behalf . . . to enjoin any person . . . who is alleged to be in violation of any provision of this chapter."<sup>80</sup> Although the plaintiffs clearly fell within that authorization, the Court thought it unconstitutional for Congress to grant standing to those who did not meet the minimum requisites identified in the Court's standing cases. Allowing such lawsuits to proceed, the Court said, would effectively sanction a legislative intrusion upon the President's Take Care responsibilities:

To permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an "individual right" vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. It would enable the courts, with the permission of Congress, "to assume a position of authority over the governmental acts of another and co-equal department," and to become "virtually continuing monitors of the wisdom and soundness of Executive action."<sup>81</sup>

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<sup>75</sup> See generally 16 U.S.C. § 1531–1544.

<sup>76</sup> *Lujan*, 504 U.S. at 557–58.

<sup>77</sup> *Id.* at 562–64.

<sup>78</sup> *Id.* at 578.

<sup>79</sup> *Id.* at 564.

<sup>80</sup> *Id.* at 571–72 (quoting 16 U.S.C. § 1540(g) (2012)).

<sup>81</sup> *Id.* at 577 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 489 (1923); and *Allen v. Wright*, 468 U.S. 737, 760 (1984)).

To be sure, the Court has since made clear that its “standing jurisprudence” ultimately “derives from Article III and not Article II.”<sup>82</sup> But the Court’s decisions nonetheless use standing doctrine to patrol a perceived constitutional boundary between the executive and the judiciary. By the Court’s lights, those who seek to use the judiciary not to resolve some genuine dispute over some concrete interest, but rather to enforce the legality of government action, intrude upon what the Court regards as exclusive presidential authority to assure government officials’ fidelity to law. That separation-of-powers principle, which constrains both Congress and the courts, comes straight from the Take Care Clause.

### C. Prosecutorial Discretion

The Court has invoked the Take Care Clause to justify finding that the President enjoys broad prosecutorial discretion. In *Heckler v. Chaney*,<sup>83</sup> prisoners who had been sentenced to capital punishment filed suit challenging the use of certain drugs for lethal injections on the ground that such use violated the Federal Food, Drug, and Cosmetic Act (FDCA).<sup>84</sup> The Court held, however, that the judicial review provisions of the Administrative Procedure Act (APA)<sup>85</sup> preclude review of decisions by the Food and Drug Administration (FDA) not to bring enforcement actions to stop use of the drugs at issue.<sup>86</sup> In so holding, the Court reasoned that the discretion implicit in decisions not to enforce a statute lay beyond the power of courts to review under the APA:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency’s overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Similar concerns animate the principles of administrative law that courts

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<sup>82</sup> *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 102 n.4 (1998)).

<sup>83</sup> 470 U.S. 821 (1985).

<sup>84</sup> 21 U.S.C. § 301 – 399f (1982).

<sup>85</sup> In relevant part, the APA authorizes judicial review of final agency action “except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law.” 5 U.S.C. § 701(a) (2012).

<sup>86</sup> *Heckler*, 470 U.S. at 831.

generally will defer to an agency's construction of the statute it is charged with implementing, and to the procedures it adopts for implementing that statute.<sup>87</sup>

This discretion, the Court reasoned, made the FDA's nonenforcement decision analogous to a prosecutor's decision not to indict—an exercise of discretion protected by the Take Care Clause.<sup>88</sup> As the Court put it:

[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>89</sup>

Although the Court was technically construing the APA, its understanding of prosecutorial discretion under the Take Care Clause informed its reading of that open-ended statute.

To similar effect was *United States v. Armstrong*,<sup>90</sup> in which the Court rejected a request for discovery to support a claim of discriminatory and selective prosecution. To justify its relatively high threshold for discovery, the Court emphasized that such a claim asks a court “to exercise judicial power over a ‘special province’ of the Executive.”<sup>91</sup> “The Attorney General and United States Attorneys,” the Court explained, “retain ‘broad discretion’ to enforce the Nation’s criminal laws.”<sup>92</sup> These federal prosecutors “have this latitude because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>93</sup> Accordingly, to protect that constitutionally conferred discretion, the Court would apply a presumption of prosecutorial regularity unless there was “clear evidence to the contrary.”<sup>94</sup>

#### D. *Legislative Supremacy and the Antidispensation Principle*

The Supreme Court has also invoked the Take Care Clause as the textual source of the President's duty to abide by and enforce the laws enacted by Congress—that is, as the instantiation of the President's duty to respect legislative supremacy and not to act *contra legem*. The most famous expression of this idea came in *Youngstown Sheet & Tube Co. v. Sawyer*, also

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<sup>87</sup> *Id.* at 831-32.

<sup>88</sup> *Id.* at 832.

<sup>89</sup> *Id.* (quoting U.S. CONST. art. II, § 3).

<sup>90</sup> 517 U.S. 456 (1996).

<sup>91</sup> *Id.* at 464 (quoting *Heckler*, 470 U.S. at 832).

<sup>92</sup> *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)).

<sup>93</sup> *Id.* (quoting U.S. CONST. art. II, § 3).

<sup>94</sup> *Id.* (quoting *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14-15 (1926)).

known as the *Steel Seizure Case*.<sup>95</sup> In the midst of the Korean Conflict, the Steelworkers called a nationwide strike over a dispute with management concerning working conditions.<sup>96</sup> After various efforts to resolve the conflict sputtered, President Truman issued an executive order directing the Secretary of Commerce to seize the nation's steel mills and to keep the output of steel flowing.<sup>97</sup> The order contained findings that seizure of the mills was necessary to continue prosecuting the war effort.<sup>98</sup> Although two defense-related statutes authorized the President to seize property in certain circumstances,<sup>99</sup> the government argued that the conditions for invoking such authority had not been met here and stressed that the statutory seizure process, at least under one such statute, was "much too cumbersome, involved, and time-consuming for the crisis which was at hand."<sup>100</sup> The President, however, defended his action based on his inherent powers under Article II's Vesting Clause,<sup>101</sup> the Commander-in-Chief Power,<sup>102</sup> and (you guessed it) the Take Care Clause.<sup>103</sup>

After rejecting the government's contention that the Commander-in-Chief power could justify such an assertion of presidential authority outside the theater of war, the Court relied on the Take Care Clause to reject the Truman Administration's other claims of inherent constitutional authority:

Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad . . . .

The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.<sup>104</sup>

Separate opinions by members of the *Youngstown* majority expressed a like sentiment about the Take Care Clause—that it obliges the President to respect

<sup>95</sup> 343 U.S. 579 (1952).

<sup>96</sup> *Id.* at 583.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 589-95 (reproducing Exec. Order No. 10,340, 17 Fed. Reg. 3139, 3140 (Apr. 10, 1952)).

<sup>99</sup> *Id.* at 586 n.2 (citing The Selective Service Act of 1948, Pub. L. No. 759, 62 Stat. 604, 625-627 codified at 50 U.S.C. app. § 468 (1952 & Supp. IV); The Defense Production Act of 1950, tit. II, Pub. L. No. 774, 64 Stat. 798 codified as amended at 50 U.S.C. app. § 2081 (1952)).

<sup>100</sup> *Id.* at 586.

<sup>101</sup> U.S. CONST. art. II, § 1.

<sup>102</sup> *Id.* art. II, § 2, cl. 1.

<sup>103</sup> *Id.* art. II, § 3.

<sup>104</sup> *Youngstown*, 343 U.S. at 587-88.

the means and ends of statutory policy power specified by Congress. In his famous concurrence, Justice Jackson wrote that the clause confers on the President “a governmental authority that reaches so far as there is law,” thereby “signify[ing] . . . that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”<sup>105</sup> To similar effect, Justice Frankfurter quoted Justice Holmes for the proposition that “[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.”<sup>106</sup> Likewise, in Justice Douglas’s words, any authority conferred by the clause “starts and ends with the laws Congress has enacted.”<sup>107</sup> These opinions rejected the broader view, reflected in Chief Justice Vinson’s dissent, that a “practical construction” of the Take Care Clause gave the President broad flexibility to prescribe appropriate “mode[s] of execution” for the “mass of legislation” on the books—authority that, according to Vinson, authorized the President to seize the steel mills to ensure the fulfillment of statutes appropriating money for the procurement of war materiel.<sup>108</sup>

Almost a century before *Youngstown*, the Court had also treated the Take Care Clause as an expression of another important principle of legislative supremacy—namely, that the President has no dispensation power. At common law, the Crown had long claimed the prerogative to dispense with or suspend Acts of Parliament when equity so required.<sup>109</sup> By the Glorious Revolution, English law had ceased to recognize such authority.<sup>110</sup> In *Kendall v. United States ex rel. Stokes*, the Court read the Take Care Clause as embodying this anti-dispensation principle in the Constitution.<sup>111</sup> At issue was a petition for mandamus filed to compel the Postmaster General, Amos Kendall, to pay the full amount that Congress had appropriated by private bill for the sum claimed to be due on a contract that Stokes and others had made with the Post Office.<sup>112</sup> In holding that

<sup>105</sup> *Id.* at 646 (Jackson, J., concurring).

<sup>106</sup> *Id.* at 610 (Frankfurter, J., concurring) (quoting *Myers v. United States*, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting)).

<sup>107</sup> *Id.* at 633 (Douglas, J., concurring).

<sup>108</sup> *Id.* at 702 (Vinson, C.J., dissenting).

<sup>109</sup> See, e.g., W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS* 30 (1965) (describing the king’s “royal power to dispense with the law to prevent violations of the higher law of equity”); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 278-79 (2009) (explaining the Crown’s power to both suspend the operation of statutes and grant to individuals the dispensation of not having to be bound by certain laws).

<sup>110</sup> See Gordon S. Wood, *The Origins of Vested Rights in the Early Republic*, 85 VA. L. REV. 1421, 1425 (1999) (noting that in the Glorious Revolution, the English Bill of Rights “declared illegal certain actions of the crown, including its dispensing with laws”); see also GWYN, *supra* note 109, at 30 (noting that the king’s dispensation power was no longer recognized by the end of the seventeenth century).

<sup>111</sup> 37 U.S. (12 Pet.) 524 (1838).

<sup>112</sup> *Id.* at 527-31.



mandamus was available to compel Kendall to pay the full amount specified in the Act of Congress, the Court considered and rejected the argument that

the postmaster general was alone subject to the direction and control of the President, with respect to the execution of the duty imposed upon him by this law, and [that] this right of the President . . . [grew] out of the obligation imposed upon him by the constitution, to take care that the laws be faithfully executed.<sup>113</sup>

Indeed, the Court concluded just the opposite:

This is a doctrine that cannot receive the sanction of this court. It would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.

To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.<sup>114</sup>

In short, the Court has read the Take Care Clause to limit the President's authority to act *contra legem*.

#### E. Presidential "Completion Power"

In a previous work, we described what we call the President's "completion power"—implied executive authority, in the absence of an express statutory grant, to take "incidental" measures that may be necessary to effectuate statutory commands.<sup>115</sup> In at least one well-known decision, *In re Neagle*, the Court relied directly on the Take Care Clause to justify the President's exercise of the completion power.<sup>116</sup> In *Neagle*, a deputy U.S. Marshal, David Neagle, was indicted for murder after shooting an assailant who seemingly posed an imminent threat to Justice Field, whom Neagle had been assigned to protect.<sup>117</sup> At issue in Neagle's subsequent habeas petition was whether Neagle was authorized to protect Justice Field, despite the lack of any statutory authorization to serve as a bodyguard to a Justice riding circuit, as Justice

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<sup>113</sup> *Id.* at 612-13.

<sup>114</sup> *Id.* at 613.

<sup>115</sup> Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2302-03 (2006).

<sup>116</sup> 135 U.S. 1, 63-64 (1890).

<sup>117</sup> *Id.* at 5.

Field was doing when attacked.<sup>118</sup> Invoking the Take Care Clause, the Court found ample implied authority for the Attorney General to assign deputy marshal Neagle to the task:

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government, we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President “shall take care that the laws be faithfully executed,” and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. . . . The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that “he shall take care that the laws be faithfully executed.”

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?<sup>119</sup>

In the support of its reasoning, the Court offered other examples of the executive’s exercise of what Professor Henry Monaghan has called “the protective power” of the presidency.<sup>120</sup> The Court, for example, cited an incident in which the captain of a U.S. warship “train[ed] his guns upon [a foreign] vessel” to secure the release of a foreign national, who had been wrongfully held on that vessel despite having initiated the process to become a naturalized U.S. citizen.<sup>121</sup> The U.S. Secretary of State ultimately secured the foreign national’s release and the actions of both the ship captain and the Secretary of State were celebrated by Congress even though no statute authorized

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<sup>118</sup> *Id.* at 58.

<sup>119</sup> *Id.* at 63-64.

<sup>120</sup> See Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61-63 (1993) (asserting that the Court has recognized, in decisions like *Neagle*, “an executive power to preserve, protect, and defend the personnel, property, and instrumentalities of the national government”).

<sup>121</sup> *Neagle*, 135 U.S. at 64.

the government's actions.<sup>122</sup> In *Neagle*, the Court found that the same inherent power made it plain that the executive could, in the absence of a statute, "make an order for the protection of the mail and of the persons and lives of its carriers."<sup>123</sup> And it could surely "place guards upon the public territory to protect [federally owned] timber"<sup>124</sup> or sue to "set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud."<sup>125</sup> In light of these examples, the President's authority to ensure the faithful execution of the laws surely provided authority for the executive, acting through the Attorney General, to provide protection for a federal officer in the performance of official duties, even in the absence of express statutory authority to do so.<sup>126</sup>

## II. "TAKE CARE" QUESTIONS FOR THE COURT

The Court has used the Take Care Clause in numerous ways that are, in many respects, in tension. In this Part, we show that the Court has done so casually and at a high level of generality, without any attention to detailed interpretive questions about the clause's meaning or history. The Court has also failed to recognize the degree to which its explication of Take Care Clause doctrine in distinct and sometimes conflicting ways requires judgments of degree and line drawing that defy judicially manageable standards.

### A. (Non)interpretation of the Take Care Clause

The most striking feature of the Court's Take Care Clause jurisprudence is that the Court almost never construes the clause, at least not in any conventional way. It does not look at any of the evidence one would expect an interpreter to consider in determining the clause's relevance to the many uses to which the Court has put it. The Court has never taken more than a glancing look at the text, its common law meaning, the subsequent practical construction ("liquidation" of the clause's meaning),<sup>127</sup> the clause's place in the broader constitutional

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<sup>122</sup> *Id.* at 64.

<sup>123</sup> *Id.* at 65.

<sup>124</sup> *Id.* at 65-66 (discussing *Wells v. Nickles*, 104 U.S. 444 (1881), in which the Court upheld the authority of the Department of Interior to make rules and regulations to protect public land despite the lack of any statutory authorization).

<sup>125</sup> *Id.* at 66-67 (discussing *United States v. San Jacinto Tin Co.*, 125 U.S. 273 (1888), in which the Court upheld the Attorney General's right to bring suit to protect the federal government's property from fraud even though no act of Congress specifically authorized such a suit).

<sup>126</sup> See Monaghan, *supra* note 120, at 62-63 (discussing the *Neagle* Court's use of the Take Care Clause to sustain the executive's authority to provide protection for Justice Field).

<sup>127</sup> See Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525-27 (2003) (discussing the expectation among some prominent members of the founding generation that

structure, or the political context from which it emerged. While it is not possible here to exhume the extensive evidence of meaning, it is at least worth noting some of the resources that the Court might have but did not consider along the way.

### 1. Text and Structure

On one issue, the Court has made sense of the clause's text and structure in a rather sophisticated way. Although legal academics have often stressed that constitutionmakers framed the clause as a duty rather than a grant of power,<sup>128</sup> a well-known—and commonsensical—canon of textual interpretation instructs that the imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled.<sup>129</sup> Time and again, the Court has acknowledged just that. For example, in *Myers*, Chief Justice Taft invoked James Madison for the proposition that presidential removal power was necessary to enable the Chief Executive to carry out “his duty expressly declared in the third section of the Article to ‘take care that the laws be faithfully executed.’”<sup>130</sup> Similarly, in upholding the President's inherent authority to assign a U.S. marshal to protect a circuit-riding Justice, the Court in *Neagle* stressed that if the President could not task subordinates to “represent him in a thousand acts to which it can hardly be supposed his personal attention is called,”

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the meaning of ambiguous constitutional language would be settled through practical construction by the branches charged with implementing it); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 910 (1985) (addressing the same phenomenon); see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424-32 (2012) (considering the role of historical practice, more generally, in structural constitutional adjudication).

<sup>128</sup> See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1198 n.221 (1992) (describing Take Care Clause text as “suggest[ing] an obligation of watchfulness, not a grant of power”); Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (explaining that the language of the Take Care Clause “plainly indicate[s] that this clause is a *duty* imposed on the president, not a source of power per se”).

<sup>129</sup> See THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 77 (5th ed. 1883) (“It is . . . established as a general rule, that when a constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one or the performance of the other.”).

<sup>130</sup> *Myers v. United States*, 272 U.S. 52, 117 (1926) (quoting 1 ANNALS OF CONG. 496-97 (1789) (Joseph Gales ed., 1834)).

it would be impossible “to fulfil the duty . . . that ‘he shall take care that the laws be faithfully executed.’”<sup>131</sup> And the list goes on.<sup>132</sup>

At the same time, however, the Court has engaged in almost no close analysis of the nature or scope of the duty that underlies the implied power. The Court has yet to examine what the clause means by “Laws.” Does the duty encompass only statutes or does it also reach the Constitution, treaties, customary international law, and federal common law? Put aside the question, largely unaddressed by the Court, of whether the President may decline to enforce laws that he or she believes to be unconstitutional.<sup>133</sup> The scope of the Take Care duty might bear on questions as common as whether an implied “completion power” extends beyond the implementation of statutory commands to constitutional ones.<sup>134</sup> It is also directly relevant to the question of whether the President can violate customary international law or treaties.<sup>135</sup> Moreover, the Court’s standing decisions suggest that Article III limits on judicial power are informed by the Take Care Clause and its apparent grant of *exclusive* presidential power to enforce the rule of law (as such) within the Executive Branch.<sup>136</sup> If Article II is more than window dressing in the Court’s standing cases, then one would presumably need to know whether the “Laws” within the President’s exclusive purview reach beyond statutes.

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<sup>131</sup> *In re Neagle*, 135 U.S. 1, 64 (1890).

<sup>132</sup> *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010) (recognizing “[t]he impossibility that one man should able to perform all the great business of the State” entrusted to the President under the Take Care Clause (alteration in original) (internal quotation marks omitted) (quoting 30 THE WRITINGS OF GEORGE WASHINGTON 334 (John C. Fitzpatrick ed., 1939))); *Morrison v. Olson*, 487 U.S. 654, 689-90 (1988) (grounding limits on Congress’s ability to impose removal requirements in the President’s Take Care Clause obligations).

<sup>133</sup> *Cf. Freytag v. Comm’r*, 501 U.S. 868, 906 (1991) (Scalia, J., concurring) (noting that the President has “the power to veto encroaching laws, or even to disregard them when they are unconstitutional”) (citation omitted).

<sup>134</sup> The Court has addressed the point without analysis of the text or history of the clause. *See Neagle*, 135 U.S. at 64 (“Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?”).

<sup>135</sup> *See, e.g.*, Louis Henkin, *The President and International Law*, AM. J. INT’L L. 930, 934 (1986) (maintaining that the President’s Take Care obligations apply to treaties and principles of customary international law); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 164 (2004) (arguing that constitutional text, history, and policy all support the inference that the “Laws” encompassed by the Take Care Clause include treaties).

<sup>136</sup> *See supra* Section I.B.

Even if the Court has not written about this, legal scholarship has pored over the question.<sup>137</sup> To some law professors, “Laws” means only statutes.<sup>138</sup> Why? Mostly, this conclusion reflects the fruits of what Akhil Amar would call intratextualism—a close reading of one text in the context of surrounding ones.<sup>139</sup> The Take Care Clause refers to “Laws” simpliciter.<sup>140</sup> But the Supremacy Clause, inter alia, draws a clear distinction among (1) “[t]his Constitution,” (2) “Laws . . . made in Pursuance thereof,” and (3) “Treaties.”<sup>141</sup> Hence, to some, the contrast between the Take Care Clause and surrounding provisions suggests that the former is limited to the enforcement of statutes.<sup>142</sup>

To others, that reading seems cramped. After all, the Constitution is surely a “Law” of sorts,<sup>143</sup> and the Supremacy Clause may in fact demarcate statutory law from other “Laws” by specifying its applicability to “Laws made in Pursuance [of [this Constitution]].”<sup>144</sup> In addition, reading “Laws” in the Take Care Clause to refer only to statutes would create a structural oddity; it would exhort the President to ensure faithful execution of statutes but not the Constitution, even as Article II’s Oath Clause simultaneously requires the

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137 The scholarship on the scope of the clause has largely focused on the question of whether the President may decline to enforce a law that he or she regards as unconstitutional. *See, e.g.*, CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS: REVIVING THE ROYAL PREROGATIVE 16-17 (1998) (arguing that the Take Care Clause prohibits Presidents from refusing to enforce statutes); David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS., Winter-Spring 2000, at 61, 64 (suggesting an analytical framework for Presidents to use to determine whether they may faithfully decline to enforce a statute they consider unconstitutional); Frank H. Easterbrook, *Presidential Review*, 40 CASE WESTERN RES. L. REV. 905, 919-22 (1989) (discussing the views of Alexander Hamilton, James Wilson, James Madison and Chief Justice John Marshall on the question); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS., Winter-Spring 2000, at 107, 108-09 (arguing that “Laws” necessarily includes the Constitution). The question has also arisen in connection with whether the President has a duty to defend in court a challenge to the constitutionality of a law that he or she believes to be unconstitutional. *See, e.g.*, Neal Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 532 (2012) (arguing that the Take Care Clause does not require the President to enforce unconstitutional laws); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1209 (2012) (discussing the Executive Branch’s responsibility to defend statutes it deems unconstitutional).

138 *E.g.*, MAY, *supra* note 137, at 17.

139 *See generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (explaining the technique of holistic textual interpretation in which a reader interprets a contested word or phrase in light of another part of the Constitution using a similar word or phrase).

140 U.S. CONST. art. II, § 3.

141 *Id.* art. VI, cl. 2. To similar effect, Article III prescribes jurisdiction over cases “arising under [1] this Constitution, [2] the Laws of the United States, and [3] Treaties made, or which shall be made, under their authority.” *Id.* art. III, § 2, cl. 1.

142 *See, e.g.*, MAY, *supra* note 137, at 17.

143 *E.g.*, Easterbrook, *supra* note 137, at 919 (citing Chief Justice Marshall’s opinion in *Marbury v. Madison* for the proposition that the Constitution is law).

144 *See* Henry Paul Monaghan, *Supremacy Clause Textualism*, 110 COLUM. L. REV. 731, 750 (2010) (explaining that the Supremacy Clause was intended to ensure that valid federal law would prevail over contrary state law).

President to “preserve, protect and defend the Constitution” to “the best of [his or her] Ability.”<sup>145</sup> The academic debate over the scope has grown extensive, invoking a range of textual, structural, functional, and historical arguments. It is not our aim, however, to wade into that debate. Rather, the important point here is that in all the cases that have invoked the Take Care Clause, the Supreme Court has *never* explicitly addressed the categories of “Laws” to which the President’s duty extends.<sup>146</sup>

Perhaps more striking is the Court’s omission to address what the clause means by saying that the laws must be “faithfully executed.” Dr. Johnson’s dictionary—the leading one of the founding era—defines “faithfully” to mean “strict adherence to duty and allegiance” and “[w]ithout failure of performance; honestly; exactly.”<sup>147</sup> Even if the clause reflects the ordinary meaning of “faithfully” (that is, even if the clause does not adopt some kind of term of art), it is hard to know what “faithful” execution entails. Surely, the idea entails some duty of fidelity—some sort of allegiance and honesty. But fidelity is a relational term. One shows fidelity or faithfulness to something, and the clause does not say to what. The best bet is perhaps that the clause exhorts the President to see that the law’s executors act with fidelity to the laws they execute—that they adhere to the law. But the wording does not perfectly fit even this most plausible interpretation, which would be better captured by a clause that instructed the President to see that the laws be “faithfully observed”—a formulation that makes “Laws” more obviously the object to which fidelity is owed. And if one compares the Take Care Clause with the Oath Clause—which prescribes an oath that the President will “faithfully execute the Office of President of the United States”<sup>148</sup>—then the Take Care Clause might be understood as an instruction to the President to ensure that the laws are implemented honestly, effectively, and without

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<sup>145</sup> U.S. CONST. art. II, § 1, cl. 8. Scholars who read the Take Care Clause in conjunction with the Oath Clause argue that the Take Care Clause applies to the Constitution. *See, e.g.*, Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 261-62 (1994) (claiming that, when read together, the Take Care Clause and Presidential Oath Clause impose a duty on the President to engage in independent constitutional review when carrying out his or her duties); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1632 (2008) (“[I]f we read the [Take Care] Clause as implicitly requiring the President to execute unconstitutional laws, his execution of such laws would serve to breach the Constitution and not preserve it.”).

<sup>146</sup> For a catalog of the various ways in which the Constitution refers to “Laws,” see Edward T. Swaine, *Taking Care of Treaties*, 108 COLUM. L. REV. 331, 342-43 n.64 (2008).

<sup>147</sup> 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington et al. 6th ed. 1785). Webster’s first dictionary contained a similar definition, suggesting that the President must act “[i]n a faithful manner; with good faith.” 1 NOAH WEBSTER, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828).

<sup>148</sup> U.S. CONST. art. II, § 1, cl. 8.

failure of performance.<sup>149</sup> On that view, both clauses, read in light of each other, point toward a general obligation of good faith, as measured by the norms and expectations that governed the proper exercise of executive power at the time.<sup>150</sup>

Again, it is not our purpose here to adjudicate what the Take Care Clause means. What we find significant is that the Court has never parsed what “faithfully” means or considered, in explicit terms, the baseline(s) against which to measure fidelity. Consider the removal cases, in which the Court has said that the President must have sufficient power to fire officials who are not faithfully executing the law.<sup>151</sup> In those cases, the permissibility of “good cause” restrictions on removal should turn directly on what “faithful” execution entails.<sup>152</sup> If it requires the President to assure that subordinates engage in honest, scrupulous, and good faith administration, the President must have fairly broad removal powers that go beyond assuring that his or her subordinates have acted lawfully.<sup>153</sup> But if faithful execution merely means adherence to law, then the removal power reserved to the President is more focused on firing official lawbreakers. Even on that view, however, the Court would need to say more than it has in order to determine what that duty entails. If the President and a subordinate disagree about the meaning of a statute about which reasonable people can differ, must the President have the removal power in order to assure faithful execution of the law as he or she sees it?<sup>154</sup> Or is the Take Care Clause satisfied if the President can simply fire a subordinate for violating the plain meaning of the statute or the

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<sup>149</sup> See Price, *supra* note 14, at 698 (arguing that because the Oath Clause does not say precisely to what the President owes fidelity in the execution of his or her office, the clause’s “faithful[ness]” requirement may simply connote a general executive duty to implement the law according “to notions of justice, equity, and the public interest” (alteration in original) (internal quotation marks omitted)).

<sup>150</sup> See *id.* at 697-98 (noting that the Take Care Clause’s “qualified language—requiring the President to ensure ‘faithful[]’ execution of the laws—invites inquiry into background normative expectations about proper performance of the executive function” (alteration in original)).

<sup>151</sup> See cases cited *supra* Section I.A.

<sup>152</sup> See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2037 n.483 (2010) (discussing potential meanings of “‘faithful’ execution of the laws” and how the term’s meaning affects the scope of the President’s removal power).

<sup>153</sup> In upholding the “good cause” limitation on the President’s authority to remove the independent counsels, the Court’s opinion in *Morrison* noted that the statutory restriction still left the President ample room to remove such prosecutors for not “competently performing” the responsibilities of his or her office in accordance with the governing statute and for “misconduct.” *Morrison v. Olson*, 487 U.S. 654, 692 (1988) (internal quotation marks omitted) (quoting H.R. Rep. No. 100-452, at 37 (1987) (Conf. Rep.)).

<sup>154</sup> It is now commonly accepted that there may be a “best” or “most natural” answer to a legal question but that “reasonable” people may still disagree about what that answer is. See, e.g., *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 702 (1991) (emphasizing that an agency’s interpretation “need not be the best or most natural one by grammatical or other standards” as long as it is a “reasonable” interpretation); *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (characterizing the question for a reviewing court as being “whether the Administrator’s view . . . is a reasonable one”).



unambiguous legislative intent?<sup>155</sup> The scope of Congress's discretion to establish independent agencies depends centrally on which of these conceptions best describes "faithful[] execut[ion]" of the laws, but the Court has never sought to determine what that requirement demands.

## 2. Interpretive Canons

In one prominent area—Article III standing—the Court has invoked but never discussed one of the most central canons of structural constitutional law: "the exclusivity maxim."<sup>156</sup> That maxim, which sits among the larger family of *expressio unius* or negative implication canons, instructs that when a legal instrument grants a power and specifies the mode of its implementation, interpreters should treat the specified mode as exclusive.<sup>157</sup> This principle underlies familiar cases that reject Congress's efforts to prescribe legislative procedures for making law outside of bicameralism and presentment,<sup>158</sup> appointing federal officers other than through the Appointments Clause,<sup>159</sup> or legislatively removing executive officers through means other than impeachment and conviction.<sup>160</sup> The maxim reflects the commonsense idea that a lawmaker would not take pains to prescribe particular means of carrying out a power if other methods would do.<sup>161</sup>

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<sup>155</sup> See *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

<sup>156</sup> Manning, *supra* note 152, at 2006-07 (internal quotation marks omitted).

<sup>157</sup> See, e.g., *COOLEY*, *supra* note 129 (explaining that "where the means for the exercise of a granted power are given, no other or different means can be implied" (quoting *Field v. People ex rel McClernand*, 3 Ill. (2 Scam.) 79, 83 (1839))).

<sup>158</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 957-58 (1983) (determining that the one-house veto was unconstitutional since such a procedure failed to "conform[] with the [Constitution's] express procedures . . . for legislative action," namely bicameralism and presentment). See U.S. CONST. art. I, § 7 for the Constitution's bicameralism and presentment requirements.

<sup>159</sup> See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam) (finding that the unorthodox method of appointing the Federal Elections Commission under the 1974 amendments to the Federal Election Campaign Act of 1971 violated the Appointments Clause because, "[u]nless their selection is elsewhere provided for, all Officers of the United States are to be appointed in accordance with the Clause"). The Appointments Clause of the Constitution specifies the President's power to appoint "Officers of the United States." U.S. CONST. art. II, § 2, cls. 2.

<sup>160</sup> See *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). The Constitution specifies a highly detailed impeachment process. See U.S. CONST. art. I, § 2, cl. 5 (authorizing the House to exercise "sole Power of Impeachment"); *id.* art. I, § 3, cl. 6 (assigning the Senate "the sole Power to try all Impeachments"); *id.* art. II, § 4 (laying out the criteria for impeachment).

<sup>161</sup> See Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1243 (1995) (reasoning that the *expressio unius* canon provides an appropriate framework for construing "provisions of the Constitution that both create entities and describe the powers those entities may wield").

Though the Court does not say so, its use of the Take Care Clause in its standing cases<sup>162</sup> turns on the applicability of this negative implication maxim. The standing cases suggest that the President's duty to ensure faithful execution of the law connotes a corresponding power that is somehow exclusive. Hence, Congress cannot establish legal rights of action that enlist individuals as private attorneys general to police the legality of government conduct. Unless the Court can satisfy itself that the plaintiff has suffered some sufficiently concrete and personalized factual injury, then Congress is simply inviting individuals to perform a legality-enforcing function that the Constitution assigns to the President—and, apparently, the President alone.

The problem of course is that the *expressio unius* family of canons is a notoriously slippery one.<sup>163</sup> As the Court has emphasized in the statutory context, whether to draw a negative inference from the specification of something depends very much on the statement's context.<sup>164</sup> For example, the Appointments Clause specifies a process that strikes a balance giving the President initiative as nominator and the Senate the power to check that presidential initiative through advice and consent.<sup>165</sup> On that view, Congress's relieving the President of the contemplated check or imposing additional checks upon the President's authority would seem to upset this balance. The clause's elaborate procedures operate as both a ceiling and a floor on the President's appointments power.

It is not clear that congressional authorization of citizen suits disrupts a similar balance under the Take Care Clause. Even if the Court has properly read the Take Care Clause as creating an implied presidential power to exercise whatever powers are needed to fulfill the duty imposed, the clause nonetheless does assign a *duty*. And it is not hard to imagine imposing a nonexclusive legality-enforcing duty upon the President. The drafters may have insisted that the President ensure the legality or good faith of executive officers while not precluding Congress from specifying other means of policing executive legality. In other words, the President's duty to ensure legality could logically have been a floor above which Congress could venture by creating private rights of action against federal officers or agencies. To

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<sup>162</sup> See cases cited *supra* Section I.B.

<sup>163</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 455 (1989) (explaining that a textual specification may reflect purposes other than implied exclusion of things left unspecified).

<sup>164</sup> See, e.g., *Barnhart v. Peabody Coal*, 537 U.S. 149, 168 (2003) (explaining that the *expressio unius* canon applies only when the context suggests that "that items not mentioned were excluded by deliberate choice, not inadvertence" (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002))); *Chevron U.S.A. Inc. v. Echazabal*, 536 U.S. 73, 81 (2002) (making a similar point about using the canon in context).

<sup>165</sup> U.S. CONST. art. II, § 2, cl. 2.

conclude that the Take Care Clause was not just a floor establishing a presidential duty but also a ceiling limiting congressional power, one would need to advance historical or functional arguments that would suggest a constitutional design to make the President's duty exclusive. The Court's cases have never tried to make such a showing.<sup>166</sup>

### 3. History and Constitutional Meaning

The Court's perfunctory approach to the Take Care Clause generally extends to the clause's history as well. Chief Justice Taft's *Myers* opinion says more about the clause's history than any other we have found, but even Taft only scratched the surface. *Myers* made passing references to what Madison and others said about the Take Care Clause during the famous Decision of 1789—the removal power debate that arose around the First Congress's establishment of the Department of Foreign Affairs.<sup>167</sup> Taft's opinion also cited President Cleveland's invocation of the clause in a statement urging the Senate to restore the removal power to him.<sup>168</sup> The Court in *Myers*, however, did not begin to grapple with Justice McReynolds's telling historical assertion, in dissent, that the New York Constitution—upon which much of Article II was modeled—contained its own Take Care Clause but did not give the Governor authority to appoint all executive officials or to remove them.<sup>169</sup>

Interestingly, neither the opinions that read the Take Care Clause as a source of legislative supremacy nor those that treat it, conversely, as a source of prosecutorial discretion, have looked at constitutional history. As discussed below, the two impulses are potentially in tension if Presidents assert

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<sup>166</sup> Leah Litman argues that the principle of presidential exclusivity implicit in the standing cases is inconsistent with areas of federal law which contemplate that other actors, including states, may vindicate the public interest in implementing federal law. See Litman, *supra* note 57, at 1308-17.

<sup>167</sup> See *Myers v. United States*, 272 U.S. 52, 112, 117, 122-23 (1926).

<sup>168</sup> *Id.* at 168-69. Taft also quoted Alexander Hamilton for the proposition that the enumeration of specific presidential powers and duties, such as the Take Care Clause, does not detract from Article II's vesting of a more general "Executive Power" that includes presidential power to remove subordinates. *Id.* at 137-39 (quoting 7 WORKS OF HAMILTON 80-81 (John C. Hamilton ed., Philadelphia, J.B. Lippincott & Co. 1864)).

<sup>169</sup> See *id.* at 236 (McReynolds, J., dissenting)

[The New York Constitution] then defined [the Governor's] powers and duties—among them, "to take care that the laws are faithfully executed to the best of his ability." It further provided, "that the Treasurer of this State shall be appointed by Act of the Legislature;" and entrusted the appointment of civil and military officers to a council. The Governor had no power to remove them, but apparently nobody thought he would be unable to execute the laws through officers designated by another. (quoting N.Y. CONST. §§ 9, 12 (amended 1821)).

For a similar argument, see, e.g., David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 97-98 (2009).

prosecutorial discretion to forbear from enforcing federal statutes in a categorical way that, in effect, creates novel exceptions to otherwise unqualified statutory commands.<sup>170</sup> One way or the other, history may shed light on the question. Some argue that U.S. constitutionmakers adopted the Take Care Clause with an evident purpose to codify the anti-dispensation and anti-suspension principles that emerged from the Glorious Revolution in England.<sup>171</sup> Others, however, see the historical record as more mixed. Professor Zachary Price, for instance, notes that several state constitutions at the time of the founding had adopted more explicit anti-prerogative clauses, that the Philadelphia Convention rejected an anti-suspension clause, and that no one in the constitutionmaking process explicitly equated the Take Care Clause with an anti-prerogative impulse.<sup>172</sup> And even if the clause was meant to preclude the President's exercise of dispensing or suspending authority, historical practice might provide insight into what our legal system has viewed as a permissible (perhaps inevitable) assertion of prosecutorial discretion rather than an exercise of obsolete royal prerogative.<sup>173</sup> Whatever the right answer to any of these questions, what is telling is that the Court has essentially omitted to consider evidence of the received understanding of the Take Care Clause, either at the time of the clause's adoption or as our political and legal system came to clarify and settle its meaning over time.<sup>174</sup>

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<sup>170</sup> See *infra* text accompanying notes 176–77.

<sup>171</sup> See, e.g., MAY, *supra* note 137, at 16 (reading the Take Care Clause, in historical context, as reflecting a purpose to reject a variety of English royal prerogatives used “to evade the will of Parliament”); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of the Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 803–08 (2013) (drawing a similar conclusion). But see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 726 n.113 (disputing the claim that the clause serves as the constitutional analogue to “English and state constitution prohibitions on dispensing and suspending the laws”).

<sup>172</sup> Price, *supra* note 14, at 692–94. Professor Price ultimately concludes, however, that the best reading of the early evidence still cuts against presidential dispensing and suspending powers—a conclusion that, in his view, is confirmed by an early circuit court decision and by the previously discussed *Kendall* decision. See *id.* at 694–96 (discussing *United States v. Smith*, 27 F. Cas. 1192 (C.C.D.N.Y. 1806) (No. 16,342), and *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838)). See *supra* text accompanying notes 111–14 for a discussion of *Kendall*.

<sup>173</sup> See Price, *supra* note 14, at 712–16 (discussing nineteenth- and early twentieth-century executive and judicial precedents concerning the exercise of prosecutorial discretion); see also Kathryn Preyer, *Jurisdiction to Punish: Federal Authority, Federalism and the Common Law of Crimes in the Early Republic*, 4 L. & HIST. REV. 223, 238 (1986) (discussing the Jefferson Administration's use of prosecutorial discretion).

<sup>174</sup> Similarly, in its standing cases, the Court has never suggested that anyone in the founding generation understood the Take Care Clause as imposing an implied limit on Article III judicial power. Nor has the Court invoked any subsequent course of practice treating the clause as a constraint on Congress's power to create previously unknown rights of action. The omissions here may reflect the novelty of the Court's reliance on the Take Care Clause as a source of standing

### B. *Consistency and Line Drawing*

We have already noted the tensions among the Court's deployments of the Take Care Clause. Some of these tensions highlight another key feature of the Court's Take Care cases. Almost all of the relevant cases turn on questions of degree and thus require inscrutable line drawing between what is permissible and impermissible under the Court's understanding of the clause.

Consider the example of the relationship between prosecutorial discretion and the scruple against executive dispensation or suspension of the law. Recall that the Court has traced the President's exercise of prosecutorial discretion to the Take Care Clause.<sup>175</sup> As noted, the Obama Administration has relied on such discretion to justify its (1) forbearance from enforcing federal marijuana possession laws in certain circumstances, (2) deferment of certain regulatory requirements under the Affordable Care Act, and (3) adoption of "deferred action" programs for classes of undocumented immigrants with strong equitable claims to continued residence by virtue of specified personal circumstances or ties to citizens or permanent residents.<sup>176</sup> To some, such exercises of power too closely resemble the royal prerogatives proscribed by the Take Care Clause—those which the Crown invoked to suspend Acts of Parliament or grant individuals dispensation from compliance with law when equity so required.<sup>177</sup>

It is not our purpose to adjudicate in detail the merits of that question, which like most constitutional questions, has arguments on both sides.<sup>178</sup> Rather, what is significant here is that if the Court's starting principles are both correct—if the Take Care Clause justifies prosecutorial discretion but also condemns executive dispensation or suspension—then there may be no principled metric for identifying when a valid exercise of prosecutorial discretion shades into an impermissible exercise of dispensation or suspension

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doctrine—a proposition that did not find its way into the U.S. Reports until about three decades ago. *See supra* Section I.B.

<sup>175</sup> *See supra* Section I.C.

<sup>176</sup> Price, *supra* note 14. As noted, after granting certiorari on whether one such deferred action program (DAPA) violated the Take Care Clause, the Court left the issue unresolved when it affirmed the decision below by an equally divided Court. *See supra* note 19.

<sup>177</sup> *See, e.g.*, Delahunty & Yoo, *supra* note 171, at 808, 835 (arguing that the Take Care Clause imposes a duty on the President to enforce all valid congressional acts); Price, *supra* note 14, at 705 (arguing that the executive impermissibly exercises obsolete royal prerogatives when prospectively licensing illegal conduct or adopting a policy of nonenforcement towards entire categories of offenders).

<sup>178</sup> *See* Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216 (2014) (arguing that President Obama's decision to defer enforcing certain immigration laws is consistent with the requirements of Article II); Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. 59, 62-64 (2013) (defending the Obama Administration's exercise of prosecutorial discretion through the Deferred Action for Childhood Arrivals program (DACA)).

power. Some prosecutorial discretion is inevitable;<sup>179</sup> if the executive cannot plausibly enforce the law against all who violate it, then enforcement agencies must set prosecution priorities.<sup>180</sup>

While Professor Price has argued that announcing such priorities categorically in advance may constitute a form of dispensation,<sup>181</sup> it is not entirely clear why the executive's articulation of such limits makes the exercise invalid. Imagine, for example, that the FDA has limited resources and concludes that corn containing twenty ppm or less of aflatoxin poses a limited risk of "adulteration" within the meaning of the FDCA.<sup>182</sup> If the agency thinks it unwise to devote scarce enforcement resources to such low-risk cases, why would the further act of announcing that policy transform sound prosecutorial discretion into unconstitutional dispensation?<sup>183</sup> Perhaps there will be cases in which the degree or character of the executive's announced forbearance is so great that it creates a sense of establishing an unauthorized exception to an otherwise unqualified statutory prohibition—in effect, an executive amendment of the statute at issue. But identifying the line between a permissible exercise of prosecutorial discretion and an impermissible dispensation of the law seems very much like a matter of degree, the limits of which are subjective and difficult to define in a principled way.<sup>184</sup>

Such tensions and line-drawing problems recur in the Take Care Clause case law because of the undefined nature of the duty or power at issue. *Youngstown* tells us that the President has no inherent power to seize steel mills in order to implement appropriations bills that call upon the President to

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<sup>179</sup> Kate Andrias has written that, given the broad delegations of regulatory power that mark the modern administrative state, "presidential involvement in the enforcement of statutes involves a considerable degree of law-shaping, if not lawmaking." Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1114-15 (2013).

<sup>180</sup> See Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 670 (1985) (acknowledging that "the executive has the power to set enforcement priorities and to allocate resources to those problems that, in the judgment of the executive, seem most severe").

<sup>181</sup> Price, *supra* note 14, at 705.

<sup>182</sup> See 21 U.S.C. § 342(a)(1) (2012) (defining "adulterated" food as that which "bears or contains any poisonous or deleterious substance which may render it injurious to health" but not "if the quantity of such substance in such food does not ordinarily render it injurious to health").

<sup>183</sup> Cf. Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 154-55 (1992) (discussing the virtues of allowing agencies to announce prosecutorial policy in advance, such as curbing abuses of agency discretion that can result from an unstructured approach).

<sup>184</sup> In this sense, the problem bears a family resemblance to that of differentiating a permissible statutory delegation of executive discretion from an impermissible statutory delegation of legislative power. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474-75 (2001) (noting that "we have 'almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law'" (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))).

purchase the tools needed to prosecute an armed conflict.<sup>185</sup> Even though the President made a finding that the seizure of plants idled by strikes was essential to ensure the procurement of the necessary weapons and ammunition,<sup>186</sup> the principle of legislative supremacy implicit in the Take Care Clause denied the President authority to implement what the Court regarded as “a presidential policy [to] be executed in a manner prescribed by the President.”<sup>187</sup>

In sharp contrast, recall that *Neagle* read the Take Care Clause to give the President some degree of power to act, without prior statutory authority, to protect “the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution.”<sup>188</sup> Indeed, in a complex world in which Congress cannot foresee and provide for every implemental detail, some implied “completion” power seems almost inevitable.<sup>189</sup> Surely, if Congress appropriated money for the President to purchase a warship, the President could rightly claim inherent power to carry that command into execution by entering into procurement contracts, even if Congress did not enact a statute authorizing the President to do so. Where the line falls between the President’s permissible exercise of a completion power and impermissible exercise of legislative power reserved to Congress seems difficult, if not impossible, to define in the abstract.<sup>190</sup>

Finally, the Court’s standing cases also present a difficult line-drawing problem—though, in this instance, not one caused by a tension in the Take Care Clause cases. As noted, if Congress authorizes someone without a concrete and immediate injury in fact to bring a federal lawsuit challenging agency action, the Court regards the resultant action as an intrusion on the President’s apparently exclusive authority to ensure faithful execution of the laws.<sup>191</sup> In this vein, the Court has consistently made clear that an abstract

<sup>185</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952).

<sup>186</sup> Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 10, 1952).

<sup>187</sup> *Youngstown*, 343 U.S. at 588.

<sup>188</sup> *In re Neagle*, 135 U.S. 1, 64 (1890).

<sup>189</sup> See *Goldsmith & Manning*, *supra* note 115, at 2305.

<sup>190</sup> In the period between his presidency and chief justiceship, Taft offered a formulation of presidential power that includes a completion power:

[T]he President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or *justly implied and included within such express grant as proper and necessary to its exercise*. Such specific grant must be either in the Federal Constitution or in an act of Congress passed in pursuance thereof.

WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 139-40 (1916) (emphasis added). As Henry Monaghan has written, however, Taft’s formulation “marks—but does not define—a boundary between what can fairly be described as presidential discretion in implementing legislation and unauthorized presidential law-making.” Monaghan, *supra* note 120, at 40.

<sup>191</sup> See *supra* notes 74-81 and accompanying text; see also *supra* text accompanying note 162.

interest in the “proper application of the Constitution and laws” cannot sustain Article III standing.<sup>192</sup>

Even accepting the validity of that position, no principled metric exists for determining just *how* concrete an injury must be before the Court will treat it as proper Article III business rather than an intrusion upon the legality-enforcing function that the Take Care Clause assigns to the President.<sup>193</sup> Recall that in *Lujan*, the Court invalidated a citizen’s suit under the Endangered Species Act because the plaintiffs did not have concrete enough plans to see the endangered species whose habitats would allegedly be affected by a violation of the Act.<sup>194</sup> The Court, in effect, would not permit standing because the plaintiffs had not purchased plane tickets to visit the affected sites. However, as Cass Sunstein has asked, “[i]f a court [confronted with a *Lujan* action] could set aside executive action at the behest of plaintiffs with a plane ticket, why does the Take Care Clause forbid it from doing so at the behest of plaintiffs without a ticket?”<sup>195</sup> In the absence of a firm line identifying where Article III power begins and the Take Care Clause obligation ends, the Court’s standing doctrine blurs at the margins.<sup>196</sup>

In short, perhaps because of internal tension within the doctrine, or perhaps because of the inherently imprecise nature of the Take Care Clause obligation, line-drawing problems are endemic to the Court’s Take Care Clause cases. Hence, identifying what the clause permits—and what it forbids—will necessarily turn upon uncertain judgment calls about which reasonable people can presumably differ. The Court, however, has not acknowledged these internal tensions nor, for the most part, grappled with the implications of the interpretive and doctrinal uncertainty that the clause has generated in the Court’s own hands.

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<sup>192</sup> *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992).

<sup>193</sup> See Cass R. Sunstein, *What’s Standing After Lujan? of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 226-28 (1992) (discussing the uncertainties surrounding courts’ application of the injury-in-fact requirement); see also Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 264 (1990) (“The factors relevant to the case determination exist on a continuum, and the Court must unavoidably make choices about where on the continuum a line should be drawn. . . . The Court must make distinctions of degree, not of kind.”).

<sup>194</sup> *Lujan*, 504 U.S. at 562-64.

<sup>195</sup> Sunstein, *supra* note 193, at 213; see also Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 100-01 (2007) (making a similar point).

<sup>196</sup> The Court has suggested as much. See, e.g., *Allen v. Wright*, 468 U.S. 737, 750 (1984) (describing standing as “an idea, which is more than an intuition but less than a rigorous and explicit theory” (quoting *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1178-79 (D.C. Cir. 1983) (Bork, J., concurring))); *Valley Forge Christian Coll. v. Americans United for the Separation of Church & State*, 454 U.S. 464, 475 (1982) (“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court . . .”).



## CONCLUSION

The Take Care Clause is both particular and delphic. It imposes a specific duty on the President but says very little about what that duty entails. The Court, however, has treated the clause as having firm and definite content. The Take Care Clause underwrites the President's removal power, draws a line between judicial and executive power, offers a source for the President's exercise of prosecutorial discretion, establishes legislative supremacy, and gives the President a measure of completion power. With rare exceptions, the Court has identified these diverse functions without any effort to ground its decisions in a careful reading of the text, structure, or history of the clause. Nor has the Court sought to reconcile its various Take Care Clause doctrines with one another or troubled itself about its own capacity to resolve the intractable line-drawing problems that its doctrine has created. Instead, the Take Care Clause has been a placeholder for broad judicial judgments about the appropriate relations among the branches in our constitutional system—like the Court's own Key Number for freestanding separation-of-powers principles.

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