2023

Federal Nonenforcement at a Crossroads

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FEDERAL NONENFORCEMENT AT A CROSSROADS

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ABSTRACT

As a novel aspect of "presidential administration"—the president-centered approach to federal governance discussed in a 2001 article by then-Professor and future Supreme Court Justice Elena Kagan—broad federal nonenforcement policies have been a major source of controversy in the past decade. As illustrated by the Obama Administration's expansive nonenforcement policies relating to marijuana, immigration, and Affordable Care Act implementation, recent presidents have recognized nonenforcement's potential to reshape statutory law to suit an administration's policy aims. This Article takes stock of this development as it relates to the past three presidential administrations. While advocating a limited view of nonenforcement authority and responding to some arguments for broader approaches, this Article documents the current confused state of both executive practice and judicial case law, offering in particular a critique of the Supreme Court's 2020 decision in Department of Homeland Security v. Regents of the University of California. *The Article concludes that federal nonenforcement authority remains at an important crossroads, with potential either to develop into an expansive power to reshape the law through executive action or to remain confined to more limited applications. It urges decisionmakers to embrace the narrower view.*

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INTRODUCTION

In 2001, then-Professor Elena Kagan—the future Supreme Court Justice featured in other contributions to this issue—published a landmark article, *Presidential Administration*,[1] that described and encouraged a president-centered approach to federal policymaking. Though pioneered by President Ronald Reagan,[2] the approach Kagan identified had become a bipartisan norm by the time she wrote.[3] Her article thus documented one common pattern of federal institutional development: innovations initially embraced by one partisan group (and often contested by the other side) establish precedents that eventually congeal, for good or ill, into bipartisan understandings accepted by officials and even judges from both parties.[4]

1. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

2. For discussion of this history, see, for example, Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 3 (1995); BARRY D. FRIEDMAN, REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE (1995); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1075–76 (1986).

3. Kagan, *supra* note 1, at 2246 ("We live today in an era of presidential administration.").

4. The literature addressing presidential administration is immense. For some recent critical analysis, see, for example, Kathryn E. Kovacs, *From Presidential Administration to Bureaucratic Dictatorship*, 135 HARV. L. REV. F. 104 (2021); Ashraf Ahmed, Lev Menand & Noah Rosenblum, *The Tragedy of Presidential Administration* (Ctr. for the Study of the Admin. State, Working Paper No. 21-39, 2021); Bijal Shal, *The*

In the past decade, one salient innovation in separation-of-powers practice has been the expanded use of nonenforcement policies to achieve presidential policy aims. Although earlier administrations used nonenforcement as a policy tool, too, high-profile policies in the Obama Administration relating to marijuana, immigration, and the Affordable Care Act highlighted the latent power of enforcement discretion—the executive authority to turn a blind eye to legal violations—to reshape the operative substantive law and circumvent congressional gridlock. Obama's successors, Donald Trump and Joseph Biden, built on these examples in important respects, threatening to establish a new bipartisan norm of plenary, policy-based nonenforcement—effectively an aggressive form of "presidential enforcement" to complement "presidential administration."[5] Nevertheless, as of this writing in late 2022, both executive practice and judicial precedent on this question remain unsettled. While presidents have hardly disclaimed authority to reshape the law with categorical nonenforcement assurances, neither has a clear bipartisan norm of the sort Kagan described yet congealed; and courts, for their part, have yet to issue any definitive ruling. Federal nonenforcement thus stands at an important crossroads.

This Article offers a brief, opinionated snapshot of the law and practice surrounding federal nonenforcement at this moment, roughly ten years and two presidential administrations after questions about federal enforcement discretion leapt to prominence during the Obama Administration. Summarizing prior work, Part I outlines the correct legal framework and responds to some competing perspectives. As Part I explains, overt categorical nonenforcement of federal law is inconsistent with the separation of powers under the U.S. Constitution and with the president's constitutional obligation to ensure faithful execution of federal law. Such nonenforcement also carries the pernicious effect of diverting political pressure for legal change into discretionary executive policies rather than more durable legislative reforms. Even under a more expansive view of federal enforcement discretion, furthermore, separation-of-powers limits on the executive should generally preclude protecting regulated parties' reliance on executive nonenforce-

Purpose of Presidential Administration (Ctr. for the Study of the Admin. State, Working Paper No. 21-44, 2021).

5. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1035–36 (2013) (discussing "presidential enforcement" and advocating an extension of the theory and practice of presidential administration to encompass enforcement policies).

ment assurances. If regulated parties could rely on such assurances and thereby obtain a legal defense to future enforcement, then executive officials could alter the law, and not just its enforcement, by inviting reliance on nonenforcement policies, yet making such changes in law is at odds with any proper notion of faithful execution.

With this framework in mind, Part II provides an overview of nonenforcement policies in the past three presidential administrations. Part II discusses bold precedents set by the Obama Administration with respect to marijuana crimes, immigration, and the implementation of the Affordable Care Act. It then describes the mixed record of the Trump Administration in rescinding some Obama policies while continuing others and setting new precedents of its own. It also offers a preliminary assessment of the Biden Administration, which has revived and strengthened some Obama policies and limited enforcement of some important federal laws, but has employed other legal theories for its boldest unilateral initiatives. Overall, Part II suggests that executive-branch legal understandings surrounding federal nonenforcement remain unsettled, though at this point administrations of both parties have tentatively embraced broad authority to reshape substantive laws through nonenforcement.

Part III turns to the current state of judicial precedent, with a focus on a critical analysis of the Supreme Court's most noteworthy recent precedent regarding nonenforcement: its 2020 decision in *Department of Homeland Security v. Regents of the University of California* ("*UC Regents*").[6] In that case, the Supreme Court barred the Trump Administration from rescinding one of the Obama Administration's nonenforcement initiatives, "Deferred Action for Childhood Arrivals" or "DACA," a program that aimed to prevent deportation of certain unauthorized immigrants who arrived in the United States as young children. Part III faults *UC Regents* for not only disregarding appropriate limits on executive nonenforcement but also protecting reliance on nonenforcement policies in ways that may encourage their future use, contrary to the correct legal principles outlined in Part I. The reasoning in *UC Regents*, however, seems deliberately narrow and ad hoc, leaving its future implications uncertain. As of this writing, as Part III explains, some lower courts have interpreted *UC Regents* to support temporarily freezing Trump Administration policies in place, but the Supreme Court rejected one such challenge on appeal following further administrative explana-

6. 140 S. Ct. 1891 (2020).

tion.[7] At the same time, new litigation before the Supreme Court could tempt it to make the opposite mistake and invalidate immigration enforcement priorities that should be upheld,[8] and renewed litigation over DACA itself may eventually compel the Court to revisit that program's legality, too.[9]

The Article ends with a conclusion highlighting the central lessons of this story. If embraced as a settled executive practice, programmatic nonenforcement could afford presidents of both parties with a potent policy tool. Its full potential, however, has not yet been embraced in practice or case law, and enforcement discretion's capacity to undermine laws of all sorts should discourage further broadening of this unilateral executive power. Either the Supreme Court or executive branch practice, or both, should settle this question by clearly selecting the path of narrower executive discretion.

I.
THE LEGAL FRAMEWORK FOR FEDERAL ENFORCEMENT DISCRETION

A. The Scope of Federal Executive Authority

In federal criminal law and some other areas of federal administration, the number of potential defendants so far exceeds the number who can realistically be prosecuted that enforcement discretion is effectively plenary. This reality, however, promotes a distorted constitutional understanding. Although courts and commentators often presume that such absolute discretion is an Article II prerogative,[10] the most relevant Article II provision, the so-called Take Care Clause, obligates the president to "take Care that the Laws be faithfully executed."[11] Far from conferring nonenforcement authority on the executive, the Constitution's plain text thus obligates presidents to effectuate any constitutionally valid federal

7. Biden v. Texas, 142 S. Ct. 2528, 2548 (2022).

8. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022) (invalidating immigration enforcement policy), *cert. granted*, No. 22A17 (22-58), 2022 WL 2841804 (U.S. July 21, 2022).

9. *See* Texas v. United States, 50 F.4th 498, 508 (5th Cir. 2022) (upholding invalidation of DACA but remanding for further proceedings).

10. *See, e.g.*, Lujan v. Defs. of Wildlife, 504 U.S. 555, 575–76 (1992); United States v. Nixon, 418 U.S. 683, 693 (1974).

11. U.S. CONST. art. II, § 3.

laws—even if the president disagrees with them, or indeed even if Congress overrides a presidential veto to enact them.[12]

To be sure, the separation of executive and legislative power in the U.S. Constitution does support presuming some baseline discretion over enforcement. Separating legislative and executive power would accomplish little, and certainly would not protect individual liberty, as Blackstone, Montesquieu, and other foundational theorists presumed it should,[13] if executive officials were duty-bound to robotically enforce every law in every conceivable circumstance. Indeed, even the terms of the Take Care Clause support this inference: one might enforce a law "faithfully" without applying it mechanically, so long as one respected the basic policy reflected in the statute.[14] Likewise, by prohibiting bills of attainder—laws singling out particular individuals or classes of individuals for punishment—the Constitution reinforces the inference that laws establishing general rules of conduct do not necessarily dictate punishment for each particular violation; making the law and executing it are distinct constitutional functions.[15] As a normative matter, furthermore, tailoring general laws to particular facts is a natural aspect of the executive function, and the basic structure of separated executive and legislative power implies a potential gap between the strict letter of the law and its application in specific circumstances.[16] Nevertheless, inferring unlimited nonenforcement authority from such case-specific forms of discretion is at odds with the president's duty of faithful execution and the limited presidential veto over legislation, both of which make plain that presidents may often be responsible for effectuating laws that they do not support as a matter of policy.

In a 2014 article exploring the law and history of federal enforcement discretion at greater length, I argued that these competing constitutional inferences—the Constitution's mandate of faithful execution on the one hand, and its presumption of some

12. For my elaboration of the argument here and in the remainder of this section, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 689–90 (2014).

13. *Id.* at 701 (collecting sources); *see also* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536–38 & n.102 (1991) (discussing the liberty-protective purposes of separation of powers); *cf.* Aaron L. Nielson, *The Policing of Prosecutors: More Lessons from Administrative Law?*, 123 DICK. L. REV. 713, 718 (2019) ("[P]rosecutorial discretion is both useful and potentially dangerous.").

14. Price, *supra* note 12, at 698.

15. *Id.* at 697.

16. *See, e.g.*, *id.*

distinct enforcement authority on the other—supported two countervailing presumptions.[17] To give effect to the separation of legislative and executive power, executive officials should presume authority to decline enforcement of general laws in particular cases for case-specific reasons.[18] To ensure faithful execution of the law, however, they should presume that they lack authority either to license violations prospectively or to suspend enforcement categorically based on policy disagreement with the statute.[19] Both these presumptions apply by default; Congress may restrict or expand discretion so long as it does so explicitly.[20] Furthermore, when, as is often the case today, practical challenges and resource constraints preclude anything approaching full enforcement of particular federal laws, establishing general, non-binding priorities for enforcement becomes a natural and inevitable aspect of the executive function.[21] Even in such areas, however, and even if drawing the precise boundary between legitimate priority-setting and impermissible categorical nonenforcement is sometimes difficult and often beyond courts' capacity in exercising judicial review,[22] the twin presumptions in favor of case-specific discretion and against categorical nonenforcement provide proper points of orientation for federal executive officials charged with enforcing federal statutes.[23]

While defending these presumptions as a matter of formal constitutional analysis, my article also argued that they accorded with early federal practice.[24] In early statutes and executive conduct, federal practice showed respect for the twin presumptions properly im-

17. *Id.* at 704–07.

18. *Id.*

19. *Id.*

20. *Id.* at 707–16.

21. *Id.* at 754–55.

22. For my discussion of limits on judicial review of nonenforcement, see Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016).

23. Price, *supra* note 12, at 755. For other recent scholarship identifying limits on enforcement discretion, see, for example, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351 (2014); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013). For a discussion of examples of legal "slack," meaning "informal latitude to break the law without sanction," see Shu-Yi Oei & Diane M. Ring, *"Slack" in the Data Age*, 73 ALA. L. REV. 47, 49 (2021).

24. Price, *supra* note 12, at 723–42.

plied by the constitutional structure itself.[25] As for more recent developments, I argued that the "pathological" origins of expanded criminal prosecutorial discretion—that is, its apparent derivation from "tough-on-crime" legislatures' consistent preference for broader prohibitions and more severe penalties[26]—supported retaining a limited understanding of enforcement discretion rather than jettisoning it.[27] Despite its role in creating legal structures predicated on enforcement discretion, Congress might have intended only to enable broad case-by-case nonenforcement and indeterminate priority-setting, not wholesale cancellation of enforcement or prospective licensing of violations.[28] Concluding otherwise could only reinforce the executive's capacity to shape legal understandings at Congress's expense through self-serving assertions of executive prerogative.[29] Even worse, by diverting political pressures for reform into temporary prosecutorial policies rather than more durable legislative changes, it might compound rather than mitigate the pathological politics surrounding federal criminal law.[30] In any event, even if Congress invited broad assertions of nonenforcement authority by enacting laws that could not be fully enforced, such indirect and implicit endorsement of broadened executive authority should not suffice to eliminate the president's explicit constitutional duty to ensure faithful execution of federal laws, including those that he or she disagrees with.[31]

In short, executive officials should presume authority, based on separation-of-powers principles discussed earlier, to decline enforcement of federal laws in particular cases and to establish sensible priorities for enforcing broad laws with limited resources. Yet presuming the further authority to decline enforcement prospectively or categorically is inconsistent with the president's duty of faithful execution and other features of the U.S. Constitution's separation of powers.

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25. *Id.*

26. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–49 (2001); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 6–7 (2011). For my own prior discussion of these dynamics, see Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 911 (2004).

27. Price, *supra* note 12, at 746–48.

28. *Id.*

29. *Id.*

30. *Id.* at 747.

31. *Id.*

B. Contrary Arguments and Their Flaws

Recent years have seen a spate of further scholarship and commentary addressing these questions, some of which has confirmed my core claims. For example, Andrew Kent, Ethan Leib, and Jed Shugerman have demonstrated that the phrase "faithful execution" was understood at the time of the founding as a term of art that bound executive officials to implement statutes without regard to their personal views about them.[32] They write: "Faithful execution was understood as requiring good faith adherence to and execution of national laws, according to the intent of the lawmaker. Waivers or refusals to enforce for policy reasons without clear congressional authorizations, then, appear to be invalid under [faithful execution] clauses."[33] This principle, moreover, "offer[s] some support for the argument against systematic executive discretion to effectively 'suspend' laws through an assertion of categorical prosecutorial discretion."[34] Another recent account of Article II's original understanding likewise concludes that the framers intended to confer only limited nonenforcement authority.[35] Even apart from other formal and functional considerations supporting the same conclusion, a limited understanding of federal enforcement discretion thus appears to have strong support in the Constitution's original understanding.

Other scholarship, by contrast, has defended broad federal nonenforcement power, either across the board or with a view to defending the DACA immigration-relief program and other related Obama Administration initiatives discussed further below.[36] One line of argument asserts that categorical nonenforcement advances

32. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019).

33. *Id.* at 2185.

34. *Id.* at 2187.

35. MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 118 (2020) ("[T]he significance [of the Take Care Clause] is that the President has the duty, not just the authority, to carry the laws of the nation into execution.").

36. *See infra* Part II.A. For a small sampling of scholarship in this vein, see, for example, Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL'Y 405, 406–07 (2019); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 383–92 (2017); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104 (2015); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015); Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015); Andrias, *supra* note 5.

rule-of-law values of transparency, consistency, and predictability.[37] Given that laws cannot be fully enforced in areas such as immigration and federal criminal law, proponents of this view maintain that executive officials should establish and announce clear enforcement criteria, thereby ensuring that like cases are treated alike and that the public knows how officials are enforcing the law.[38]

Even assuming that such functional considerations could overcome the formal constitutional reasons for limited executive nonenforcement authority, this argument is unconvincing. In the enforcement context, guaranteeing consistency and predictability comes at the expense of other rule-of-law imperatives such as legislative supremacy and executive subordination to law. In other words, allowing executive officials to establish determinate, publicly-announced enforcement policies may effectively replace enacted legal requirements with executive policies as the key determinant of regulated parties' conduct. After all, transparency in this context may only enable evasion; for that reason, officials seeking to bring about compliance with governing laws normally keep their priorities and enforcement practices secret.[39] The putative rule-of-law values of transparency and consistency thus cannot justify expansive nonenforcement.[40]

A related line of argument has suggested that determinate nonenforcement policies are necessary to ensure accountable, top-down control of on-the-ground enforcement practices. If priority-setting is inevitable, the argument goes, then more accountable, high-level officials should set the priorities, and doing so in a clear and determinate fashion may be the best means of guaranteeing compliance by line-level officials.[41] A regime of case-specific enforcement discretion, by contrast, empowers line-level officials to

37. *See, e.g.*, Shane, *supra* note 36, at 438; Cox & Rodríguez, *supra* note 36, at 112; Andrias, *supra* note 5, at 1117.

38. For a general argument along these lines with respect to criminal law, see Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012).

39. *See, e.g.*, Mayer Brown LLP v. I.R.S., 562 F.3d 1190, 1193 (D.C. Cir. 2009) (discussing the importance of secrecy for internal enforcement policies). For my further discussion of transparency's drawbacks with respect to enforcement policy, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RSRV. L. REV. 1119, 1138–39 (2015).

40. I address rule-of-law arguments for and against nonenforcement at greater length in Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235 (2016).

41. *See, e.g.*, Cox & Rodríguez, *supra* note 36, at 112; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1929 (2015).

follow idiosyncratic priorities that expose regulated parties to essentially random enforcement.[42]

The problem with this argument is that categorical enforcement policies should not be necessary to maintain supervisory control of enforcement agencies. On the contrary, internal discipline and other forms of supervision should empower senior officials to ensure subordinates' compliance with their priorities. Furthermore, this supervisory-control argument overlooks, once again, the costs that categorical nonenforcement policies carry for legal compliance and legislative authority. Determinate nonenforcement guarantees may well enable senior officials to ensure that their view of appropriate policy takes effect, but that is precisely what is wrong with them: such policies may enable senior officials to alter the governing law's operative content without obtaining a change in law from Congress or through appropriate administrative process.[43]

Offering a still broader theory of executive discretion, an important book by Adam Cox and Cristina Rodríguez posits that in immigration, and perhaps in other areas as well, the president has not functioned as a "faithful agent" of Congress's statutory directives and policy aims, but instead as a "co-principal" who actively reshapes the operative law, at times even in ways that defy Congress's wishes.[44] Cox and Rodríguez further argue that by enacting broad and punitive immigration laws while consistently providing inadequate resources for their enforcement, Congress has made a "de facto delegation" of lawmaking power to the executive, effectively enabling presidents to determine the contours of the immigration population through enforcement choices rather than formal law.[45] On both these grounds, Cox and Rodríguez argue that broad, programmatic exercises of nonenforcement authority are consistent, at least in immigration law, with separation of powers.[46]

These twin rationales for broad immigration nonenforcement—de facto delegation and the president's status as "co-principal" with Congress—seem somewhat in tension and may carry

42. *See, e.g.*, Cox & Rodríguez, *supra* note 36, at 112.

43. For further discussion of this point, see Price, *supra* note 39, at 1140–43.

44. ADAM B. COX & CRISTINA M. RODRÍGUEZ, THE PRESIDENT AND IMMIGRATION LAW 192 (2020).

45. *Id.* at 193; *see also* Shane, *supra* note 36, at 407 (arguing that the scope of federal prosecutorial discretion in any given area is a question of statutory law).

46. COX & RODRÍGUEZ, *supra* note 44.

different implications.[47] If Congress intended to enable determinate, prospective nonenforcement, then broad, programmatic forbearance policies may faithfully discharge congressional policy. On the other hand, if such initiatives reflect a bold effort to reshape immigration law through unilateral executive action, then it is harder to see them as valid exercises of delegated power, de facto or otherwise.

In any event, even if Cox and Rodríguez's theory that presidents have often acted as co-principals with Congress is descriptively compelling, deriving an "ought" from an "is" here is unpersuasive. It may be inevitable, and perhaps sometimes desirable, that presidents will push legal boundaries to achieve key policy goals or gratify important constituencies. But the constitutional separation of powers should limit this presidential impulse, not encourage it. For that reason, arguments from past practice normally seek limiting principles to cabin past examples and preserve important restraints; past presidential norm-breaking should not necessarily be normative.[48] Here, past practice has largely limited executive officials to indeterminate priority-setting policies, not more determinate categorical or prospective guarantees. Furthermore, as discussed earlier, such policies accord with the Constitution's formal structure of separated powers in a way that more determinate guarantees do not. Encouraging presidents to view themselves instead as co-principals with Congress and recipients of broad implicit delegations seems at odds not only with the president's explicit constitutional duty of faithful execution, but also with the Constitution's implicit premise that Congress, with its broad and varied constituency and capacity for logrolling and compromise, has superior legitimacy in effecting major policy changes.[49]

In short, recent work has advanced a number of arguments for expansive executive nonenforcement authority, but none succeeds in rebutting the framework outlined above in subpart A and supported by other recent scholarship.

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47. For an elaboration of my points here, see my contribution to an online symposium on Cox and Rodríguez's book: Zachary Price, *A Brilliant but Unsettling Vision of Separation of Powers*, YALE J. REG.: NOTICE & COMMENT BLOG (Mar. 26, 2021), https://www.yalejreg.com/nc/the-president-and-immigration-law-02/ [https://perma.cc/S9AK-QLJR].

48. On the strength of practice arguments in constitutional interpretation, see, for example, Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

49. For a discussion of Congress's role in legitimating major legal changes over the course of American history, see DAVID R. MAYHEW, THE IMPRINT OF CONGRESS (2017).

C. The Problem of Reliance

Even if broad, categorical nonenforcement were lawful, separation of powers would impose yet another limit on such executive policies: they are necessarily revocable and cannot estop the government from changing course in the future. This limitation follows from the nature of nonenforcement itself: to the extent a policy is just an exercise of enforcement discretion, meaning a choice to turn a blind eye to some violations so as to concentrate on others, that policy must be subject to change in the future. Otherwise, the policy would amount to a change in the law itself, and not just a change in enforcement focus. In consequence, the price of reshaping law through nonenforcement is that the law may always be reasserted in the future by different officials with different preferences—with the implication for regulated parties that they generally cannot rely on nonenforcement assurances from the executive branch.[50]

In keeping with this limitation, key Supreme Court decisions have resisted allowing such assurances to preclude future enforcement. In particular, although the Court has recognized a due process defense to criminal prosecution when the government specifically invited unlawful conduct, decisions based on this principle have typically afforded immunity from prosecution only insofar as the government indicated the conduct was lawful; they do not apply if the government merely promised nonenforcement.[51] Lower courts, furthermore, have generally limited these defenses' application to situations in which the legal assurances were objectively reasonable.[52] These limitations in the case law are harsh because lax enforcement can easily mislead the public about what conduct is lawful. I have accordingly argued that they should be relaxed at the margins when the unfairness to individuals is acute and the cost to separation of powers in protecting reliance is slight.[53] In general, however, these limits reflect a necessary limit on executive authority itself: if inviting reliance on promised forbearance could establish a legal defense, then executive officials could effectively change the law itself just by promising nonenforcement,

50. This subpart summarizes arguments I developed at greater length in Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

51. *See, e.g.*, United States v. Pa. Indus. Chem. Corp., 411 U.S. 655, 674 (1973); Cox v. Louisiana, 379 U.S. 559, 570–71 (1965); Raley v. Ohio, 360 U.S. 423, 438–39 (1959); United States v. Rampton, 762 F.3d 1152, 1157 (10th Cir. 2014); United States v. Smith, 940 F.2d 710, 715 (1st Cir. 1970).

52. Price, *supra* note 50, at 944–45.

53. *Id.*

yet that is precisely what enforcement discretion alone affords no power to do.[54] As the Supreme Court has observed, "[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law."[55]

Some confusion surrounds this reliance question because administrative agencies sometimes issue "enforcement policies" that are really exercises of delegated interpretive authority.[56] Unlike criminal prosecutors, administrative agencies sometimes hold interpretive discretion or law-making authority with respect to the laws they administer. In other words, they are understood to exercise a power, delegated from Congress, to determine what the law is, and not merely how it is enforced.[57] Agencies, furthermore, may often choose whether to develop their interpretation of governing laws through notice-and-comment regulations or instead through orders resolving case-specific adjudications.[58] When agencies pursue the latter course, they sometimes issue guidance to regulated parties indicating what conduct they are likely to treat as unlawful. Yet such guidance documents, though sometimes styled "enforcement policies," are distinct from the sort of priority-setting enforcement policy discussed earlier. They do not indicate which violations of a clearly applicable law the agency will focus resources on pursuing; they instead indicate what the agency understands the law to prohibit in the first place.[59]

To give a concrete example, in a classic case regarding administrative guidance, the Food and Drug Administration established "'action levels' informing food producers of the allowable levels of unavoidable contaminants such as aflatoxins."[60] On some level, these action levels merely indicated how the agency planned to enforce statutory and regulatory restrictions on "poisonous or deleterious substances" in food, and the court at one point characterized

54. *Id.* at 945.

55. Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 327 (2014).

56. *See* Price, *supra* note 50, at 982–86.

57. *See, e.g.*, City of Arlington v. FCC, 569 U.S. 290, 296 (2013) (discussing the "stable background rule" that "[s]tatutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency").

58. *See, e.g.*, NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974).

59. An immense literature addresses agencies' use of guidance documents. For a helpful recent survey of agency practice and some proposals for reform, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165 (2019).

60. Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 945 (D.C. Cir. 1987) (per curiam).

the action levels as "cabining . . . [the] agency's prosecutorial discretion."[61] In reality, however, the agency's guidance did not merely indicate what forms of adulterated food it was prioritizing for enforcement; it interpreted what food the agency considered adulterated as a matter of law in the first place. The reviewing court accordingly concluded that the guidance announced a legislative rule that could be promulgated only through notice-and-comment procedures.[62] In a more recent case, *FCC v. Fox Television Stations, Inc.* (*Fox I*), the Supreme Court addressed whether the Federal Communications Commission could change its "enforcement policy" with respect to a statutory prohibition on "obscene, indecent, or profane" broadcasts, and despite upholding the policy change at issue, the Court indicated that agencies generally must provide a reasoned explanation for any disruption of "serious reliance interests" based on a prior policy.[63] Again, however, the type of enforcement policy at issue in *Fox I* was not a mere prioritization of some offenses over others, but an indication of what statements the agency would treat as indecent under the statutory standard.[64]

As *Fox I* indicates, courts have sometimes protected regulated parties' reliance on legal understandings reflected in agency policy statements, even though legal interpretations in such documents might not receive judicial deference on review. Indeed, in a later round of the *Fox Television* litigation, the Court held that a due process principle of fair notice precluded the agency from retroactively penalizing a broadcaster for material that the then-effective agency policy indicated was lawful.[65] Similarly, in *Christopher v. SmithKline Beecham Corp.*, the Supreme Court reviewed an agency's interpretation of its own regulations without deference because the agency's "very lengthy period of conspicuous inaction" with respect to conduct defying the agency's current interpretation signaled to regulated parties that the agency "did not think the industry's practice was unlawful."[66]

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61. *Id.* at 945, 948.

62. *Id.* at 948.

63. 556 U.S. 502, 506, 515–16 (2009).

64. *Id.* at 517–18 (discussing the agency's decision to treat some "nonrepetitive use" of expletives as actionably indecent and characterizing it as a choice to "expand[ ] the scope of its enforcement activity").

65. FCC v. Fox Television Stations, Inc. (*Fox II*), 567 U.S. 239, 254 (2012).

66. 567 U.S. 142, 158 (2012); *see also* Encino Motorcars, LLC v. Navarro, 579 U.S. 211, 222 (2016) (denying deference to a legislative rule because it departed from the agency's past interpretation without accounting for regulated parties' reliance interests). In a more recent decision addressing deference to agency interpretations of their own regulations in general, the Court cited *Christopher*

Yet these cases again protected regulated parties' reliance on regulators' stated or apparent view of the law. They did not suggest that regulated parties could rely on what we might call "true" agency enforcement policies—policies, that is, that indicate only what violations the agency will pursue, not what conduct the agency believes violates the law in the first place.[67] Agencies of all sorts may issue enforcement policies of the priority-setting variety too, but courts have resisted protecting reliance on those sorts of enforcement policies. At the least, courts have repeatedly rejected arguments that such reliance should establish a defense to future enforcement—or so at least things stood until the *UC Regents* decision discussed below in Part III.[68]

To sum up, then, enforcement discretion is not an absolute executive prerogative. Instead, absent any more specific statutory direction, Article II properly supports only a default authority to decline enforcement in particular cases and to set general, nonbinding priorities when limitations of time and money preclude full enforcement. Furthermore, outside certain administrative contexts in which an agency exercises interpretive authority through its enforcement choices, the law generally cannot protect reliance on nonenforcement assurances. Instead, the underlying substantive law must remain at least theoretically enforceable, so as to prevent executive officials from acquiring a de facto power to eliminate legal requirements by inviting reliance on promised forbearance. Arguments for categorical suspension of laws' enforcement not only misunderstand the appropriate limits on executive authority but

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approvingly and characterized it as "refus[ing] to defer to an interpretation that would have imposed retroactive liability on parties for longstanding conduct that the agency had never before addressed." Kisor v. Wilkie, 139 S. Ct. 2400, 2418 (2019).

67. For further discussion of this distinction and the relevant case law, see Price, *supra* note 50, at 982–86.

68. *See, e.g.*, Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 423 (1990) (indicating that recognizing estoppel based on executive assurances would "invade the legislative province reserved to Congress"); Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc., 467 U.S. 51, 60 (1984) (rejecting estoppel against the government so as to protect the interest of the "citizenry as a whole" in legal compliance); United States v. Washington, 887 F. Supp. 2d 1077, 1084 (D. Mont. 2012) (rejecting reliance defense based on federal marijuana nonenforcement policy despite acknowledging that, "when taken in the aggregate, particularly through the filter of the news media, the words of federal officials were enough to convince those who were considering entry into the medical marijuana business that they could engage in that enterprise without fear of federal criminal consequences"), *adhered to on reconsideration*, No. CR 11-61-M-DLC, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

also risk entrapping regulated parties in forms of reliance that courts cannot properly protect.

II.
RECENT DEVELOPMENTS IN THE EXECUTIVE BRANCH

These legal principles provide guideposts for assessing a number of recent controversies regarding nonenforcement. I will begin with some examples from the Obama Administration, then turn to President Trump, and then finally take stock of some recent state-level developments and the first two years of Biden's presidency. The general theme of this overview is that recent presidents have been pushing against the limits on their power, threatening to convert nonenforcement into a powerful technique for reshaping governing law and circumventing the challenge of obtaining legislative reforms from a polarized and gridlocked Congress. Even so, the broadest forms of nonenforcement—categorical policies aimed at stripping force from disfavored laws—have yet to take hold as a settled executive practice.

A. Obama-Era Controversies

At least three major controversies over nonenforcement arose in the Obama years. First, in a series of policy statements addressing state-level legalization of marijuana, the Administration issued explicit enforcement policies assigning low priority to certain federal marijuana crimes. In the first iteration of this policy, a 2009 directive from the Deputy Attorney General instructed U.S. Attorneys not to focus federal enforcement resources on "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."[69] Two years later, the Justice Department clarified that the 2009 policy "was never intended to shield" large growing operations from federal enforcement.[70] This new policy instructed U.S. Attorneys that, "[c]onsistent with resource constraints and the discretion you may exercise in your district, such persons are subject to federal enforcement action, including potential prosecution."[71]

69. Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009).

70. Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011).

71. *Id.*

In 2012, however, voters in two states, Colorado and Washington, approved measures to allow not only medical marijuana, but also recreational use of the drug.[72] In response, in 2013, the Obama Administration issued yet another federal enforcement policy. In this last policy, the Administration took its most permissive approach yet, instructing U.S. Attorneys to focus federal enforcement efforts on certain specified federal priorities and give low priority to state-compliant marijuana possession and distribution in states that maintained "strong and effective state regulatory systems."[73] The Justice Department followed up this policy with a further directive in 2014 indicating that federal crimes involving marijuana-related financial transactions were subject to the same priorities, meaning that federal officials should generally turn a blind eye to transactions associated with state-compliant marijuana businesses.[74]

A second set of enforcement-related controversies involved implementation of the Affordable Care Act, President Obama's signature legislation seeking to extend health-insurance coverage to all Americans. In two policies announced in 2013, the Administration granted "transition relief" delaying the statutory effective dates of certain prohibitions in the Affordable Care Act. One such delay suspended certain minimum coverage requirements for insurance plans; the other postponed employers' obligation to provide employees with qualifying coverage or else incur certain penalties.[75] Both delays reflected political controversies surrounding the provisions in question.[76]

Finally, and most controversially, in 2012 and 2014 the Obama Administration adopted policies encouraging broad categories of unauthorized immigrants to apply for two- or three-year renewable promises of nonenforcement known as "deferred action." Though technically only a non-binding assurance of enforcement forbearance, these deferred-action grants conferred in practice a prospective guarantee of non-deportation for the prescribed time period,

72. Aaron Smith, *Marijuana Legalization Passes in Colorado, Washington*, CNN BUSINESS (Nov. 8, 2012), https://money.cnn.com/2012/11/07/news/economy/marijuana-legalization-washington-colorado/index.html [https://perma.cc/BSM8-3WNB].

73. Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

74. Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014).

75. For further description and analysis of these examples, see Price, *supra* note 12, at 750–54; Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1721–25 (2016).

76. Bagley, *supra* note 75, at 1721–25.

as well as the opportunity to apply for work authorization and obtain other benefits.[77] DACA, the first of these programs, invited hundreds of thousands of immigrants who entered the United States without authorization as young children and met certain other criteria to apply for deferred action.[78] The second program, "Deferred Action for Parents of Americans" or "DAPA," extended a similar invitation to a much larger group of unauthorized immigrants who were parents of U.S. citizens or lawful permanent residents.[79]

To justify this second program, the Administration released an opinion by the Justice Department's Office of Legal Counsel that approved DAPA while rejecting a still broader program that would have extended deferred action to parents of DACA recipients as well.[80] OLC's opinion largely accepted the legal principles outlined above in Part I; among other things, it noted that "the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences" and that "a general policy of non-enforcement that forecloses the exercise of case-by-case discretion poses 'special risks' that the agency has exceeded the bounds of its enforcement discretion."[81] The opinion, however, claimed to find adequate authority for DAPA based on priorities reflected in the immigration code, as well as Congress's prior acquiescence in putatively similar relief programs.[82]

All of these policies arose in a context of intense partisan animosity and, after 2011, divided partisan control of Congress and the Presidency. Unable to obtain statutory amendments to the ACA or adjustments to drug and immigration laws, the Obama Administration resorted to executive authority over enforcement instead. Nevertheless, these policies conflicted with the separation-of-powers principles identified earlier. At the outset, the marijuana policy was defensible insofar as it made clear that it was non-binding and merely established priorities for federal enforcement, avoiding any sort of legal permission for law-breakers.[83] Over time, however, the

77. For the Administration's description and legal defense of these programs, see Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States, 38 Op. O.L.C. 39 (2014).

78. *Id.* at 60.

79. *Id.* at 40.

80. *Id.* at 81.

81. *Id.* at 46–47 (quoting Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994)).

82. *Id.* at 70–78.

83. Price, *supra* note 12, at 757–59.

policy seemed to harden into a more definitive guarantee, eventually spawning a multi-billion-dollar marijuana industry operating openly in multiple states in flagrant violation of federal criminal statutes.[84] For their part, the ACA delays and deferred action programs crossed the line from the start because they effectively suspended statutory requirements prospectively for broad categories of regulated parties.[85] Recognizing this problem, a federal district court enjoined DAPA nationwide before it ever took effect, and a split Fifth Circuit panel affirmed.[86] The Supreme Court, down one justice due to Justice Antonin Scalia's then-recent death, affirmed by an equally divided vote in 2016, just as the Obama Administration drew to a close.[87]

B. The Trump Administration's Mixed Record

President Obama's successor, Donald Trump, came to office promising that Americans would "finally wake up in a country where the laws of the United States are enforced."[88] In keeping with this promise, the Trump Administration rescinded the Obama Administration's marijuana guidance and sought to end the DACA program as well. (DAPA was still enjoined.) Some ACA delays continued, however, and in general, not surprisingly, the Trump Administration's commitment to enforcement proved selective. Overall, as has been characteristic of other Republican administrations with a deregulatory bent, enforcement rates with respect to many laws and regulations cratered during the Trump Administration.[89] Some Trump Administration policies, furthermore, closely

84. For my discussion of this point, see Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, *in* MARIJUANA FEDERALISM: UNCLE SAM & MARY JANE 123, 128 (Jonathan Adler ed., 2020).

85. Price, *supra* note 12, at 749–54, 759–62. For similar arguments regarding the second immigration program, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 216 (2015); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015).

86. Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016).

87. *Id.*

88. Donald J. Trump, Republican Convention Acceptance Speech (July 21, 2016), https://www.politifact.com/article/2016/jul/21/donald-trumps-gop-acceptance-speech-annotated/ [https:// perma.cc/4YM4-CW49].

89. *See, e.g.*, Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549, 1558–59 (2018); Seema Kakade, *Environmental Enforceability*, 30 N.Y.U. ENVT'L L.J. 65, 68 (2022). For my discussion of pre-Obama nonenforcement controversies during deregulatory administrations, see Price, *supra* note 12; *see also* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L.

mirrored Obama-era policies by employing nonenforcement promises to effectively cancel disfavored regulations. Courts enjoined some such policies, however, and in at least a few other examples the Administration showed surprising restraint—in some cases even in defiance of the president's expressed wishes.

To begin with the parallel examples, a number of Trump Administration policies sought to suspend binding regulations while the Administration reconsidered them. Insofar as they sought to eliminate regulations with the force and effect of law without going through the process required to repeal them, these administrative policies violated precisely the same limits transgressed by DACA, DAPA, and the ACA delays: the policies sought to employ executive authority over how laws are enforced to alter the content of the laws themselves.[90] In several cases, courts invalidated these policies, much as they had enjoined DAPA during the Obama Administration.

In *Clean Air Council v. Pruitt*, for example, the D.C. Circuit held that the Environmental Protection Agency lacked authority to "stay" a recent regulation limiting so-called "fugitive" emissions from oil and gas production.[91] Calling it "'axiomatic' that 'administrative agencies may act only pursuant to authority delegated to them by Congress,'" the court held that the agency could not repeal or suspend its rule without a new notice-and-comment process because the only statutory provision invoked by the agency provided no authority for doing so.[92] Likewise, in *Natural Resources Defense Council v. National Highway Traffic Safety Administration* (*NRDC v. NHTSA*),

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REV. 795 (2010). For discussion of Trump Administration initiatives aimed at achieving deregulatory goals by undermining agencies' administrative capacity, see Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 592–621 (2021).

90. *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (discussing the legally binding character of legislative rules); United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260, 266–67 (1954) (holding that agencies are bound by their own regulations until validly repealed); Env't Def. Fund, Inc. v. EPA, 716 F.2d 915, 920 (D.C. Cir. 1983) (rejecting arguments that an agency could rescind a regulation without notice-and-comment procedures because of a putative "pressing need to avoid industry compliance with regulations that were to be eliminated"). For an argument that rules delaying the effective date of regulations should be exempt from notice-and-comment requirements, see Nicholas R. Bednar, *Justifying Delay: Why Agencies Delay Compliance Dates and How They Do It*, 4 J. REGUL. COMPLIANCE 1 (2019). For a general discussion of agency authority to undo past rules, see Cary Coglianese, Gabriel Scheffler & Daniel E. Walters, *Unrules*, 73 STAN. L. REV. 885, 909 (2021).

91. 862 F.3d 1, 4 (D.C. Cir. 2017).

92. *Id.* at 9 (quoting Verizon v. FCC, 740 F.3d 623, 632 (D.C. Cir. 2014)).

the Second Circuit invalidated an agency's suspension of civil penalties adopted in a prior fuel-economy regulation because the APA's requirement to follow notice-and-comment procedures applies "with the same force when an agency seeks to delay or repeal a previously promulgated final rule."[93] These decisions effectively enforced the same legal limit discussed above with respect to DACA and the ACA delays: although agencies may prioritize some violations over others because they lack the time and resources to pursue both, enforcement discretion alone provides no authority to alter substantive legal obligations.[94]

Courts thus enforced appropriate limits on enforcement discretion in some areas. In other examples, the Trump Administration itself declined to build on the Obama Administration's examples, even when doing so would have been politically convenient. In particular, in 2018, the state of Idaho announced that it would allow the sale of new health insurance plans in the state that failed to meet coverage requirements imposed by the federal ACA.[95] Although it could have announced that it would not enforce ACA requirements either, thereby approving Idaho's action and encouraging other states to follow suit, the Trump Administration in-

93. 894 F.3d 95, 113 (2d Cir. 2018); *see also* Air All. Houston v. EPA, 906 F.3d 1049, 1065 (D.C. Cir. 2018) ("EPA may not employ delay tactics to effectively repeal a final rule while sidestepping the statutorily mandated process for revising or repealing that rule on the merits."); Am. Acad. of Pediatrics v. Food & Drug Admin., 379 F. Supp. 3d 461, 492–93 (D. Md. 2019) (rejecting agency's "across-the-board suspension" of statutory requirements as an invalid exercise of enforcement discretion); Pineros y Campesinos Unidos del Noroeste v. Pruitt, 293 F. Supp. 3d 1062, 1066 (N.D. Cal. 2018) ("By repeatedly delaying the effective date of the Pesticide Rule, EPA engaged in substantive rulemaking and was thus required to comply with the requirements of the APA."); Open Cmtys. All. v. Carson, 286 F. Supp. 3d 148, 162–63 (D.D.C. 2017) (applying principle that delaying a substantive rule is itself a substantive legal change that normally requires notice-and-comment procedures).

94. Some courts have held that agencies, at least as a default, retain authority to waive regulatory (as opposed to statutory) requirements in particular cases. Any such authority is an exercise of the agency's ongoing interpretive authority with respect to the laws it administers, not an exercise of mere enforcement discretion, and case-specific waivers of this sort do not present the same issues as an across-the-board suspension of a previously promulgated regulation or requirement. For questions presented by this type of waiver, see generally Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHICAGO-KENT L. REV. 1359 (1997). *See also* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 274 (2013) ("[W]aiver immunizes; nonenforcement merely looks the other way.").

95. Nicholas Bagley, *Idaho Is Ignoring Obamacare Rules. That Could Set Off a Catastrophic Chain Reaction.*, VOX (Feb. 24, 2018), https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt [https://perma.cc/ZNE2-6J98].

stead forcefully repudiated Idaho's policy. Making clear that the ACA—a law the Administration had hoped to repeal—"remains the law and we have a duty to enforce and uphold the law," the Department of Health and Human Services announced that it would enforce the ACA's restrictions itself if the state failed to do so.[96]

In a second example, President Trump himself promised to wipe away a disfavored law but his Administration failed to follow suit. At a Rose Garden ceremony with faith leaders in 2017, Trump assured the audience that the so-called Johnson Amendment, which denies tax-exempt status to religious organizations that engage in political activity, would no longer "interfer[e] with your First Amendment rights."[97] Earlier, Trump had promised to "totally destroy" the Johnson Amendment.[98] Yet the executive order supposedly effectuating these promises did nothing of the kind. Instead, it simply directed the Treasury Secretary to "ensure" that religious groups were not penalized in circumstances "where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury."[99]

What might explain this apparent self-restraint? As the examples illustrate, nonenforcement is hardly an inherently progressive authority. If anything, in the past it was employed more aggressively by deregulatory Republican administrations than by progressive Democratic ones.[100] Nor is pressure for restraint likely to have come from Trump himself. Despite his law-and-order rhetoric, Trump's personal commitment to the rule of law appeared highly situational. As just one illustration, at a 2017 meeting with Native

96. Letter from Seema Verma, Adm'r Ctrs. for Medicare & Medicaid Servs., U.S. Dep't of Health and Hum. Servs. to C.L. "Butch" Otter, Governor of Idaho & Dean Cameron, Dir. of the Idaho Dep't of Ins. (Mar. 8, 2018), https://www.cms.gov/CCIIO/Resources/Letters/Downloads/letter-to-Otter.pdf [https://perma.cc/6QQV-UH88]. For contemporaneous commentary and analysis, see Nicholas Bagley, *Knock It Off, Idaho. (But Carry On, Idaho.)*, Take Care Blog (Mar. 9, 2018), https://takecareblog.com/blog/knock-it-off-idaho-but-carry-on-idaho [https://perma.cc/7QTF-EWHB]; Bagley, *supra* note 95.

97. Gregory Korte & Fredreka Schouten, *Trump's Religious Freedom Order Doesn't Change Law on Political Activity*, USA Today (May 5, 2017), https://www.usatoday.com/story/news/politics/2017/05/04/president-trumps-religious-order-could-unleash-political-money/101289500/ [https://perma.cc/9MNK-C8XB].

98. *Id.*

99. Promoting Free Speech and Religious Liberty, Exec. Order No. 13,798 § 2, 82 Fed. Reg. 21,675 (May 4, 2017).

100. *See* Price, *supra* note 39, at 1120 (discussing examples).

American tribal leaders regarding regulatory barriers to resource extraction on native lands, President Trump reportedly stated: "But now it's me. The government's different now. Obama's gone; and we're doing things differently here. . . . So what I'm saying is, just do it."[101] Still more emphatically, Trump reportedly went on: "Chief, chief, . . . what are they going to do? Once you get it out of the ground are they going to make you put it back in there? . . . You've just got to do it."[102] A president who so blithely advised regulated parties to circumvent regulatory burdens by ignoring them seems unlikely to have personally opposed employing nonenforcement policies to relax politically inconvenient laws.

It is more plausible that key administration lawyers did personally oppose categorical nonenforcement, perhaps due in part to principled opposition to the Obama Administration's earlier policies. In a series of speeches in 2017 and 2018, then Deputy Attorney General Rod Rosenstein repeatedly emphasized the rule of law, which he characterized as "the principle that the law must be enforced fairly, and the government must follow neutral principles," even though "[w]hen you follow the rule of law, it does not mean that you will always be happy about the outcome. To the contrary, you know for sure that you are following the rule of law when you are not always happy with the outcome."[103] Later, Attorney General William Barr vehemently criticized lenient local prosecutors, faulting them for "undercutting the police, letting criminals off the hook, and refusing to enforce the law."[104]

The Administration, moreover, had rescinded DACA based in part on a professed judgment that the program was unlawful,[105] and throughout most of President Trump's four years in office, the Administration was defending this rescission against claims that its reasons for repealing the program were inadequate.[106] Even apart

101. Jonathan Swan, *The Unfiltered Version of Trump's Meeting with Native American Leaders*, Axios (Nov. 6, 2017), https://www.axios.com/the-unfiltered-version-of-trumps-meeting-with-native-american-leaders-1513306700-7702b071-1143-4f14-b2ef-9282ba23c2f2.html [https://perma.cc/3SWT-QHYH].

102. *Id.*

103. Rod J. Rosenstein, Deputy Att'y Gen., Remarks at the Ninth Annual Judge Thomas A. Flannery Lecture on the Administration of Justice (Nov. 1, 2017).

104. William P. Barr, Att'y Gen., Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference (Aug. 12, 2019), https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th [https://perma.cc/N4WX-EEY2].

105. Dep't of Homeland Sec. v. Regents of the Univ. of California (*UC Regents*), 140 S. Ct. 1891, 1903 (2020).

106. *See id.*

from any principled commitment to a limited view of enforcement discretion, this litigation posture may have discouraged policies that would have appeared to contradict the Administration's justification for rescinding the Obama immigration policy. Finally, it is possible that the OLC opinion upholding DAPA but casting doubt on categorical nonenforcement policies in general had some restraining effect, although the Administration ended up revoking that opinion in 2020.[107]

Overall, the Trump Administration's practice with respect to nonenforcement appears mixed. Despite pervasive under-enforcement of disfavored laws and regulations, as well as routine outbursts of lawless rhetoric by the president and some overt policies seeking to nullify binding regulations, the Administration showed restraint in other areas and sought to rescind the Obama Administration's immigration and marijuana nonenforcement initiatives. Ultimately, however, the Supreme Court stymied the DACA rescission in *UC Regents*,[108] and the Administration eventually flip-flopped on marijuana. Despite its rescission of earlier Justice Department policies under Trump's first Attorney General, the Administration never attempted meaningful enforcement of federal marijuana prohibitions against state-compliant distributors, and Trump's second Attorney General indicated he would not do so during his confirmation hearings.[109] In short, if Trump did not build expansively on earlier categorical policies, his Administration hardly repudiated the legal theory underlying them either.

C. State-Level Developments and the Biden Administration

Beginning in the mid 2010s, around the same time the Trump Administration was developing its mixed record at the federal level, nonenforcement gained considerable strength as a progressive policy tool at the state and local level. Starting in roughly 2014, a wave of self-styled "progressive prosecutors" won elections in cities across the country, including Brooklyn, Boston, Chicago, Los Angeles, San Francisco, Dallas, and Manhattan.[110] Among other reforms, many

107. *See* Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States, 38 Op. O.L.C. 39, 39 n.* (2014) (editor's note describing revocation). These examples might reflect the restraining effect on presidents of statutory provisions that vest legal authorities in other executive officers. For my discussion of this issue both in general and with a focus on the military, see Zachary S. Price, *Congress's Power over Military Offices*, 99 Tex. L. Rev. 491 (2021).

108. *See infra* Part III.

109. *See* Price, *supra* note 84, at 126.

110. For some general accounts of this development, see Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA Crim. Just. L. Rev.

such prosecutors embraced categorical nonenforcement, disclaiming prosecution of crimes including prostitution, drug possession, petty theft, and shoplifting.[111] Although the legality of such local policies should properly turn on state and local law rather than federal separation of powers,[112] these local developments, if they prove durable,[113] could influence how federal officials understand their own authority and perhaps lead to calls for similar policies at the federal level.[114]

For its part, the Biden Administration has so far carried forward the general pattern of his two predecessors. For example, President Biden doubled down on President Obama's broad claims of power with respect to immigration. On his very first day in office, President Biden issued a memorandum directing his Administration to "preserve and fortify" DACA,[115] and in August 2022 the Department of Homeland Security issued regulations formalizing the

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1, 6–15 (2019); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 296 (2019); David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 667–68 (2017).

111. *See, e.g.*, Memorandum from Alvin L. Bragg, Jr., Dist. Att'y, Cnty. of N.Y. to All Staff, Achieving Fairness and Safety (Jan. 3, 2022), https://www.manhattanda.org/wp-content/uploads/2022/01/Day-One-Letter-Policies-1.03.2022.pdf [https://perma.cc/9F84-CDJB]; Memorandum from Rachael Rollins, Dist. Att'y, Suffolk Cnty. (Mar. 25, 2019), http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf [https://perma.cc/6BSR-F74D]; Memorandum from Larry Krasner, Dist. Att'y, Cnty. of Phila., New Policies Announced Feb. 15, 2018, https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html#document/p1 [https://perma.cc/D47R-5RTP].

112. *See* Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. (forthcoming 2023).

113. Recent electoral defeats suggest a possible reversal of this trend. *See, e.g.*, Zusha Elinson & Christine Mai-Duc, *San Francisco District Attorney Chesa Boudin Recalled by Voters*, WALL ST. J. (June 8, 2022), https://www.wsj.com/articles/san-francisco-district-attorney-chesa-boudin-faces-recall-election-11654603200 [https://perma.cc/6UUW-AN4S] (reporting successful recall of San Francisco District Attorney and describing the result as "a blow to the progressive prosecutors movement").

114. For evidence of such influence, see, for example, Harper Neidig, *Biden Under Pressure to Pick New Breed of Federal Prosecutors*, THE HILL (July 11, 2021), https://thehill.com/homenews/administration/562364-biden-under-pressure-to-pick-new-breed-of-federal-prosecutors [https://perma.cc/EV3K-4528] ("With more and more cities electing progressive district attorneys who campaigned on reducing mass incarceration, reformers are pushing Biden to follow suit and pick a new breed of federal prosecutors.").

115. President Joseph R. Biden, Preserving and Fortifying Deferred Action for Childhood Arrivals (DACA), 86 Fed. Reg. 7053 (Jan. 20, 2021).

program.[116] Although the final rules preserve authority to deny applications "on a case-by-case basis" if "any factor specific to [the individual applicant] makes deferred action inappropriate,"[117] the regulations as a whole, like the original DACA program, appear designed to confer durable relief from enforcement on a substantial subset of undocumented immigrants who meet specified criteria.[118] The rule's preamble, moreover, asserted broad authority to grant deferred action programmatically as an aspect of the Department's enforcement discretion.[119]

Apart from DACA, the Biden Administration established general immigration enforcement priorities aimed at focusing arrests and deportations on recent arrivals and immigrants who pose public-safety or national-security risks.[120] Although this policy seems likely to limit enforcement in practice, and although several states have challenged it in litigation now before the Supreme Court,[121] the Administration carefully framed the policy, much like the Obama Administration's marijuana nonenforcement policies, in terms of indeterminate priorities rather than categorical assur-

116. Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736 (proposed Sept. 28, 2021).

117. 8 C.F.R. § 236.22(c).

118. *See id.* § 236.22(b) (specifying "threshold criteria" for eligibility); *see also* Deferred Action for Childhood Arrivals, 87 Fed. Reg. 53,152, 53,274 (Aug. 30, 2022) (projecting population of over 900,000 active DACA beneficiaries by 2030).

119. *See* Deferred Action for Childhood Arrivals, 87 Fed. Reg. at 53,185 (responding to comments asserting DACA's unlawfulness by noting "the fundamental role that prosecutorial discretion plays with respect to immigration enforcement"). In the initial notice of proposed rulemaking, the Department recognized that it could not disregard statutory directives or abdicate enforcement of immigration law. The Department maintained, however, that the proposed rule violated neither of these limits because the statutory scheme contemplated establishment of enforcement priorities and because the agency would "continue to enforce the immigration laws as fully as its appropriated resources allow." Deferred Action for Childhood Arrivals, 86 Fed. Reg. at 53,755–56.

120. Memorandum from Alejandro N. Mayorkas, Sec'y of Homeland Sec., to Tae D. Johnson, Acting Dir., U.S. Immigr. and Customs Enf't, Guidelines for the Enforcement of Civil Immigration Law (Sept. 30, 2021) [hereinafter *Immigration Enforcement Guidelines*], https://www.ice.gov/doclib/news/guidelines-civilimmigrationlaw.pdf [https://perma.cc/CME3-PYWW].

121. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022), *cert. granted*, No. 22A17 (22-58), 2022 WL 2841804 (U.S. July 21, 2022); *see also* Texas v. United States, 40 F.4th 205 (5th Cir. 2022) (denying stay pending appeal).

ances.[122] In separate litigation, the Sixth Circuit rejected a challenge against the policy for that reason.[123]

Beyond immigration, some evidence suggests an overall decline in levels of federal criminal prosecution,[124] but this change, too, seems to have arisen organically through a change in enforcement focus rather than through any form of determinate policy akin to DACA, DAPA, or the ACA delays. In other examples, the Administration did not claim nonenforcement power even though doing so could have been expedient. For example, although President Biden, confronting politically damaging inflation, called for a "gas tax holiday" to limit rising fuel prices, he called for legislation, rather than unilateral executive nonenforcement, to bring about this result.[125]

In sum, a decade and two presidencies after the Obama Administration's major initiatives, the record of executive nonenforcement practice appears mixed and confused. Administrations from both parties have employed nonenforcement policies to strip force from disfavored laws. In part because of court losses and litigation exigencies, however, administrations from both parties have also shown restraint in some areas, pulling back from establishing a broad norm of unrestricted enforcement discretion. Future developments in the executive branch may therefore depend significantly on what happens in court, but the Supreme Court's most important decision to date on these questions has only compounded the confusion, as the next Part explains.

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122. *Immigration Enforcement Guidelines*, *supra* note 120, at 2 (establishing policy to "focus" enforcement efforts without "lessen[ing] our commitment to enforce immigration law to the best of our ability").

123. Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022).

124. Thomas Hogan & Joseph McGettigan, *The Disappearing Federal Prosecutor*, CITY JOURNAL (Aug. 22, 2022), https://www.city-journal.org/disappearing-federal-prosecutor [https://perma.cc/H65Y-ZCKL] (reporting evidence that the overall number of federal indictments and informations declined thirty percent from 2010 to 2021, with a particularly sharp drop from 2019 to 2021).

125. White House, *Fact Sheet: President Biden Calls for a Three-Month Federal Gas Tax Holiday* (June 22, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/22/fact-sheet-president-biden-calls-for-a-three-month-federal-gas-tax-holiday/ [https://perma.cc/65M6-2H5S] (reporting that President Biden "is calling on Congress to suspend the federal gas tax for three months, through September").

III.
RECENT DEVELOPMENTS IN THE JUDICIARY

If executive practice appears unsettled, current judicial precedent appears equally so. The Supreme Court's most significant recent ruling on executive nonenforcement—its decision in *UC Regents* setting aside the Trump Administration's attempted rescission of DACA[126]—risks either compounding existing confusion or even inviting renewed executive unilateralism. Indeed, although the Court's majority opinion included multiple indications that it did not intend to make any broad changes to the law, the decision might well encourage further use of executive nonenforcement policies in the Biden Administration and beyond. On the other hand, pending litigation challenging the Biden Administration's immigration enforcement priorities could tempt the Court in the opposite direction—towards invalidating a policy that should be sustained, despite its permissive character, because of its priority-setting character.[127] Meanwhile, ongoing litigation in lower courts over DACA and other issues could eventually lead to clearer judicial resolution of enforcement-related questions.[128]

A. The Supreme Court's Mistake in UC Regents

In *UC Regents*, the Supreme Court rejected the Trump Administration's effort to repeal DACA. Assessing whether the repeal was "arbitrary and capricious" in violation of the Administrative Procedure Act, the Court concluded that DACA's rescission was unlawful because the Administration inadequately explained the reasons for its action. In particular, despite recognizing that the Secretary of Homeland Security was bound by an earlier determination by the Attorney General that DACA was unlawful,[129] the Court faulted the Secretary for failing to consider that she might have canceled certain legal benefits associated with deferred action without terminating the policy's "forbearance component," meaning its promise that beneficiaries would not be deported.[130]

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126. 140 S. Ct. 1891, 1901 (2020).

127. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022), *cert. granted*, No. 22A17 (22-58), 2022 WL 2841804 (U.S. July 21, 2022).

128. Texas v. United States, 50 F.4th 498, 508 (5th Cir. 2022) (upholding vacatur of directives establishing the DACA program but remanding case to the district court for consideration of new regulations).

129. *UC Regents*, 140 S. Ct. at 1910.

130. *Id.* at 1897–99.

In addition, as a second and apparently independent defect in the agency's decision-making, the majority faulted the Secretary for inadequately considering the reliance interests of DACA beneficiaries. Instead of the terse statement it issued upon initially rescinding DACA, the Secretary should have "assess[ed] whether there were reliance interests, determine[d] whether they were significant, and weigh[ed] any such interests against competing policy concerns."[131] In response to a district court's rejection of an earlier explanation, the Secretary had, in fact, issued a new explanation making clear that she considered it "critically important for [the government] to project a message that [left] no doubt regarding the clear, consistent, and transparent enforcement of the immigration laws against all classes and categories of aliens."[132] Yet the Court disregarded this statement as a "post hoc rationalization" that could not justify the policy under arbitrariness review.[133]

The Court's reasoning in *UC Regents* was narrow to the point of incoherence and seemed calculated to limit the decision's precedential implications.[134] Nevertheless, key elements of the Court's majority opinion could encourage future aggressive policies like DACA. To begin with, by distinguishing between DACA's affirmative benefits and its "forbearance component," the Court appeared to validate employing "forbearance" in the unusually determinate and prospective manner that characterized DACA. The Secretary could have issued a policy, akin to the Obama Administration's marijuana guidance, that assigned low priority to enforcing immigration laws against sympathetic and otherwise law-abiding immigrants of the sort protected by DACA; indeed, the Department did just that before adopting the DACA policy, and the Biden Administration did it again afterwards in its general immigration enforcement

131. *Id.* at 1915.

132. Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec. (June 22, 2018); *see UC Regents*, 140 S. Ct. at 1904.

133. *UC Regents*, 140 S. Ct. at 1908–09. This aspect of the decision could cast doubt on the previously accepted practice of remanding flawed agency decisions without vacating them. *See* Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for* Chenery I*'s Ordinary Remand Rule?*, YALE J. REG.: NOTICE & COMMENT BLOG (June 19, 2020), https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-chenery-is-ordinary-remand-rule/ [https://perma.cc/C3HE-GZNN].

134. For my critique of the opinion's internal contradictions, and further elaboration of some points advanced here, see Zachary S. Price, *DACA and the Need for Symmetrical Legal Principles*, SCOTUSBLOG (June 19, 2020, 3:51 PM), https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles/ [https://perma.cc/PY8A-RAWQ].

priorities.[135] Yet DACA differed from such a policy precisely in that it entailed granting prospective individualized assurances of nonenforcement to a large category of deportable immigrants. This further step requires affirmative statutory authorization; it is not lawful simply by virtue of executive enforcement discretion. Despite professing not to rule on DACA's ultimate legality, however, the *UC Regents* majority implied that even such determinate promises of nonenforcement are mere garden-variety exercises of executive "forbearance."[136]

Furthermore, by applying an exacting form of arbitrariness review to DACA's repeal, the Court encouraged further use of nonenforcement policies—even potentially unlawful ones. As discussed earlier in Part I.C, the central constraint on abuse of nonenforcement policies is their revocability: executive officials may hesitate to invite unlawful conduct with permissive policies if they know their successors in office may rescind those policies and prosecute those who relied on them.[137] Accordingly, imposing any significant burden of explanation for the repeal of a nonenforcement policy weakens the central constraint on adopting such policies in the first place. This problem is particularly severe if the past policy was in fact unlawful, as I argued was true of DACA (and as Justice Thomas argued in his *UC Regents* dissent).[138] Rigorously reviewing an agency's reasons for canceling an unlawful program risks freezing such programs in place instead of facilitating restoration of law-bound governance.

In *UC Regents*, moreover, the Court compounded this entrenchment problem by faulting the agency for insufficient consideration of reliance interests. To the extent it was lawful, DACA was justified as an exercise of agency enforcement discretion; DHS characterized the policy as an exercise of "prosecutorial discretion" and argued that past programmatic grants of deferred action,

135. *See* Cox & Rodríguez, *supra* note 36, at 136 (discussing earlier policies); *Immigration Enforcement Guidelines*, *supra* note 120 (new policy).

136. Cristina Rodríguez has suggested that the decision's apparent decoupling of nonenforcement from the associated benefits of deferred action could eventually enable courts to invalidate the latter without setting aside the former. *See* Cristina M. Rodríguez, *Reading* Regents *and the Political Significance of Law*, 2020 SUP. CT. REV. 1, 14 (2020) ("Despite not addressing DACA's legality squarely, the construction and reasoning of the Court's opinion are both highly suggestive: whereas forbearance seems safe, the future of work authorization and other benefits is in doubt.").

137. Price, *supra* note 50.

138. *UC Regents*, 140 S. Ct. at 1919 (Thomas, J., concurring in part and dissenting in part).

though more limited in scope and addressed to more particularized circumstances, afforded precedents for the larger DACA program.[139] If DACA was simply a valid exercise of enforcement discretion, however, then a necessary consequence of this theory should have been that the DACA grants were also revocable, as indeed the agency repeatedly stated they were. Understanding arbitrariness review to protect reliance in this context, as the Court did in *UC Regents*, risks weakening a central constraint on adopting permissive policies in the first place.

In sum, multiple aspects of the Court's reasoning in *UC Regents* could encourage further use of nonenforcement policies, even determinate and prospective ones like DACA, to reshape statutory obligations for regulated parties. Earlier, by affirming the Fifth Circuit's invalidation of DAPA by an equally divided vote, the Court seemed to recognize (or at least leave in place) the legal limits on such policies that lower courts recognized in cases like *Clean Air Council* and *NRDC v. NHTSA*.[140] *UC Regents*, however, has now cast doubt on those limits, potentially encouraging executive policies that invite reliance on promised nonenforcement.[141]

The best argument in *UC Regents'* favor may be that requiring clear articulation of interests negatively affected by a policy change promotes democratic accountability by requiring the agency to acknowledge and accept its new policy's costs.[142] Yet here, at least in its second policy statement (which the Court majority conveniently disregarded), the agency did in fact take responsibility for the re-

139. *See* Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [https://perma.cc/5KJT-LRQ9] (policy document establishing DACA program). For a later discussion by the Justice Department of earlier deferred-action programs and their significance, see Prioritizing and Deferring Removal of Certain Aliens Unlawfully Present in the United States, 38 Op. O.L.C. 39, 57–63 (2014). For a narrow defense of DACA's legality based on these earlier policies, see Peter Margulies, *Immigration Law's Boundary Problem: Determining the Scope of Executive Discretion*, HASTINGS L.J. (forthcoming 2023) (draft at 47–51).

140. Clean Air Council v. Pruitt, 862 F.3d 1, 4 (D.C. Cir. 2017); NRDC v. NHTSA, 894 F.3d 95, 113 (2d Cir. 2018).

141. *Cf.* Ronald A. Cass, *The Umpire Strikes Back: Expanding Judicial Discretion for Review of Administrative Actions* 30 (Ctr. for the Study of the Admin. State, Working Paper No. 21-14, 2021) (faulting *UC Regents* for "introduc[ing] extra degrees of flexibility for courts reviewing agency exercises of discretion").

142. For an extended argument for exercising judicial review to achieve this effect, see Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, 130 YALE L.J. 1748 (2021).

scission's harsh effects by deeming it critically "important" for the government to "project a message" that leaves no doubt regarding the continued enforcement of the immigration laws "against all classes and categories of aliens."[143] In context, such generalized acknowledgment of policy tradeoffs should have been enough; requiring greater specificity only invites inevitably subjective and manipulable judicial assessments of how much detail suffices. In the enforcement context, furthermore, any benefit to democratic accountability in requiring such a statement is offset by the loss to statutory primacy and law-bound governance that results from impairing agencies' authority to reverse permissive policies.[144]

In short, despite the opinion's ad hoc character, the Court's mistaken decision in *UC Regents* confuses the law surrounding executive nonenforcement policies and at least opens the door to future executive unilateralism.

*B. Post-*Regents *Cases*

In the wake of *UC Regents*, some court rulings concretely demonstrated the decision's potential to freeze in place discretionary policies adopted in prior administrations. Shortly after President Biden took office, a lower court enjoined his attempted termination of the Trump Administration's so-called "Remain-in-Mexico" policy, a policy that generally required migrants from Mexico seeking asylum in the United States to wait in Mexico until their asylum claims were resolved.[145] Citing the government's failure to address alternatives and reliance interests, the district court held in this case that *UC Regents* required enjoining the revocation.[146] The

143. Memorandum from Kirstjen M. Nielsen, Sec'y of Homeland Sec. (June 22, 2018); *see UC Regents*, 140 S. Ct. at 1904.

144. For an analysis of the DACA rescission as an example of "agency statutory abnegation," meaning an attempt to undo past regulatory action by claiming the past action was undertaken without proper legal authority, see William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019).

145. *See* State v. Biden, 10 F.4th 538 (5th Cir. 2021) (denying stay pending appeal of district court decision barring termination of the Remain-in-Mexico policy). For my analysis of this ruling and its connection to *UC Regents*, see Zachary Price, *Paying the Piper in the Remain-in-Mexico Case*, YALE J. REG.: NOTICE & COMMENT BLOG (Sept. 1, 2021), https://www.yalejreg.com/nc/paying-the-piper-in-the-remain-in-mexico-case-by-zachary-price/ [https://perma.cc/BNG3-MRCL]. For the eventual decision on the merits, see Texas v. Biden, 554 F. Supp. 3d 818 (N.D. Tex. 2021), *enforced in part*, No. 2:21-CV-067-Z, 2021 WL 5399844 (N.D. Tex. Nov. 18, 2021), *aff'd*, 20 F.4th 928 (5th Cir. 2021), *rev'd and remanded*, 142 S. Ct. 2528 (2022).

146. *Biden*, 554 F. Supp. 3d at 849.

Fifth Circuit denied a stay pending appeal,[147] and the Supreme Court did the same, noting in a terse per curiam opinion that "[t]he applicants have failed to show a likelihood of success on the claim that the memorandum rescinding the [policy] was not arbitrary and capricious."[148] Later, however, after the agency provided further explanation for the policy change, the Supreme Court rejected challenges to the rescission on the merits.[149] Although this ultimate outcome may suggest that *UC Regents* will have limited significance going forward, the earlier injunction and stay denials illustrate how the decision could at least sometimes empower courts to block reversals of discretionary policies through an intensive form of arbitrariness review.[150]

Meanwhile, as noted, a case now before the Supreme Court challenges the Biden Administration's immigration enforcement priorities.[151] This case could tempt the Court to err in the opposite direction and employ arbitrariness review to override an enforcement policy that is too lax rather than too rigid. Assuming it has jurisdiction and the policy at issue is not otherwise unlawful, the Supreme Court should reject this challenge, much as the Sixth Circuit did in parallel litigation.[152] The problem here is not that the policy in question necessarily satisfies appropriate standards of faithful execution; on the contrary, the Take Care Clause may well require a more serious effort at bringing about full legal compliance. Yet even if the policy falls short of ideal faithful execution, courts lack administrable standards for determining whether the priorities reflected in the policy are adequate and appropriate. In other words, because the government has framed its policy in indeterminate terms—as a set of priorities rather than a categorical or

147. *Biden*, 10 F.4th at 552–57.

148. Biden v. Texas, 142 S. Ct. 926 (2021).

149. Biden v. Texas, 142 S. Ct. 2528, 2535 (2022).

150. One leading proponent of DACA's legality has raised concern about this aspect of the decision. *See* Rodríguez, *supra* note 136, at 30–31 ("[B]ecause just about every agency action generates reliance interests of some kind, the way the Court deploys them in *Regents* could undermine the very act of policy change."). In fact, on remand from the Supreme Court's decision, the district court again stayed the rescission of the Remain-in-Mexico policy, holding that the rescission was likely arbitrary and capricious because of the agency's "[f]ailure to adequately consider the costs imposed on States and their reliance interests." Texas v. Biden, No. 2:21-CV-067-Z, 2022 WL 17718634, at *17 (N.D. Tex. Dec. 15, 2022).

151. Texas v. United States, No. 6:21-CV-00016, 2022 WL 2109204 (S.D. Tex. June 10, 2022), *cert. granted*, No. 22A17 (22-58), 2022 WL 2841804 (U.S. July 21, 2022); *see also* Texas v. United States, 40 F.4th 205 (5th Cir. 2022) (denying stay pending appeal).

152. Arizona v. Biden, 40 F.4th 375 (6th Cir. 2022).

prospective assurance of nonenforcement to any particular immigrants—courts lack any clear yardstick for evaluating its adequacy and should therefore treat the policy's lawfulness as a question for the political process rather than judicial review.[153] The Supreme Court's unusual choice to grant certiorari before judgment and hear a direct appeal from the district court could suggest it is headed in this direction (or towards upholding the policy on other grounds), but on the other hand the Court pointedly denied a stay pending appeal,[154] a choice that could suggest skepticism about the policy's validity.

Finally, other ongoing litigation has raised, once again, the question of DACA's legality on the merits. As of this writing, one district court in Texas has deemed DACA unlawful, though the court stayed its ruling's effect as to then-existing DACA beneficiaries.[155] On appeal, the Fifth Circuit affirmed, but nevertheless remanded the case to the district court to consider the new regulations, keeping the existing stay in place for the time being.[156] Meanwhile, another preliminary injunction issued by a different federal district court in 2018 (before *UC Regents*) appears to bar the government from terminating some existing DACA grants.[157] Absent new legislation, this ongoing litigation seems likely to place the question of DACA's legality before the Supreme Court at last, potentially forcing it to clarify the confused signals that both it and the executive branch have sent regarding the scope of executive nonenforcement authority.

CONCLUSION

In sum, as a matter of both practice and case law, federal nonenforcement appears to stand at a crossroads, with two alternative

153. For my argument for incomplete judicial enforcement of limits on enforcement discretion, see Price, *supra* note 22.

154. United States v. Texas, No. 22A17 (22-58), 2022 WL 2841804 (U.S. July 21, 2022) (granting certiorari before judgment but denying stay pending appeal).

155. Texas v. United States, 549 F. Supp. 3d 572, 624 (S.D. Tex. 2021) (ordering vacatur of the DACA policy but staying the order as to individuals previously granted deferred action under DACA); Texas v. United States, No. 1:18-CV-00068, 2021 WL 3022434, at *2 (S.D. Tex. July 16, 2021) (order issuing permanent injunction).

156. Texas v. United States, 50 F.4th 498, 508 (5th Cir. 2022).

157. Inland Empire-Immigrant Youth Collective v. Nielsen, No. EDCV172048PSGSHKX, 2018 WL 1061408, at *1 (C.D. Cal. Feb. 26, 2018). The initial notice of proposed rules to codify DACA discussed the government's understanding of this injunction's effect. *See* Deferred Action for Childhood Arrivals, 86 Fed. Reg. 53,736, 53,751 (proposed Sept. 28, 2021).

paths open. The Biden Administration and its successors might employ broad, programmatic nonenforcement to reshape substantive laws, or they might simply leave DACA, marijuana nonenforcement, and the ACA delays lingering as isolated outliers. For their part, courts might build on *UC Regents* to validate expansive nonenforcement authority and complicate future reversal of permissive executive policies, or they might instead confine *UC Regents* to its facts, treating it as a case-specific ruling with limited general significance. In pending litigation over the Biden Administration's immigration enforcement policy, the Supreme Court might curtail executive discretion, or it might instead preserve executive authority to set enforcement priorities, with or without some indication that faithful execution should require greater executive effort than courts can compel through judicial review. Finally, in lower-court litigation over DACA, courts might finally clarify the scope of executive authority, or they might reach some muddled fact-specific resolution of the case, or perhaps Congress will finally step in to clarify the applicable law. Further compounding the uncertainty, although federal and local nonenforcement should present distinct legal issues from state and local prosecutorial leniency, continuing controversy over local prosecutorial policies might end up influencing legal understandings at the federal level.

Clearer court decisions or executive-branch legal practices in the years ahead could resolve these questions. As courts, executive branch lawyers, and other federal decision makers confront future enforcement-related questions, they should hew to the legal framework outlined in Part I of this Article. Categorical and prospective nonenforcement assurances are unlawful without statutory authorization; courts may invalidate such policies if they are unduly determinate; and courts generally should not protect regulated parties' reliance by blocking future reversals of permissive executive-branch policies. These principles could provide clear ground rules, applicable equally to administrations from both parties. They would also maintain a strong norm of statutory primacy, one that channels political conflict over outdated or unpopular laws into durable legislative reforms instead of changeable executive policies.

That outcome would best accord with the formal constitutional structure while also providing consistent rules of engagement for our polarized and conflicted political system. It should be clear at this point, however, that if courts and the executive branch instead choose the alternative path of unbounded executive enforcement discretion, the costs and benefits of this choice are unlikely to fall entirely on one side of our current political divides. On the con-

trary, administrations from both parties can be expected to relish undermining disfavored laws through explicit nonenforcement assurances, particularly if courts will later protect regulated parties' reliance and prevent future reversals. Much as presidential administration began as a partisan tool and became a bipartisan approach to federal governance, expanded notions of nonenforcement authority could enable a new bipartisan blow to legislative primacy—one that we all may eventually regret.