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CLASS II

Legal, Litigation and Policy Issues in *United States v. Texas* and President Obama's Deferred Action Immigration Pan

1.5 CLE Credit

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Legal, Litigation and Policy Issues in United States v. Texas and President Obama's Deferred Action Immigration Plan

This program will explore the legal, policy and litigation strategy issues in *United States v. Texas*, a case before the Supreme Court this Term. At issue a challenge by Texas and other states to President Obama's plan for providing deferred action status to noncitizens who arrived in the United States as minors and to noncitizens who are parents of United States citizen or lawful permanent resident children. The program will unpack the legal status of "deferred action" and arguments about whether a broad grant of deferred action status by the Executive violates its Constitutional and statutory responsibilities. The program will also explore litigation decisions by both sides and how they have held up national implementation of the President's plan for over a year.

Readings:

- Jeh Johnson, Secretary of the Department of Homeland Security, Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014) https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf
- Memorandum from the Office of Legal Counsel to the Sec'y of Homeland Sec. and the Counsel to the President 10 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf
- Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law Redux, http://www.yalelawjournal.org/article/the-president-and-immigration-law-redux
- Briefs in *United States v. Texas*, No. 15-674, http://www.scotusblog.com/case-files/cases/united-states-v-texas/

15-674 UNITED STATES V. TEXAS

DECISION BELOW: 2015 WL 6873190

LOWER COURT CASE NUMBER: 15-40238

QUESTION PRESENTED:

The Department of Homeland Security has long engaged in "a regular practice * * * known as 'deferred action,'" in which the Secretary "exercis[es] [his] discretion" to forbear, "for humanitarian reasons or simply for [his] own convenience," from removing particular aliens from the United States. *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-484 (1999). On November 20, 2014, the Secretary issued a memorandum (Guidance) directing his subordinates to establish a process for considering deferred action for certain aliens who have lived in the United States for five years and either came here as children or already have children who are U.S. citizens or permanent residents.

The questions presented are:

1. Whether a State that voluntarily provides a subsidy to all aliens with deferred action has Article III standing and a justiciable cause of action under the Administrative Procedure Act (APA), 5 U.S.C. 500 *et seq.*, to challenge the Guidance because it will lead to more aliens having deferred action.

2. Whether the Guidance is arbitrary and capricious or otherwise not in accordance with law.

3. Whether the Guidance was subject to the APA's notice-and-comment procedures.

IN ADDITION TO THE QUESTIONS PRESENTED BY THE PETITION, THE PARTIES ARE DIRECTED TO BRIEF AND ARGUE THE FOLLOWING QUESTION: “WHETHER THE GUIDANCE VIOLATES THE TAKE CARE CLAUSE OF THE CONSTITUTION, ART. II, §3.”

CERT. GRANTED 1/19/2016

The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others

The Department of Homeland Security's proposed policy to prioritize the removal of certain aliens unlawfully present in the United States would be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of U.S. citizens and legal permanent residents would also be a permissible exercise of DHS's discretion to enforce the immigration laws.

The Department of Homeland Security's proposed deferred action program for parents of recipients of deferred action under the Deferred Action for Childhood Arrivals program would not be a permissible exercise of DHS's enforcement discretion.

November 19, 2014

MEMORANDUM OPINION FOR THE SECRETARY OF HOMELAND SECURITY AND THE COUNSEL TO THE PRESIDENT

You have asked two questions concerning the scope of the Department of Homeland Security's discretion to enforce the immigration laws. First, you have asked whether, in light of the limited resources available to the Department ("DHS") to remove aliens unlawfully present in the United States, it would be legally permissible for the Department to implement a policy prioritizing the removal of certain categories of aliens over others. DHS has explained that although there are approximately 11.3 million undocumented aliens in the country, it has the resources to remove fewer than 400,000 such aliens each year. DHS's proposed policy would prioritize the removal of aliens who present threats to national security, public safety, or border security. Under the proposed policy, DHS officials could remove an alien who did not fall into one of these categories provided that an Immigration and Customs Enforcement ("ICE") Field Office Director determined that "removing such an alien would serve an important federal interest." Draft Memorandum for Thomas S. Winkowski, Acting Director, ICE, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Policies for the Apprehension, Detention, and Removal of Undocumented Immigrants* at 5 (Nov. 17, 2014) ("Johnson Prioritization Memorandum").

Second, you have asked whether it would be permissible for DHS to extend deferred action, a form of temporary administrative relief from removal, to certain aliens who are the parents of children who are present in the United States. Specifically, DHS has proposed to implement a program under which an alien could apply for, and would be eligible to receive, deferred action if he or she is not a DHS removal priority under the policy described above; has continuously resided in the United States since before January 1, 2010; has a child who is either a U.S. citizen or a lawful permanent resident; is physically present in the United

States both when DHS announces its program and at the time of application for deferred action; and presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Draft Memorandum for Leon Rodriguez, Director, U.S. Citizenship and Immigration Services, et al., from Jeh Charles Johnson, Secretary of Homeland Security, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and Others* at 4 (Nov. 17, 2014) ("Johnson Deferred Action Memorandum"). You have also asked whether DHS could implement a similar program for parents of individuals who have received deferred action under the Deferred Action for Childhood Arrivals ("DACA") program.

As has historically been true of deferred action, these proposed deferred action programs would not "legalize" any aliens who are unlawfully present in the United States: Deferred action does not confer any lawful immigration status, nor does it provide a path to obtaining permanent residence or citizenship. Grants of deferred action under the proposed programs would, rather, represent DHS's decision not to seek an alien's removal for a prescribed period of time. *See generally Reno v. Am.-Arab Anti-Discrim. Comm.*, 525 U.S. 471, 483–84 (1999) (describing deferred action). Under decades-old regulations promulgated pursuant to authority delegated by Congress, *see* 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3), aliens who are granted deferred action—like certain other categories of aliens who do not have lawful immigration status, such as asylum applicants—may apply for authorization to work in the United States in certain circumstances, 8 C.F.R. § 274a.12(c)(14) (providing that deferred action recipients may apply for work authorization if they can show an "economic necessity for employment"); *see also* 8 C.F.R. § 109.1(b)(7) (1982). Under DHS policy guidance, a grant of deferred action also suspends an alien's accrual of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I), provisions that restrict the admission of aliens who have departed the United States after having been unlawfully present for specified periods of time. A grant of deferred action under the proposed programs would remain in effect for three years, subject to renewal, and could be terminated at any time at DHS's discretion. *See* Johnson Deferred Action Memorandum at 2, 5.

For the reasons discussed below, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be permissible exercises of DHS's discretion to enforce the immigration laws. We further conclude that, as it has been described to us, the proposed deferred action program for parents of DACA recipients would not be a permissible exercise of enforcement discretion.

I.

We first address DHS's authority to prioritize the removal of certain categories of aliens over others. We begin by discussing some of the sources and limits of

DHS's enforcement discretion under the immigration laws, and then analyze DHS's proposed prioritization policy in light of these considerations.

A.

DHS's authority to remove aliens from the United States rests on the Immigration and Nationality Act of 1952 ("INA"), as amended, 8 U.S.C. §§ 1101 *et seq.* In the INA, Congress established a comprehensive scheme governing immigration and naturalization. The INA specifies certain categories of aliens who are inadmissible to the United States. *See* 8 U.S.C. § 1182. It also specifies "which aliens may be removed from the United States and the procedures for doing so." *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012). "Aliens may be removed if they were inadmissible at the time of entry, have been convicted of certain crimes, or meet other criteria set by federal law." *Id.* (citing 8 U.S.C. § 1227); *see* 8 U.S.C. § 1227(a) (providing that "[a]ny alien . . . in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien" falls within one or more classes of deportable aliens); *see also* 8 U.S.C. § 1182(a) (listing classes of aliens ineligible to receive visas or be admitted to the United States). Removal proceedings ordinarily take place in federal immigration courts administered by the Executive Office for Immigration Review, a component of the Department of Justice. *See id.* § 1229a (governing removal proceedings); *see also id.* §§ 1225(b)(1)(A), 1228(b) (setting out expedited removal procedures for certain arriving aliens and certain aliens convicted of aggravated felonies).

Before 2003, the Department of Justice, through the Immigration and Naturalization Service ("INS"), was also responsible for providing immigration-related administrative services and generally enforcing the immigration laws. In the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135, Congress transferred most of these functions to DHS, giving it primary responsibility both for initiating removal proceedings and for carrying out final orders of removal. *See* 6 U.S.C. §§ 101 *et seq.*; *see also Clark v. Martinez*, 543 U.S. 371, 374 n.1 (2005) (noting that the immigration authorities previously exercised by the Attorney General and INS "now reside" in the Secretary of Homeland Security and DHS). The Act divided INS's functions among three different agencies within DHS: U.S. Citizenship and Immigration Services ("USCIS"), which oversees legal immigration into the United States and provides immigration and naturalization services to aliens; ICE, which enforces federal laws governing customs, trade, and immigration; and U.S. Customs and Border Protection ("CBP"), which monitors and secures the nation's borders and ports of entry. *See* Pub. L. No. 107-296, §§ 403, 442, 451, 471, 116 Stat. 2135, 2178, 2193, 2195, 2205; *see also Name Change From the Bureau of Citizenship and Immigration Services to U.S. Citizenship and Immigration Services*, 69 Fed. Reg. 60938, 60938 (Oct. 13, 2004); *Name Change of Two DHS Components*, 75 Fed. Reg. 12445, 12445 (Mar. 16, 2010). The Secretary of Homeland Security is thus now "charged with the administration and

enforcement of [the INA] and all other laws relating to the immigration and naturalization of aliens." 8 U.S.C. § 1103(a)(1).

As a general rule, when Congress vests enforcement authority in an executive agency, that agency has the discretion to decide whether a particular violation of the law warrants prosecution or other enforcement action. This discretion is rooted in the President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, and it reflects a recognition that the "faithful[]" execution of the law does not necessarily entail "act[ing] against each technical violation of the statute" that an agency is charged with enforcing. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). Rather, as the Supreme Court explained in *Chaney*, the decision whether to initiate enforcement proceedings is a complex judgment that calls on the agency to "balanc[e] . . . a number of factors which are peculiarly within its expertise." *Id.* These factors include "whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and . . . whether the agency has enough resources to undertake the action at all." *Id.* at 831; *cf. United States v. Armstrong*, 517 U.S. 456, 465 (1996) (recognizing that exercises of prosecutorial discretion in criminal cases involve consideration of "'[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan'" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))). In *Chaney*, the Court considered and rejected a challenge to the Food and Drug Administration's refusal to initiate enforcement proceedings with respect to alleged violations of the Federal Food, Drug, and Cosmetic Act, concluding that an agency's decision not to initiate enforcement proceedings is presumptively immune from judicial review. *See* 470 U.S. at 832. The Court explained that, while Congress may "provide[] guidelines for the agency to follow in exercising its enforcement powers," in the absence of such "legislative direction," an agency's non-enforcement determination is, much like a prosecutor's decision not to indict, a "special province of the Executive." *Id.* at 832–33.

The principles of enforcement discretion discussed in *Chaney* apply with particular force in the context of immigration. Congress enacted the INA against a background understanding that immigration is "a field where flexibility and the adaptation of the congressional policy to infinitely variable conditions constitute the essence of the program." *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 543 (1950) (internal quotation marks omitted). Consistent with this understanding, the INA vested the Attorney General (now the Secretary of Homeland Security) with broad authority to "establish such regulations; . . . issue such instructions; and perform such other acts as he deems necessary for carrying out his authority" under the statute. 8 U.S.C. § 1103(a)(3). Years later, when Congress created the Department of Homeland Security, it expressly charged DHS with responsibility for "[e]stablishing national immigration enforcement policies and

priorities." Homeland Security Act of 2002, Pub. L. No. 107-296, § 402(5), 116 Stat. 2135, 2178 (codified at 6 U.S.C. § 202(5)).

With respect to removal decisions in particular, the Supreme Court has recognized that "the broad discretion exercised by immigration officials" is a "principal feature of the removal system" under the INA. *Arizona*, 132 S. Ct. at 2499. The INA expressly authorizes immigration officials to grant certain forms of discretionary relief from removal for aliens, including parole, 8 U.S.C. § 1182(d)(5)(A); asylum, *id.* § 1158(b)(1)(A); and cancellation of removal, *id.* § 1229b. But in addition to administering these statutory forms of relief, "[f]ederal officials, as an initial matter, must decide whether it makes sense to pursue removal at all." *Arizona*, 132 S. Ct. at 2499. And, as the Court has explained, "[a]t each stage" of the removal process—"commenc[ing] proceedings, adjudicat[ing] cases, [and] execut[ing] removal orders"—immigration officials have "discretion to abandon the endeavor." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483 (quoting 8 U.S.C. § 1252(g) (alterations in original)). Deciding whether to pursue removal at each of these stages implicates a wide range of considerations. As the Court observed in *Arizona*:

> Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The dynamic nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities.

132 S. Ct. at 2499.

Immigration officials' discretion in enforcing the laws is not, however, unlimited. Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952). These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is "faithful[]" to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules. And because the exercise of enforcement discretion generally is not subject to judicial review, *see*

Chaney, 470 U.S. at 831–33, neither the Supreme Court nor the lower federal courts have squarely addressed its constitutional bounds. Rather, the political branches have addressed the proper allocation of enforcement authority through the political process. As the Court noted in *Chaney*, Congress "may limit an agency's exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue." *Id.* at 833. The history of immigration policy illustrates this principle: Since the INA was enacted, the Executive Branch has on numerous occasions exercised discretion to extend various forms of immigration relief to categories of aliens for humanitarian, foreign policy, and other reasons. When Congress has been dissatisfied with Executive action, it has responded, as *Chaney* suggests, by enacting legislation to limit the Executive's discretion in enforcing the immigration laws.[1]

Nonetheless, the nature of the Take Care duty does point to at least four general (and closely related) principles governing the permissible scope of enforcement discretion that we believe are particularly relevant here. First, enforcement decisions should reflect "factors which are peculiarly within [the enforcing agency's] expertise." *Chaney*, 470 U.S. at 831. Those factors may include considerations related to agency resources, such as "whether the agency has enough resources to undertake the action," or "whether agency resources are best spent on this violation or another." *Id*. Other relevant considerations may include "the proper ordering of [the agency's] priorities," *id.* at 832, and the agency's assessment of "whether the particular enforcement action [at issue] best fits the agency's overall policies," *id*. at 831.

Second, the Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences. *See id*. at 833 (an agency may not "disregard legislative direction in the statutory scheme that [it] administers"). In other words, an agency's enforcement decisions should be consonant with, rather than contrary to, the congressional policy underlying the statutes the agency is charged with administering. *Cf. Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (explaining that where Congress has given an agency the power to administer a statutory scheme, a court will not vacate the agency's decision about the proper administration of the statute unless, among other things, the agency "'has relied on factors which Congress had not intended it to consider'" (quoting

[1] *See, e.g.*, Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 Yale L.J. 458, 503–05 (2009) (describing Congress's response to its dissatisfaction with the Executive's use of parole power for refugee populations in the 1960s and 1970s); *see also, e.g.*, *infra* note 5 (discussing legislative limitations on voluntary departure and extended voluntary departure).

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983))).

Third, the Executive Branch ordinarily cannot, as the Court put it in *Chaney*, "'consciously and expressly adopt[] a general policy' that is so extreme as to amount to an abdication of its statutory responsibilities." 470 U.S. at 833 n.4 (quoting *Adams v. Richardson*, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (en banc)); *see id.* (noting that in situations where an agency had adopted such an extreme policy, "the statute conferring authority on the agency might indicate that such decisions were not 'committed to agency discretion'"). Abdication of the duties assigned to the agency by statute is ordinarily incompatible with the constitutional obligation to faithfully execute the laws. *But see, e.g.*, *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 200 (1994) (noting that under the Take Care Clause, "the President is required to act in accordance with the laws—including the Constitution, which takes precedence over other forms of law").

Finally, lower courts, following *Chaney*, have indicated that non-enforcement decisions are most comfortably characterized as judicially unreviewable exercises of enforcement discretion when they are made on a case-by-case basis. *See, e.g.*, *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). That reading of *Chaney* reflects a conclusion that case-by-case enforcement decisions generally avoid the concerns mentioned above. Courts have noted that "single-shot non-enforcement decisions" almost inevitably rest on "the sort of mingled assessments of fact, policy, and law . . . that are, as *Chaney* recognizes, peculiarly within the agency's expertise and discretion." *Crowley Caribbean Transp.*, 37 F.3d at 676–77 (emphasis omitted). Individual enforcement decisions made on the basis of case-specific factors are also unlikely to constitute "general polic[ies] that [are] so extreme as to amount to an abdication of [the agency's] statutory responsibilities." *Id.* at 677 (quoting *Chaney*, 477 U.S. at 833 n.4). That does not mean that all "general policies" respecting non-enforcement are categorically forbidden: Some "general policies" may, for example, merely provide a framework for making individualized, discretionary assessments about whether to initiate enforcement actions in particular cases. *Cf. Reno v. Flores*, 507 U.S. 292, 313 (1993) (explaining that an agency's use of "reasonable presumptions and generic rules" is not incompatible with a requirement to make individualized determinations). But 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. *Crowley Caribbean Transp.*, 37 F.3d at 677.

B.

We now turn, against this backdrop, to DHS's proposed prioritization policy. In their exercise of enforcement discretion, DHS and its predecessor, INS, have long

employed guidance instructing immigration officers to prioritize the enforcement of the immigration laws against certain categories of aliens and to deprioritize their enforcement against others. *See, e.g.*, INS Operating Instructions § 103(a)(1)(i) (1962); Memorandum for All Field Office Directors, ICE, et al., from John Morton, Director, ICE, *Re: Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens* (June 17, 2011); Memorandum for All ICE Employees, from John Morton, Director, ICE, *Re: Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens* (Mar. 2, 2011); Memorandum for Regional Directors, INS, et al., from Doris Meissner, Commissioner, INS, *Re: Exercising Prosecutorial Discretion* (Nov. 17, 2000). The policy DHS proposes, which is similar to but would supersede earlier policy guidance, is designed to "provide clearer and more effective guidance in the pursuit" of DHS's enforcement priorities; namely, "threats to national security, public safety and border security." Johnson Prioritization Memorandum at 1.

Under the proposed policy, DHS would identify three categories of undocumented aliens who would be priorities for removal from the United States. *See generally id.* at 3–5. The highest priority category would include aliens who pose particularly serious threats to national security, border security, or public safety, including aliens engaged in or suspected of espionage or terrorism, aliens convicted of offenses related to participation in criminal street gangs, aliens convicted of certain felony offenses, and aliens apprehended at the border while attempting to enter the United States unlawfully. *See id*. at 3. The second-highest priority would include aliens convicted of multiple or significant misdemeanor offenses; aliens who are apprehended after unlawfully entering the United States who cannot establish that they have been continuously present in the United States since January 1, 2014; and aliens determined to have significantly abused the visa or visa waiver programs. *See id*. at 3–4. The third priority category would include other aliens who have been issued a final order of removal on or after January 1, 2014. *See id.* at 4. The policy would also provide that none of these aliens should be prioritized for removal if they "qualify for asylum or another form of relief under our laws." *Id*. at 3–5.

The policy would instruct that resources should be directed to these priority categories in a manner "commensurate with the level of prioritization identified." *Id.* at 5. It would, however, also leave significant room for immigration officials to evaluate the circumstances of individual cases. *See id.* (stating that the policy "requires DHS personnel to exercise discretion based on individual circumstances"). For example, the policy would permit an ICE Field Office Director, CBP Sector Chief, or CBP Director of Field Operations to deprioritize the removal of an alien falling in the highest priority category if, in her judgment, "there are compelling and exceptional factors that clearly indicate the alien is not a threat to national security, border security, or public safety and should not therefore be an enforcement priority." *Id.* at 3. Similar discretionary provisions would apply to

aliens in the second and third priority categories.[2] The policy would also provide a non-exhaustive list of factors DHS personnel should consider in making such deprioritization judgments.[3] In addition, the policy would expressly state that its terms should not be construed "to prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities," and would further provide that "[i]mmigration officers and attorneys may pursue removal of an alien not identified as a priority" if, "in the judgment of an ICE Field Office Director, removing such an alien would serve an important federal interest." *Id*. at 5.

DHS has explained that the proposed policy is designed to respond to the practical reality that the number of aliens who are removable under the INA vastly exceeds the resources Congress has made available to DHS for processing and carrying out removals. The resource constraints are striking. As noted, DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a significant percentage of whom are typically encountered at or near the border rather than in the interior of the country. *See* E-mail for Karl R. Thompson, Principal Deputy Assistant Attorney General, Office of Legal Counsel, from David Shahoulian, Deputy General Counsel, DHS, *Re: Immigration Opinion* (Nov. 19, 2014) ("Shahoulian E-mail"). The proposed policy explains that, because DHS "cannot respond to all immigration violations or remove all persons illegally in the United States," it seeks to "prioritize the use of enforcement personnel, detention space, and removal assets" to "ensure that use of its limited resources is devoted to the pursuit of" DHS's highest priorities. Johnson Prioritization Memorandum at 2.

In our view, DHS's proposed prioritization policy falls within the scope of its lawful discretion to enforce the immigration laws. To begin with, the policy is based on a factor clearly "within [DHS's] expertise." *Chaney*, 470 U.S. at 831. Faced with sharply limited resources, DHS necessarily must make choices about which removals to pursue and which removals to defer. DHS's organic statute itself recognizes this inevitable fact, instructing the Secretary to establish "national

[2] Under the proposed policy, aliens in the second tier could be deprioritized if, "in the judgment of an ICE Field Office Director, CBP Sector Chief, CBP Director of Field Operations, USCIS District Director, or USCIS Service Center Director, there are factors indicating the alien is not a threat to national security, border security, or public safety, and should not therefore be an enforcement priority." Johnson Prioritization Memorandum at 4. Aliens in the third tier could be deprioritized if, "in the judgment of an immigration officer, the alien is not a threat to the integrity of the immigration system or there are factors suggesting the alien should not be an enforcement priority." *Id*. at 5.

[3] These factors include "extenuating circumstances involving the offense of conviction; extended length of time since the offense of conviction; length of time in the United States; military service; family or community ties in the United States; status as a victim, witness or plaintiff in civil or criminal proceedings; or compelling humanitarian factors such as poor health, age, pregnancy, a young child or a seriously ill relative." Johnson Prioritization Memorandum at 6.

immigration enforcement policies and priorities." 6 U.S.C. § 202(5). And an agency's need to ensure that scarce enforcement resources are used in an effective manner is a quintessential basis for the use of prosecutorial discretion. *See Chaney*, 470 U.S. at 831 (among the factors "peculiarly within [an agency's] expertise" are "whether agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all").

The policy DHS has proposed, moreover, is consistent with the removal priorities established by Congress. In appropriating funds for DHS's enforcement activities—which, as noted, are sufficient to permit the removal of only a fraction of the undocumented aliens currently in the country—Congress has directed DHS to "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime." Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 ("DHS Appropriations Act"). Consistent with this directive, the proposed policy prioritizes individuals convicted of criminal offenses involving active participation in a criminal street gang, most offenses classified as felonies in the convicting jurisdiction, offenses classified as "aggravated felonies" under the INA, and certain misdemeanor offenses. Johnson Prioritization Memorandum at 3–4. The policy ranks these priority categories according to the severity of the crime of conviction. The policy also prioritizes the removal of other categories of aliens who pose threats to national security or border security, matters about which Congress has demonstrated particular concern. *See, e.g.*, 8 U.S.C. § 1226(c)(1)(D) (providing for detention of aliens charged with removability on national security grounds); *id.* § 1225(b) & (c) (providing for an expedited removal process for certain aliens apprehended at the border). The policy thus raises no concern that DHS has relied "on factors which Congress had not intended it to consider." *Nat'l Ass'n of Home Builders*, 551 U.S. at 658.

Further, although the proposed policy is not a "single-shot non-enforcement decision," neither does it amount to an abdication of DHS's statutory responsibilities, or constitute a legislative rule overriding the commands of the substantive statute. *Crowley Caribbean Transp.*, 37 F.3d at 676–77. The proposed policy provides a general framework for exercising enforcement discretion in individual cases, rather than establishing an absolute, inflexible policy of not enforcing the immigration laws in certain categories of cases. Given that the resources Congress has allocated to DHS are sufficient to remove only a small fraction of the total population of undocumented aliens in the United States, setting forth written guidance about how resources should presumptively be allocated in particular cases is a reasonable means of ensuring that DHS's severely limited resources are systematically directed to its highest priorities across a large and diverse agency, as well as ensuring consistency in the administration of the removal system. The proposed policy's identification of categories of aliens who constitute removal

priorities is also consistent with the categorical nature of Congress's instruction to prioritize the removal of criminal aliens in the DHS Appropriations Act.

And, significantly, the proposed policy does not identify any category of removable aliens whose removal may not be pursued under any circumstances. Although the proposed policy limits the discretion of immigration officials to expend resources to remove non-priority aliens, it does not eliminate that discretion entirely. It directs immigration officials to use their resources to remove aliens in a manner "commensurate with the level of prioritization identified," but (as noted above) it does not "prohibit or discourage the apprehension, detention, or removal of aliens unlawfully in the United States who are not identified as priorities." Johnson Prioritization Memorandum at 5. Instead, it authorizes the removal of even non-priority aliens if, in the judgment of an ICE Field Office Director, "removing such an alien would serve an important federal interest," a standard the policy leaves open-ended. *Id*. Accordingly, the policy provides for case-by-case determinations about whether an individual alien's circumstances warrant the expenditure of removal resources, employing a broad standard that leaves ample room for the exercise of individualized discretion by responsible officials. For these reasons, the proposed policy avoids the difficulties that might be raised by a more inflexible prioritization policy and dispels any concern that DHS has either undertaken to rewrite the immigration laws or abdicated its statutory responsibilities with respect to non-priority aliens.[4]

II.

We turn next to the permissibility of DHS's proposed deferred action programs for certain aliens who are parents of U.S. citizens, lawful permanent residents ("LPRs"), or DACA recipients, and who are not removal priorities under the proposed policy discussed above. We begin by discussing the history and current practice of deferred action. We then discuss the legal authorities on which deferred

[4] In *Crane v. Napolitano*, a district court recently concluded in a non-precedential opinion that the INA "mandates the initiation of removal proceedings whenever an immigration officer encounters an illegal alien who is not 'clearly and beyond a doubt entitled to be admitted.'" Opinion and Order Respecting Pl. App. for Prelim. Inj. Relief, No. 3:12-cv-03247-O, 2013 WL 1744422, at *5 (N.D. Tex. Apr. 23) (quoting 8 U.S.C. § 1225(b)(2)(A)). The court later dismissed the case for lack of jurisdiction. *See Crane v. Napolitano*, No. 3:12-cv-03247-O, 2013 WL 8211660, at *4 (N.D. Tex. July 31). Although the opinion lacks precedential value, we have nevertheless considered whether, as it suggests, the text of the INA categorically forecloses the exercise of enforcement discretion with respect to aliens who have not been formally admitted. The district court's conclusion is, in our view, inconsistent with the Supreme Court's reading of the INA as permitting immigration officials to exercise enforcement discretion at any stage of the removal process, including when deciding whether to initiate removal proceedings against a particular alien. *See Arizona*, 132 S. Ct. at 2499; *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 483–84. It is also difficult to square with authority holding that the presence of mandatory language in a statute, standing alone, does not necessarily limit the Executive Branch's enforcement discretion, *see, e.g.*, *Chaney*, 470 U.S. at 835; *Inmates of Attica Corr. Facility v. Rockefeller*, 477 F.2d 375, 381 (2d Cir. 1973).

action relies and identify legal principles against which the proposed use of deferred action can be evaluated. Finally, we turn to an analysis of the proposed deferred action programs themselves, beginning with the program for parents of U.S. citizens and LPRs, and concluding with the program for parents of DACA recipients.

A.

In immigration law, the term "deferred action" refers to an exercise of administrative discretion in which immigration officials temporarily defer the removal of an alien unlawfully present in the United States. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (citing 6 Charles Gordon et al., *Immigration Law and Procedure* § 72.03[2][h] (1998)); *see* USCIS, *Standard Operating Procedures for Handling Deferred Action Requests at USCIS Field Offices* at 3 (2012) ("USCIS SOP"); INS Operating Instructions § 103.1(a)(1)(ii) (1977). It is one of a number of forms of discretionary relief—in addition to such statutory and non-statutory measures as parole, temporary protected status, deferred enforced departure, and extended voluntary departure—that immigration officials have used over the years to temporarily prevent the removal of undocumented aliens.[5]

[5] Parole is available to aliens by statute "for urgent humanitarian reasons or significant public benefit." 8 U.S.C. § 1182(d)(5)(A). Among other things, parole gives aliens the ability to adjust their status without leaving the United States if they are otherwise eligible for adjustment of status, *see id*. § 1255(a), and may eventually qualify them for Federal means-tested benefits, *see id.* §§ 1613, 1641(b)(4). Temporary protected status is available to nationals of designated foreign states affected by armed conflicts, environmental disasters, and other extraordinary conditions. *Id.* § 1254a. Deferred enforced departure, which "has no statutory basis" but rather is an exercise of "the President's constitutional powers to conduct foreign relations," may be granted to nationals of appropriate foreign states. USCIS, Adjudicator's Field Manual § 38.2(a) (2014). Extended voluntary departure was a remedy derived from the voluntary departure statute, which, before its amendment in 1996, permitted the Attorney General to make a finding of removability if an alien agreed to voluntarily depart the United States, without imposing a time limit for the alien's departure. *See* 8 U.S.C. §§ 1252(b), 1254(e) (1988 & Supp. II 1990); *cf*. 8 U.S.C. § 1229c (current provision of the INA providing authority to grant voluntary departure, but limiting such grants to 120 days). Some commentators, however, suggested that extended voluntary departure was in fact a form of "discretionary relief formulated administratively under the Attorney General's general authority for enforcing immigration law." Sharon Stephan, Cong. Research Serv., 85-599 EPW, *Extended Voluntary Departure and Other Grants of Blanket Relief from Deportation* at 1 (Feb. 23, 1985). It appears that extended voluntary departure is no longer used following enactment of the Immigration Act of 1990, which established the temporary protected status program. *See U.S. Citizenship and Immigration Services Fee Schedule*, 75 Fed. Reg. 33446, 33457 (June 11, 2010) (proposed rule) (noting that "since 1990 neither the Attorney General nor the Secretary have designated a class of aliens for nationality-based 'extended voluntary departure,' and there no longer are aliens in the United States benefiting from such a designation," but noting that deferred enforced departure is still used); H.R. Rep. No. 102-123, at 2 (1991) (indicating that in establishing temporary protected status, Congress was "codif[ying] and supersed[ing]" extended voluntary departure). *See generally* Andorra Bruno et al., Cong. Research Serv., *Analysis of June 15, 2012 DHS Memorandum,* Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children at 5–10 (July 13, 2012) ("CRS Immigration Report").

The practice of granting deferred action dates back several decades. For many years after the INA was enacted, INS exercised prosecutorial discretion to grant "non-priority" status to removable aliens who presented "appealing humanitarian factors." Letter for Leon Wildes, from E. A. Loughran, Associate Commissioner, INS at 2 (July 16, 1973) (defining a "non-priority case" as "one in which the Service in the exercise of discretion determines that adverse action would be unconscionable because of appealing humanitarian factors"); *see* INS Operating Instructions § 103.1(a)(1)(ii) (1962). This form of administrative discretion was later termed "deferred action." *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484; *see* INS Operating Instructions § 103.1(a)(1)(ii) (1977) (instructing immigration officers to recommend deferred action whenever "adverse action would be unconscionable because of the existence of appealing humanitarian factors").

Although the practice of granting deferred action "developed without express statutory authorization," it has become a regular feature of the immigration removal system that has been acknowledged by both Congress and the Supreme Court. *Am.-Arab Anti-Discrim. Comm.*, 525 U.S. at 484 (internal quotation marks omitted); *see id.* at 485 (noting that a congressional enactment limiting judicial review of decisions "to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA]" in 8 U.S.C. § 1252(g) "seems clearly designed to give some measure of protection to 'no deferred action' decisions and similar discretionary determinations"); *see also, e.g.*, 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (providing that certain individuals are "eligible for deferred action"). Deferred action "does not confer any immigration status"—i.e., it does not establish any enforceable legal right to remain in the United States—and it may be revoked by immigration authorities at their discretion. USCIS SOP at 3, 7. Assuming it is not revoked, however, it represents DHS's decision not to seek the alien's removal for a specified period of time.

Under longstanding regulations and policy guidance promulgated pursuant to statutory authority in the INA, deferred action recipients may receive two additional benefits. First, relying on DHS's statutory authority to authorize certain aliens to work in the United States, DHS regulations permit recipients of deferred action to apply for work authorization if they can demonstrate an "economic necessity for employment." 8 C.F.R. § 274a.12(c)(14); *see* 8 U.S.C. § 1324a(h)(3) (defining an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]"). Second, DHS has promulgated regulations and issued policy guidance providing that aliens who receive deferred action will temporarily cease accruing "unlawful presence" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); Memorandum for Field Leadership, from Donald Neufeld, Acting Associate Director, Domestic Operations Directorate, USCIS, *Re: Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I) of the Act* at 42

(May 6, 2009) ("USCIS Consolidation of Guidance") (noting that "[a]ccrual of unlawful presence stops on the date an alien is granted deferred action"); *see* 8 U.S.C. § 1182(a)(9)(B)(ii) (providing that an alien is "unlawfully present" if, among other things, he "is present in the United States after the expiration of the period of stay authorized by the Attorney General").[6]

Immigration officials today continue to grant deferred action in individual cases for humanitarian and other purposes, a practice we will refer to as "ad hoc deferred action." Recent USCIS guidance provides that personnel may recommend ad hoc deferred action if they "encounter cases during [their] normal course of business that they feel warrant deferred action." USCIS SOP at 4. An alien may also apply for ad hoc deferred action by submitting a signed, written request to USCIS containing "[a]n explanation as to why he or she is seeking deferred action" along with supporting documentation, proof of identity, and other records. *Id.* at 3.

For decades, INS and later DHS have also implemented broader programs that make discretionary relief from removal available for particular classes of aliens. In many instances, these agencies have made such broad-based relief available through the use of parole, temporary protected status, deferred enforced departure, or extended voluntary departure. For example, from 1956 to 1972, INS implemented an extended voluntary departure program for physically present aliens who were beneficiaries of approved visa petitions—known as "Third Preference" visa petitions—relating to a specific class of visas for Eastern Hemisphere natives. *See United States ex rel. Parco v. Morris*, 426 F. Supp. 976, 979–80 (E.D. Pa. 1977). Similarly, for several years beginning in 1978, INS granted extended voluntary departure to nurses who were eligible for H-1 visas. *Voluntary Departure for Out-of-Status Nonimmigrant H-1 Nurses*, 43 Fed. Reg. 2776, 2776 (Jan. 19, 1978). In addition, in more than two dozen instances dating to 1956, INS and later DHS granted parole, temporary protected status, deferred enforced departure, or extended voluntary departure to large numbers of nationals of designated foreign states. *See, e.g.*, CRS Immigration Report at 20–23; Cong. Research Serv., ED206779, *Review of U.S. Refugee Resettlement Programs and Policies* at 9, 12–14 (1980). And in 1990, INS implemented a "Family Fairness" program that authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens who had been granted legal status under the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 ("IRCA"). *See* Memorandum for Regional Commissioners,

[6] Section 1182(a)(9)(B)(i) imposes three- and ten-year bars on the admission of aliens (other than aliens admitted to permanent residence) who departed or were removed from the United States after periods of unlawful presence of between 180 days and one year, or one year or more. Section 1182(a)(9)(C)(i)(I) imposes an indefinite bar on the admission of any alien who, without being admitted, enters or attempts to reenter the United States after previously having been unlawfully present in the United States for an aggregate period of more than one year.

INS, from Gene McNary, Commissioner, INS, *Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens* (Feb. 2, 1990) ("Family Fairness Memorandum"); *see also* CRS Immigration Report at 10.

On at least five occasions since the late 1990s, INS and later DHS have also made discretionary relief available to certain classes of aliens through the use of deferred action:

1. Deferred Action for Battered Aliens Under the Violence Against Women Act. INS established a class-based deferred action program in 1997 for the benefit of self-petitioners under the Violence Against Women Act of 1994 ("VAWA"), Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902. VAWA authorized certain aliens who have been abused by U.S. citizen or LPR spouses or parents to self-petition for lawful immigration status, without having to rely on their abusive family members to petition on their behalf. *Id.* § 40701(a) (codified as amended at 8 U.S.C. § 1154(a)(1)(A)(iii)–(iv), (vii)). The INS program required immigration officers who approved a VAWA self-petition to assess, "on a case-by-case basis, whether to place the alien in deferred action status" while the alien waited for a visa to become available. Memorandum for Regional Directors et al., INS, from Paul W. Virtue, Acting Executive Associate Commissioner, INS, *Re: Supplemental Guidance on Battered Alien Self-Petitioning Process and Related Issues* at 3 (May 6, 1997). INS noted that "[b]y their nature, VAWA cases generally possess factors that warrant consideration for deferred action." *Id.* But because "[i]n an unusual case, there may be factors present that would militate against deferred action," the agency instructed officers that requests for deferred action should still "receive individual scrutiny." *Id.* In 2000, INS reported to Congress that, because of this program, no approved VAWA self-petitioner had been removed from the country. *See Battered Women Immigrant Protection Act: Hearings on H.R. 3083 Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. at 43 (July 20, 2000) ("H.R. 3083 Hearings").

2. Deferred Action for T and U Visa Applicants. Several years later, INS instituted a similar deferred action program for applicants for nonimmigrant status or visas made available under the Victims of Trafficking and Violence Protection Act of 2000 ("VTVPA"), Pub. L. No. 106-386, 114 Stat. 1464. That Act created two new nonimmigrant classifications: a "T visa" available to victims of human trafficking and their family members, and a "U visa" for victims of certain other crimes and their family members. *Id.* §§ 107(e), 1513(b)(3) (codified at 8 U.S.C. § 1101(a)(15)(T)(i), (U)(i)). In 2001, INS issued a memorandum directing immigration officers to locate "possible victims in the above categories," and to use "[e]xisting authority and mechanisms such as parole, deferred action, and stays of removal" to prevent those victims' removal "until they have had the opportunity to avail themselves of the provisions of the VTVPA." Memorandum

for Michael A. Pearson, Executive Associate Commissioner, INS, from Michael D. Cronin, Acting Executive Associate Commissioner, INS, *Re: Victims of Trafficking and Violence Protection Act of 2000 (VTVPA) Policy Memorandum #2—"T" and "U" Nonimmigrant Visas* at 2 (Aug. 30, 2001). In subsequent memoranda, INS instructed officers to make "deferred action assessment[s]" for "all [T visa] applicants whose applications have been determined to be bona fide," Memorandum for Johnny N. Williams, Executive Associate Commissioner, INS, from Stuart Anderson, Executive Associate Commissioner, INS, *Re: Deferred Action for Aliens with Bona Fide Applications for T Nonimmigrant Status* at 1 (May 8, 2002), as well as for all U visa applicants "determined to have submitted *prima facie* evidence of [their] eligibility," Memorandum for the Director, Vermont Service Center, INS, from William R. Yates, USCIS, *Re: Centralization of Interim Relief for U Nonimmigrant Status Applicants* at 5 (Oct. 8, 2003). In 2002 and 2007, INS and DHS promulgated regulations embodying these policies. *See* 8 C.F.R. § 214.11(k)(1), (k)(4), (m)(2) (promulgated by *New Classification for Victims of Severe Forms of Trafficking in Persons; Eligibility for "T" Nonimmigrant Status*, 67 Fed. Reg. 4784, 4800–01 (Jan. 31, 2002)) (providing that any T visa applicant who presents "*prima facie* evidence" of his eligibility should have his removal "automatically stay[ed]" and that applicants placed on a waiting list for visas "shall maintain [their] current means to prevent removal (deferred action, parole, or stay of removal)"); *id.* § 214.14(d)(2) (promulgated by *New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status*, 72 Fed. Reg. 53014, 53039 (Sept. 17, 2007)) ("USCIS will grant deferred action or parole to U-1 petitioners and qualifying family members while the U-1 petitioners are on the waiting list" for visas.).

3. Deferred Action for Foreign Students Affected by Hurricane Katrina. As a consequence of the devastation caused by Hurricane Katrina in 2005, several thousand foreign students became temporarily unable to satisfy the requirements for maintaining their lawful status as F-1 nonimmigrant students, which include "pursuit of a 'full course of study.'" USCIS, *Interim Relief for Certain Foreign Academic Students Adversely Affected by Hurricane Katrina: Frequently Asked Questions (FAQ)* at 1 (Nov. 25, 2005) (quoting 8 C.F.R. § 214.2(f)(6)), *available at* http//www.uscis.gov/sites/default/files/USCIS/Humanitarian/Special%20Situations/Previous%20Special%20Situations%20By%20Topic/faq-interim-student-relief-hurricane-katrina.pdf (last visited Nov. 19, 2014). DHS announced that it would grant deferred action to these students "based on the fact that [their] failure to maintain status is directly due to Hurricane Katrina." *Id.* at 7. To apply for deferred action under this program, students were required to send a letter substantiating their need for deferred action, along with an application for work authorization. Press Release, USCIS, *USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina* at 1–2 (Nov. 25, 2005), *available at* http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf (last visited Nov. 19, 2014). USCIS explained that such

requests for deferred action would be "decided on a case-by-case basis" and that it could not "provide any assurance that all such requests will be granted." *Id.* at 1.

4. Deferred Action for Widows and Widowers of U.S. Citizens. In 2009, DHS implemented a deferred action program for certain widows and widowers of U.S. citizens. USCIS explained that "no avenue of immigration relief exists for the surviving spouse of a deceased U.S. citizen if the surviving spouse and the U.S. citizen were married less than 2 years at the time of the citizen's death" and USCIS had not yet adjudicated a visa petition on the spouse's behalf. Memorandum for Field Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, *Re: Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children* at 1 (Sept. 4, 2009). "In order to address humanitarian concerns arising from cases involving surviving spouses of U.S. citizens," USCIS issued guidance permitting covered surviving spouses and "their qualifying children who are residing in the United States" to apply for deferred action. *Id.* at 2, 6. USCIS clarified that such relief would not be automatic, but rather would be unavailable in the presence of, for example, "serious adverse factors, such as national security concerns, significant immigration fraud, commission of other crimes, or public safety reasons." *Id.* at 6.[7]

5. Deferred Action for Childhood Arrivals. Announced by DHS in 2012, DACA makes deferred action available to "certain young people who were brought to this country as children" and therefore "[a]s a general matter . . . lacked the intent to violate the law." Memorandum for David Aguilar, Acting Commissioner, CBP, et al., from Janet Napolitano, Secretary, DHS, *Re: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* at 1 (June 15, 2012) ("Napolitano Memorandum"). An alien is eligible for DACA if she was under the age of 31 when the program began; arrived in the United States before the age of 16; continuously resided in the United States for at least 5 years immediately preceding June 15, 2012; was physically present on June 15, 2012; satisfies certain educational or military service requirements; and neither has a serious criminal history nor "poses a threat to national security or public safety." *See id.* DHS evaluates applicants' eligibility for DACA on a case-by-case basis. *See id.* at 2; USCIS, *Deferred Action for Childhood Arrivals (DACA) Toolkit: Resources for Community Partners* at 11 ("DACA Toolkit"). Successful DACA applicants receive deferred action for a

[7] Several months after the deferred action program was announced, Congress eliminated the requirement that an alien be married to a U.S. citizen "for at least 2 years at the time of the citizen's death" to retain his or her eligibility for lawful immigration status. Department of Homeland Security Appropriations Act, 2010, Pub. L. No. 111-83, § 568(c), 123 Stat. 2142, 2186 (2009). Concluding that this legislation rendered its surviving spouse guidance "obsolete," USCIS withdrew its earlier guidance and treated all pending applications for deferred action as visa petitions. *See* Memorandum for Executive Leadership, USCIS, from Donald Neufeld, Acting Associate Director, USCIS, et al., *Re: Additional Guidance Regarding Surviving Spouses of Deceased U.S. Citizens and Their Children (REVISED)* at 3, 10 (Dec. 2, 2009).

period of two years, subject to renewal. *See* DACA Toolkit at 11. DHS has stated that grants of deferred action under DACA may be terminated at any time, *id.* at 16, and "confer[] no substantive right, immigration status or pathway to citizenship," Napolitano Memorandum at 3.[8]

Congress has long been aware of the practice of granting deferred action, including in its categorical variety, and of its salient features; and it has never acted to disapprove or limit the practice.[9] On the contrary, it has enacted several pieces of legislation that have either assumed that deferred action would be available in certain circumstances, or expressly directed that deferred action be extended to certain categories of aliens. For example, as Congress was considering VAWA reauthorization legislation in 2000, INS officials testified before Congress about their deferred action program for VAWA self-petitioners, explaining that "[a]pproved [VAWA] self-petitioners are placed in deferred action status," such that "[n]o battered alien who has filed a[n approved] self petition . . . has been deported." H.R. 3083 Hearings at 43. Congress responded by not only acknowledging but also expanding the deferred action program in the 2000 VAWA reauthorization legislation, providing that children who could no longer self-petition under VAWA because they were over the age of 21 would nonetheless be "eligible for deferred action and work authorization." Victims of Trafficking and

[8] Before DACA was announced, our Office was consulted about whether such a program would be legally permissible. As we orally advised, our preliminary view was that such a program would be permissible, provided that immigration officials retained discretion to evaluate each application on an individualized basis. We noted that immigration officials typically consider factors such as having been brought to the United States as a child in exercising their discretion to grant deferred action in individual cases. We explained, however, that extending deferred action to individuals who satisfied these and other specified criteria on a class-wide basis would raise distinct questions not implicated by ad hoc grants of deferred action. We advised that it was critical that, like past policies that made deferred action available to certain classes of aliens, the DACA program require immigration officials to evaluate each application for deferred action on a case-by-case basis, rather than granting deferred action automatically to all applicants who satisfied the threshold eligibility criteria. We also noted that, although the proposed program was predicated on humanitarian concerns that appeared less particularized and acute than those underlying certain prior class-wide deferred action programs, the concerns animating DACA were nonetheless consistent with the types of concerns that have customarily guided the exercise of immigration enforcement discretion.

[9] Congress has considered legislation that would limit the practice of granting deferred action, but it has never enacted such a measure. In 2011, a bill was introduced in both the House and the Senate that would have temporarily suspended DHS's authority to grant deferred action except in narrow circumstances. *See* H.R. 2497, 112th Cong. (2011); S. 1380, 112th Cong. (2011). Neither chamber, however, voted on the bill. This year, the House passed a bill that purported to bar any funding for DACA or other class-wide deferred action programs, H.R. 5272, 113th Cong. (2014), but the Senate has not considered the legislation. Because the Supreme Court has instructed that unenacted legislation is an unreliable indicator of legislative intent, *see Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969), we do not draw any inference regarding congressional policy from these unenacted bills.

Violence Protection Act of 2000, Pub. L. No. 106-386, § 1503(d)(2), 114 Stat. 1464, 1522 (codified at 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV)).[10]

Congress demonstrated a similar awareness of INS's (and later DHS's) deferred action program for bona fide T and U visa applicants. As discussed above, that program made deferred action available to nearly all individuals who could make a prima facie showing of eligibility for a T or U visa. In 2008 legislation, Congress authorized DHS to "grant . . . an administrative stay of a final order of removal" to any such individual. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 204, 122 Stat. 5044, 5060 (codified at 8 U.S.C. § 1227(d)(1)). Congress further clarified that "[t]he denial of a request for an administrative stay of removal under this subsection shall not preclude the alien from applying for . . . deferred action." *Id.* It also directed DHS to compile a report detailing, among other things, how long DHS's "specially trained [VAWA] Unit at the [USCIS] Vermont Service Center" took to adjudicate victim-based immigration applications for "deferred action," along with "steps taken to improve in this area." *Id.* § 238. Representative Berman, the bill's sponsor, explained that the Vermont Service Center should "strive to issue work authorization and deferred action" to "[i]mmigrant victims of domestic violence, sexual assault and other violence crimes . . . in most instances within 60 days of filing." 154 Cong. Rec. 24603 (2008).

In addition, in other enactments, Congress has specified that certain classes of individuals should be made "eligible for deferred action." These classes include certain immediate family members of LPRs who were killed on September 11, 2001, USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361, and certain immediate family members of certain U.S. citizens killed in combat, National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 1703(c)–(d), 117 Stat. 1392, 1694. In the same legislation, Congress made these individuals eligible to obtain lawful status as "family-sponsored immigrant[s]" or "immediate relative[s]" of U.S. citizens. Pub. L. No. 107-56, § 423(b), 115 Stat. 272, 361; Pub. L. No. 108-136, § 1703(c)(1)(A), 117 Stat. 1392, 1694; *see generally Scialabba v. Cuellar de Osorio*, 134 S. Ct. 2191, 2197 (2014) (plurality opinion) (explaining which aliens typically qualify as family-sponsored immigrants or immediate relatives).

Finally, Congress acknowledged the practice of granting deferred action in the REAL ID Act of 2005, Pub. L. No. 109-13, div. B, 119 Stat. 231, 302 (codified at

[10] Five years later, in the Violence Against Women and Department of Justice Reauthorization Act of 2005, Pub. L. No. 109-162, 119 Stat. 2960, Congress specified that, "[u]pon the approval of a petition as a VAWA self-petitioner, the alien . . . is eligible for work authorization." *Id.* § 814(b) (codified at 8 U.S.C. § 1154(a)(1)(K)). One of the Act's sponsors explained that while this provision was intended to "give[] DHS statutory authority to grant work authorization . . . without having to rely upon deferred action . . . [t]he current practice of granting deferred action to approved VAWA self-petitioners should continue." 151 Cong. Rec. 29334 (2005) (statement of Rep. Conyers).

49 U.S.C. § 30301 note), which makes a state-issued driver's license or identification card acceptable for federal purposes only if the state verifies, among other things, that the card's recipient has "[e]vidence of [l]awful [s]tatus." Congress specified that, for this purpose, acceptable evidence of lawful status includes proof of, among other things, citizenship, lawful permanent or temporary residence, or "approved deferred action status." *Id.* § 202(c)(2)(B)(viii).

B.

The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed. It is one of several mechanisms by which immigration officials, against a backdrop of limited enforcement resources, exercise their "broad discretion" to administer the removal system—and, more specifically, their discretion to determine whether "it makes sense to pursue removal" in particular circumstances. *Arizona*, 132 S. Ct. at 2499.

Deferred action, however, differs in at least three respects from more familiar and widespread exercises of enforcement discretion. First, unlike (for example) the paradigmatic exercise of prosecutorial discretion in a criminal case, the conferral of deferred action does not represent a decision not to prosecute an individual for past unlawful conduct; it instead represents a decision to openly tolerate an undocumented alien's continued presence in the United States for a fixed period (subject to revocation at the agency's discretion). Second, unlike most exercises of enforcement discretion, deferred action carries with it benefits in addition to non-enforcement itself; specifically, the ability to seek employment authorization and suspension of unlawful presence for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I). Third, class-based deferred action programs, like those for VAWA recipients and victims of Hurricane Katrina, do not merely enable individual immigration officials to select deserving beneficiaries from among those aliens who have been identified or apprehended for possible removal—as is the case with ad hoc deferred action—but rather set forth certain threshold eligibility criteria and then invite individuals who satisfy these criteria to apply for deferred action status.

While these features of deferred action are somewhat unusual among exercises of enforcement discretion, the differences between deferred action and other exercises of enforcement discretion are less significant than they might initially appear. The first feature—the toleration of an alien's continued unlawful presence—is an inevitable element of almost any exercise of discretion in immigration enforcement. Any decision not to remove an unlawfully present alien—even through an exercise of routine enforcement discretion—necessarily carries with it a tacit acknowledgment that the alien will continue to be present in the United States without legal status. Deferred action arguably goes beyond such tacit acknowledgment by expressly communicating to the alien that his or her unlawful

presence will be tolerated for a prescribed period of time. This difference is not, in our view, insignificant. But neither does it fundamentally transform deferred action into something other than an exercise of enforcement discretion: As we have previously noted, deferred action confers no lawful immigration status, provides no path to lawful permanent residence or citizenship, and is revocable at any time in the agency's discretion.

With respect to the second feature, the additional benefits deferred action confers—the ability to apply for work authorization and the tolling of unlawful presence—do not depend on background principles of agency discretion under DHS's general immigration authorities or the Take Care Clause at all, but rather depend on independent and more specific statutory authority rooted in the text of the INA. The first of those authorities, DHS's power to prescribe which aliens are authorized to work in the United States, is grounded in 8 U.S.C. § 1324a(h)(3), which defines an "unauthorized alien" not entitled to work in the United States as an alien who is neither an LPR nor "authorized to be . . . employed by [the INA] or by the Attorney General [now the Secretary of Homeland Security]." This statutory provision has long been understood to recognize the authority of the Secretary (and the Attorney General before him) to grant work authorization to particular classes of aliens. *See* 8 C.F.R. § 274a.12; *see also Perales v. Casillas*, 903 F.2d 1043, 1048–50 (5th Cir. 1990) (describing the authority recognized by section 1324a(h)(3) as "permissive" and largely "unfettered").[11] Although the INA

[11] Section 1324a(h)(3) was enacted in 1986 as part of IRCA. Before then, the INA contained no provisions comprehensively addressing the employment of aliens or expressly delegating the authority to regulate the employment of aliens to a responsible federal agency. INS assumed the authority to prescribe the classes of aliens authorized to work in the United States under its general responsibility to administer the immigration laws. In 1981, INS promulgated regulations codifying its existing procedures and criteria for granting employment authorization. *See Employment Authorization to Aliens in the United States*, 46 Fed. Reg. 25079, 25080–81 (May 5, 1981) (citing 8 U.S.C. § 1103(a)). Those regulations permitted certain categories of aliens who lacked lawful immigration status, including deferred action recipients, to apply for work authorization under certain circumstances. 8 C.F.R. § 109.1(b)(7) (1982). In IRCA, Congress introduced a "comprehensive scheme prohibiting the employment of illegal aliens in the United States," *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 147 (2002), to be enforced primarily through criminal and civil penalties on employers who knowingly employ an "unauthorized alien." As relevant here, Congress defined an "unauthorized alien" barred from employment in the United States as an alien who "is not . . . either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter *or by the Attorney General*." 8 U.S.C. § 1324a(h)(3) (emphasis added). Shortly after IRCA was enacted, INS denied a petition to rescind its employment authorization regulation, rejecting an argument that "the phrase 'authorized to be so employed by this Act or the Attorney General' does not recognize the Attorney General's authority to grant work authorization except to those aliens who have already been granted specific authorization by the Act." *Employment Authorization; Classes of Aliens Eligible*, 52 Fed. Reg. 46092, 46093 (Dec. 4, 1987). Because the same statutory phrase refers both to aliens authorized to be employed by the INA and aliens authorized to be employed by the Attorney General, INS concluded that the only way to give effect to both references is to conclude "that Congress, being fully aware of the Attorney General's authority to promulgate regulations, and approving of the manner in which he has exercised that authority in this matter, defined 'unauthorized alien' in such fashion as to exclude aliens who have been authorized employment by the Attorney General through the

requires the Secretary to grant work authorization to particular classes of aliens, *see, e.g.*, 8 U.S.C. § 1158(c)(1)(B) (aliens granted asylum), it places few limitations on the Secretary's authority to grant work authorization to other classes of aliens. Further, and notably, additional provisions of the INA expressly contemplate that the Secretary may grant work authorization to aliens lacking lawful immigration status—even those who are in active removal proceedings or, in certain circumstances, those who have already received final orders of removal. *See id.* § 1226(a)(3) (permitting the Secretary to grant work authorization to an otherwise work-eligible alien who has been arrested and detained pending a decision whether to remove the alien from the United States); *id.* § 1231(a)(7) (permitting the Secretary under certain narrow circumstances to grant work authorization to aliens who have received final orders of removal). Consistent with these provisions, the Secretary has long permitted certain additional classes of aliens who lack lawful immigration status to apply for work authorization, including deferred action recipients who can demonstrate an economic necessity for employment. *See* 8 C.F.R. § 274a.12(c)(14); *see also id.* § 274a.12(c)(8) (applicants for asylum), (c)(10) (applicants for cancellation of removal); *supra* note 11 (discussing 1981 regulations).

The Secretary's authority to suspend the accrual of unlawful presence of deferred action recipients is similarly grounded in the INA. The relevant statutory provision treats an alien as "unlawfully present" for purposes of 8 U.S.C. § 1182(a)(9)(B)(i) and (a)(9)(C)(i)(I) if he "is present in the United States after the expiration of the period of stay authorized by the Attorney General." 8 U.S.C. § 1182(a)(9)(B)(ii). That language contemplates that the Attorney General (and now the Secretary) may authorize an alien to stay in the United States without accruing unlawful presence under section 1182(a)(9)(B)(i) or section 1182(a)(9)(C)(i). And DHS regulations and policy guidance interpret a "period of stay authorized by the Attorney General" to include periods during which an alien has been granted deferred action. *See* 8 C.F.R. § 214.14(d)(3); 28 C.F.R. § 1100.35(b)(2); USCIS Consolidation of Guidance at 42.

The final unusual feature of deferred action programs is particular to class-based programs. The breadth of such programs, in combination with the first two features of deferred action, may raise particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances. But the salient feature of class-based programs—the establishment of an affirmative application process with threshold eligibility criteria—does not in and of itself cross the line between executing the law and rewriting it. Although every class-wide deferred action program that has been implemented to date has established

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regulatory process, in addition to those who are authorized employment by statute." *Id.*; *see Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 844 (1986) (stating that "considerable weight must be accorded" an agency's "contemporaneous interpretation of the statute it is entrusted to administer").

certain threshold eligibility criteria, each program has also left room for case-by-case determinations, giving immigration officials discretion to deny applications even if the applicant fulfills all of the program criteria. *See supra* pp. 15–18. Like the establishment of enforcement priorities discussed in Part I, the establishment of threshold eligibility criteria can serve to avoid arbitrary enforcement decisions by individual officers, thereby furthering the goal of ensuring consistency across a large agency. The guarantee of individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law by defining new categories of aliens who are automatically entitled to particular immigration relief. *See Crowley Caribbean Transp.*, 37 F.3d at 676–77; *see also Chaney*, 470 U.S. at 833 n.4. Furthermore, while permitting potentially eligible individuals to apply for an exercise of enforcement discretion is not especially common, many law enforcement agencies have developed programs that invite violators of the law to identify themselves to the authorities in exchange for leniency.[12] Much as is the case with those programs, inviting eligible aliens to identify themselves through an application process may serve the agency's law enforcement interests by encouraging lower-priority individuals to identify themselves to the agency. In so doing, the process may enable the agency to better focus its scarce resources on higher enforcement priorities.

Apart from the considerations just discussed, perhaps the clearest indication that these features of deferred action programs are not per se impermissible is the fact that Congress, aware of these features, has repeatedly enacted legislation appearing to endorse such programs. As discussed above, Congress has not only directed that certain classes of aliens be made eligible for deferred action programs—and in at least one instance, in the case of VAWA beneficiaries, directed the expansion of an existing program—but also ranked evidence of approved deferred action status as evidence of "lawful status" for purposes of the REAL ID Act. These enactments strongly suggest that when DHS in the past has decided to grant deferred action to an individual or class of individuals, it has been acting in a manner consistent with congressional policy "'rather than embarking on a frolic of its own.'" *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 139

[12] For example, since 1978, the Department of Justice's Antitrust Division has implemented a "leniency program" under which a corporation that reveals an antitrust conspiracy in which it participated may receive a conditional promise that it will not be prosecuted. *See* Dep't of Justice, *Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters (November 19, 2008)*, *available at* http://www.justice.gov/atr/public/criminal/239583.pdf (last visited Nov. 19, 2014); *see also* Internal Revenue Manual § 9.5.11.9(2) (Revised IRS Voluntary Disclosure Practice), *available at* http://www.irs.gov/uac/Revised-IRS-Voluntary-Disclosure-Practice (last visited Nov. 19, 2014) (explaining that a taxpayer's voluntary disclosure of misreported tax information "may result in prosecution not being recommended"); U.S. Marshals Service, *Fugitive Safe Surrender FAQs*, *available at* http://www.usmarshals.gov/safesurrender/faqs.html (last visited Nov. 19, 2014) (stating that fugitives who surrender at designated sites and times under the "Fugitive Safe Surrender" program are likely to receive "favorable consideration").

(1985) (quoting *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969)); *cf. id.* at 137–39 (concluding that Congress acquiesced in an agency's assertion of regulatory authority by "refus[ing] . . . to overrule" the agency's view after it was specifically "brought to Congress'[s] attention," and further finding implicit congressional approval in legislation that appeared to acknowledge the regulatory authority in question); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (finding that Congress "implicitly approved the practice of claim settlement by executive agreement" by enacting the International Claims Settlement Act of 1949, which "create[d] a procedure to implement" those very agreements).

Congress's apparent endorsement of certain deferred action programs does not mean, of course, that a deferred action program can be lawfully extended to any group of aliens, no matter its characteristics or its scope, and no matter the circumstances in which the program is implemented. Because deferred action, like the prioritization policy discussed above, is an exercise of enforcement discretion rooted in the Secretary's broad authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed, it is subject to the same four general principles previously discussed. *See supra* pp. 6–7. Thus, any expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects considerations within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute. *See supra* pp. 6–7 (citing *Youngstown*, 343 U.S. at 637, and *Nat'l Ass'n of Home Builders*, 551 U.S. at 658). Immigration officials cannot abdicate their statutory responsibilities under the guise of exercising enforcement discretion. *See supra* p. 7 (citing *Chaney*, 470 U.S. at 833 n.4). And any new deferred action program should leave room for individualized evaluation of whether a particular case warrants the expenditure of resources for enforcement. *See supra* p. 7 (citing *Glickman*, 96 F.3d at 1123, and *Crowley Caribbean Transp.*, 37 F.3d at 676–77).

Furthermore, because deferred action programs depart in certain respects from more familiar and widespread exercises of enforcement discretion, particularly careful examination is needed to ensure that any proposed expansion of deferred action complies with these general principles, so that the proposed program does not, in effect, cross the line between executing the law and rewriting it. In analyzing whether the proposed programs cross this line, we will draw substantial guidance from Congress's history of legislation concerning deferred action. In the absence of express statutory guidance, the nature of deferred action programs Congress has implicitly approved by statute helps to shed light on Congress's own understandings about the permissible uses of deferred action. Those understandings, in turn, help to inform our consideration of whether the proposed deferred action programs are "faithful[]" to the statutory scheme Congress has enacted. U.S. Const. art. II, § 3.

C.

We now turn to the specifics of DHS's proposed deferred action programs. DHS has proposed implementing a policy under which an alien could apply for, and would be eligible to receive, deferred action if he or she: (1) is not an enforcement priority under DHS policy; (2) has continuously resided in the United States since before January 1, 2010; (3) is physically present in the United States both when DHS announces its program and at the time of application for deferred action; (4) has a child who is a U.S. citizen or LPR; and (5) presents "no other factors that, in the exercise of discretion, make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. You have also asked about the permissibility of a similar program that would be open to parents of children who have received deferred action under the DACA program. We first address DHS's proposal to implement a deferred action program for the parents of U.S. citizens and LPRs, and then turn to the permissibility of the program for parents of DACA recipients in the next section.

1.

We begin by considering whether the proposed program for the parents of U.S. citizens and LPRs reflects considerations within the agency's expertise. DHS has offered two justifications for the proposed program for the parents of U.S. citizens and LPRs. First, as noted above, severe resource constraints make it inevitable that DHS will not remove the vast majority of aliens who are unlawfully present in the United States. Consistent with Congress's instruction, DHS prioritizes the removal of individuals who have significant criminal records, as well as others who present dangers to national security, public safety, or border security. *See supra* p. 10. Parents with longstanding ties to the country and who have no significant criminal records or other risk factors rank among the agency's lowest enforcement priorities; absent significant increases in funding, the likelihood that any individual in that category will be determined to warrant the expenditure of severely limited enforcement resources is very low. Second, DHS has explained that the program would serve an important humanitarian interest in keeping parents together with children who are lawfully present in the United States, in situations where such parents have demonstrated significant ties to community and family in this country. *See* Shahoulian E-mail.

With respect to DHS's first justification, the need to efficiently allocate scarce enforcement resources is a quintessential basis for an agency's exercise of enforcement discretion. *See Chaney*, 470 U.S. at 831. Because, as discussed earlier, Congress has appropriated only a small fraction of the funds needed for full enforcement, DHS can remove no more than a small fraction of the individuals who are removable under the immigration laws. *See supra* p. 9. The agency must therefore make choices about which violations of the immigration laws it

will prioritize and pursue. And as *Chaney* makes clear, such choices are entrusted largely to the Executive's discretion. 470 U.S. at 831.

The deferred action program DHS proposes would not, of course, be costless. Processing applications for deferred action and its renewal requires manpower and resources. *See Arizona*, 132 S. Ct. at 2521 (Scalia, J., concurring in part and dissenting in part). But DHS has informed us that the costs of administering the proposed program would be borne almost entirely by USCIS through the collection of application fees. *See* Shahoulian E-mail; *see also* 8 U.S.C. § 1356(m); 8 C.F.R. § 103.7(b)(1)(i)(C), (b)(1)(i)(HH). DHS has indicated that the costs of administering the deferred action program would therefore not detract in any significant way from the resources available to ICE and CBP—the enforcement arms of DHS—which rely on money appropriated by Congress to fund their operations. *See* Shahoulian E-mail. DHS has explained that, if anything, the proposed deferred action program might increase ICE's and CBP's efficiency by in effect using USCIS's fee-funded resources to enable those enforcement divisions to more easily identify non-priority aliens and focus their resources on pursuing aliens who are strong candidates for removal. *See id.* The proposed program, in short, might help DHS address its severe resource limitations, and at the very least likely would not exacerbate them. *See id.*

DHS does not, however, attempt to justify the proposed program solely as a cost-saving measure, or suggest that its lack of resources alone is sufficient to justify creating a deferred action program for the proposed class. Rather, as noted above, DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity by enabling those parents of U.S. citizens and LPRs who are not otherwise enforcement priorities and who have demonstrated community and family ties in the United States (as evidenced by the length of time they have remained in the country) to remain united with their children in the United States. Like determining how best to respond to resource constraints, determining how to address such "human concerns" in the immigration context is a consideration that is generally understood to fall within DHS's expertise. *Arizona*, 132 S. Ct. at 2499.

This second justification for the program also appears consonant with congressional policy embodied in the INA. Numerous provisions of the statute reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States. *See, e.g.*, *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977); *INS v. Errico*, 385 U.S. 214, 220 n.9 (1966) ("'The legislative history of the Immigration and Nationality Act clearly indicates that the Congress . . . was concerned with the problem of keeping families of United States citizens and immigrants united.'" (quoting H.R. Rep. No. 85-1199, at 7 (1957)). The INA provides a path to lawful status for the parents, as well as other immediate relatives, of U.S. citizens: U.S. citizens aged twenty-one or over may petition for parents to obtain visas that would permit them to enter and permanently reside

in the United States, and there is no limit on the overall number of such petitions that may be granted. *See* 8 U.S.C. § 1151(b)(2)(A)(i); *see also Cuellar de Osorio*, 134 S. Ct. at 2197–99 (describing the process for obtaining a family-based immigrant visa). And although the INA contains no parallel provision permitting LPRs to petition on behalf of their parents, it does provide a path for LPRs to become citizens, at which point they too can petition to obtain visas for their parents. *See, e.g.*, 8 U.S.C. § 1427(a) (providing that aliens are generally eligible to become naturalized citizens after five years of lawful permanent residence); *id.* § 1430(a) (alien spouses of U.S. citizens become eligible after three years of lawful permanent residence); *Demore v. Kim*, 538 U.S. 510, 544 (2003).[13] Additionally, the INA empowers the Attorney General to cancel the removal of, and adjust to lawful permanent resident status, aliens who have been physically present in the United States for a continuous period of not less than ten years, exhibit good moral character, have not been convicted of specified offenses, and have immediate relatives who are U.S. citizens or LPRs and who would suffer exceptional hardship from the alien's removal. 8 U.S.C. § 1229b(b)(1). DHS's proposal to focus on the parents of U.S. citizens and LPRs thus tracks a congressional concern, expressed in the INA, with uniting the immediate families of individuals who have permanent legal ties to the United States.

At the same time, because the temporary relief DHS's proposed program would confer to such parents is sharply limited in comparison to the benefits Congress has made available through statute, DHS's proposed program would not operate to circumvent the limits Congress has placed on the availability of those benefits. The statutory provisions discussed above offer the parents of U.S. citizens and LPRs the prospect of permanent lawful status in the United States. The cancellation of removal provision, moreover, offers the prospect of receiving such status

[13] The INA does permit LPRs to petition on behalf of their spouses and children even before they have attained citizenship. *See* 8 U.S.C. § 1153(a)(2). However, the exclusion of LPRs' parents from this provision does not appear to reflect a congressional judgment that, until they attain citizenship, LPRs lack an interest in being united with their parents comparable to their interest in being united with their other immediate relatives. The distinction between parents and other relatives originated with a 1924 statute that exempted the wives and minor children of U.S. citizens from immigration quotas, gave "preference status"—eligibility for a specially designated pool of immigrant visas—to other relatives of U.S. citizens, and gave no favorable treatment to the relatives of LPRs. Immigration Act of 1924, Pub. L. No. 68-139, §§ 4(a), 6, 43 Stat. 153, 155–56. In 1928, Congress extended preference status to LPRs' wives and minor children, reasoning that because such relatives would be eligible for visas without regard to any quota when their LPR relatives became citizens, granting preference status to LPRs' wives and minor children would "hasten[]" the "family reunion." S. Rep. No. 70-245, at 2 (1928); *see* Act of May 29, 1928, ch. 914, 45 Stat. 1009, 1009–10. The special visa status for wives and children of LPRs thus mirrored, and was designed to complement, the special visa status given to wives and minor children of U.S. citizens. In 1965, Congress eliminated the basis on which the distinction had rested by exempting all "immediate relatives" of U.S. citizens, including parents, from numerical restrictions on immigration. Pub. L. No. 89-236, § 1, 79 Stat. 911, 911. But it did not amend eligibility for preference status for relatives of LPRs to reflect that change. We have not been able to discern any rationale for this omission in the legislative history or statutory text of the 1965 law.

immediately, without the delays generally associated with the family-based immigrant visa process. DHS's proposed program, in contrast, would not grant the parents of U.S. citizens and LPRs any lawful immigration status, provide a path to permanent residence or citizenship, or otherwise confer any legally enforceable entitlement to remain in the United States. *See* USCIS SOP at 3. It is true that, as we have discussed, a grant of deferred action would confer eligibility to apply for and obtain work authorization, pursuant to the Secretary's statutory authority to grant such authorization and the longstanding regulations promulgated thereunder. *See supra* pp. 13, 21–22. But unlike the automatic employment eligibility that accompanies LPR status, *see* 8 U.S.C. § 1324a(h)(3), this authorization could be granted only on a showing of economic necessity, and would last only for the limited duration of the deferred action grant, *see* 8 C.F.R. § 274a.12(c)(14).

The other salient features of the proposal are similarly consonant with congressional policy. The proposed program would focus on parents who are not enforcement priorities under the prioritization policy discussed above—a policy that, as explained earlier, comports with the removal priorities set by Congress. *See supra* p. 10. The continuous residence requirement is likewise consistent with legislative judgments that extended periods of continuous residence are indicative of strong family and community ties. *See* IRCA, Pub. L. No. 99-603, § 201(a), 100 Stat. 3359, 3394 (1986) (codified as amended at 8 U.S.C. § 1255a(a)(2)) (granting lawful status to certain aliens unlawfully present in the United States since January 1, 1982); *id.* § 302(a) (codified as amended at 8 U.S.C. § 1160) (granting similar relief to certain agricultural workers); H.R. Rep. No. 99-682, pt. 1, at 49 (1986) (stating that aliens present in the United States for five years "have become a part of their communities[,] . . . have strong family ties here which include U.S. citizens and lawful residents[,] . . . have built social networks in this country[, and] . . . have contributed to the United States in myriad ways"); S. Rep. No. 99-132, at 16 (1985) (deporting aliens who "have become well settled in this country" would be a "wasteful use of the Immigration and Naturalization Service's limited enforcement resources"); *see also Arizona*, 132 S. Ct. at 2499 (noting that "[t]he equities of an individual case" turn on factors "including whether the alien has . . . long ties to the community").

We also do not believe DHS's proposed program amounts to an abdication of its statutory responsibilities, or a legislative rule overriding the commands of the statute. As discussed earlier, DHS's severe resource constraints mean that, unless circumstances change, it could not as a practical matter remove the vast majority of removable aliens present in the United States. The fact that the proposed program would defer the removal of a subset of these removable aliens—a subset that ranks near the bottom of the list of the agency's removal priorities—thus does not, by itself, demonstrate that the program amounts to an abdication of DHS's responsibilities. And the case-by-case discretion given to immigration officials under DHS's proposed program alleviates potential concerns that DHS has

abdicated its statutory enforcement responsibilities with respect to, or created a categorical, rule-like entitlement to immigration relief for, the particular class of aliens eligible for the program. An alien who meets all the criteria for deferred action under the program would receive deferred action only if he or she "present[ed] no other factors that, in the exercise of discretion," would "make[] the grant of deferred action inappropriate." Johnson Deferred Action Memorandum at 4. The proposed policy does not specify what would count as such a factor; it thus leaves the relevant USCIS official with substantial discretion to determine whether a grant of deferred action is warranted. In other words, even if an alien is not a removal priority under the proposed policy discussed in Part I, has continuously resided in the United States since before January 1, 2010, is physically present in the country, and is a parent of an LPR or a U.S. citizen, the USCIS official evaluating the alien's deferred action application must still make a judgment, in the exercise of her discretion, about whether that alien presents any other factor that would make a grant of deferred action inappropriate. This feature of the proposed program ensures that it does not create a categorical entitlement to deferred action that could raise concerns that DHS is either impermissibly attempting to rewrite or categorically declining to enforce the law with respect to a particular group of undocumented aliens.

Finally, the proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action. As noted above, the program uses deferred action as an interim measure for a group of aliens to whom Congress has given a prospective entitlement to lawful immigration status. While Congress has provided a path to lawful status for the parents of U.S. citizens and LPRs, the process of obtaining that status "takes time." *Cuellar de Osorio*, 134 S. Ct. at 2199. The proposed program would provide a mechanism for families to remain together, depending on their circumstances, for some or all of the intervening period.[14] Immigration officials have on several

[14] DHS's proposed program would likely not permit all potentially eligible parents to remain together with their children for the entire duration of the time until a visa is awarded. In particular, undocumented parents of adult citizens who are physically present in the country would be ineligible to adjust their status without first leaving the country if they had never been "inspected and admitted or paroled into the United States." 8 U.S.C. § 1255(a) (permitting the Attorney General to adjust to permanent resident status certain aliens present in the United States if they become eligible for immigrant visas). They would thus need to leave the country to obtain a visa at a U.S. consulate abroad. *See id.* § 1201(a); *Cuellar de Osorio*, 134 S. Ct. at 2197–99. But once such parents left the country, they would in most instances become subject to the 3- or 10-year bar under 8 U.S.C. § 1182(a)(9)(B)(i) and therefore unable to obtain a visa unless they remained outside the country for the duration of the bar. DHS's proposed program would nevertheless enable other families to stay together without regard to the 3- or 10-year bar. And even as to those families with parents who would become subject to that bar, the proposed deferred action program would have the effect of reducing the

occasions deployed deferred action programs as interim measures for other classes of aliens with prospective entitlements to lawful immigration status, including VAWA self-petitioners, bona fide T and U visa applicants, certain immediate family members of certain U.S. citizens killed in combat, and certain immediate family members of aliens killed on September 11, 2001. As noted above, each of these programs has received Congress's implicit approval—and, indeed, in the case of VAWA self-petitioners, a direction to expand the program beyond its original bounds. *See supra* pp. 18–20.[15] In addition, much like these and other programs Congress has implicitly endorsed, the program serves substantial and particularized humanitarian interests. Removing the parents of U.S. citizens and LPRs—that is, of children who have established permanent legal ties to the United States—would separate them from their nuclear families, potentially for many years, until they were able to secure visas through the path Congress has provided. During that time, both the parents and their U.S. citizen or LPR children would be deprived of both the economic support and the intangible benefits that families provide.

We recognize that the proposed program would likely differ in size from these prior deferred action programs. Although DHS has indicated that there is no reliable way to know how many eligible aliens would actually apply for or would be likely to receive deferred action following individualized consideration under the proposed program, it has informed us that approximately 4 million individuals could be eligible to apply. *See* Shahoulian E-mail. We have thus considered whether the size of the program alone sets it at odds with congressional policy or the Executive's duties under the Take Care Clause. In the absence of express statutory guidance, it is difficult to say exactly how the program's potential size bears on its permissibility as an exercise of executive enforcement discretion. But because the size of DHS's proposed program corresponds to the size of a population to which Congress has granted a prospective entitlement to lawful status

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amount of time the family had to spend apart, and could enable them to adjust the timing of their separation according to, for example, their children's needs for care and support.

[15] Several extended voluntary departure programs have been animated by a similar rationale, and the most prominent of these programs also received Congress's implicit approval. In particular, as noted above, the Family Fairness policy, implemented in 1990, authorized granting extended voluntary departure and work authorization to the estimated 1.5 million spouses and children of aliens granted legal status under IRCA—aliens who would eventually "acquire lawful permanent resident status" and be able to petition on behalf of their family members. Family Fairness Memorandum at 1; *see supra* pp. 14–15. Later that year, Congress granted the beneficiaries of the Family Fairness program an indefinite stay of deportation. *See* Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5030. Although it did not make that grant of relief effective for nearly a year, Congress clarified that "the delay in effectiveness of this section shall not be construed as reflecting a Congressional belief that the existing family fairness program should be modified in any way before such date." *Id.* § 301(g). INS's policies for qualifying Third Preference visa applicants and nurses eligible for H-1 nonimmigrant status likewise extended to aliens with prospective entitlements to lawful status. *See supra* p. 14.

without numerical restriction, it seems to us difficult to sustain an argument, based on numbers alone, that DHS's proposal to grant a limited form of administrative relief as a temporary interim measure exceeds its enforcement discretion under the INA. Furthermore, while the potential size of the program is large, it is nevertheless only a fraction of the approximately 11 million undocumented aliens who remain in the United States each year because DHS lacks the resources to remove them; and, as we have indicated, the program is limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. There is thus little practical danger that the program, simply by virtue of its size, will impede removals that would otherwise occur in its absence. And although we are aware of no prior exercises of deferred action of the size contemplated here, INS's 1990 Family Fairness policy, which Congress later implicitly approved, made a comparable fraction of undocumented aliens—approximately four in ten—potentially eligible for discretionary extended voluntary departure relief. *Compare* CRS Immigration Report at 22 (estimating the Family Fairness policy extended to 1.5 million undocumented aliens), *with* Office of Policy and Planning, INS, *Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000* at 10 (2003) (estimating an undocumented alien population of 3.5 million in 1990); *see supra* notes 5 & 15 (discussing extended voluntary departure and Congress's implicit approval of the Family Fairness policy). This suggests that DHS's proposed deferred action program is not, simply by virtue of its relative size, inconsistent with what Congress has previously considered a permissible exercise of enforcement discretion in the immigration context.

In light of these considerations, we believe the proposed expansion of deferred action to the parents of U.S. citizens and LPRs is lawful. It reflects considerations—responding to resource constraints and to particularized humanitarian concerns arising in the immigration context—that fall within DHS's expertise. It is consistent with congressional policy, since it focuses on a group—law-abiding parents of lawfully present children who have substantial ties to the community—that Congress itself has granted favorable treatment in the immigration process. The program provides for the exercise of case-by-case discretion, thereby avoiding creating a rule-like entitlement to immigration relief or abdicating DHS's enforcement responsibilities for a particular class of aliens. And, like several deferred action programs Congress has approved in the past, the proposed program provides interim relief that would prevent particularized harm that could otherwise befall both the beneficiaries of the program and their families. We accordingly conclude that the proposed program would constitute a permissible exercise of DHS's enforcement discretion under the INA.

2.

We now turn to the proposed deferred action program for the parents of DACA recipients. The relevant considerations are, to a certain extent, similar to those

discussed above: Like the program for the parents of U.S. citizens and LPRs, the proposed program for parents of DACA recipients would respond to severe resource constraints that dramatically limit DHS's ability to remove aliens who are unlawfully present, and would be limited to individuals who would be unlikely to be removed under DHS's proposed prioritization policy. And like the proposed program for LPRs and U.S. citizens, the proposed program for DACA parents would preserve a significant measure of case-by-case discretion not to award deferred action even if the general eligibility criteria are satisfied.

But the proposed program for parents of DACA recipients is unlike the proposed program for parents of U.S. citizens and LPRs in two critical respects. First, although DHS justifies the proposed program in large part based on considerations of family unity, the parents of DACA recipients are differently situated from the parents of U.S. citizens and LPRs under the family-related provisions of the immigration law. Many provisions of the INA reflect Congress's general concern with not separating individuals who are legally entitled to live in the United States from their immediate family members. *See, e.g.*, 8 U.S.C. § 1151(b)(2)(A)(i) (permitting citizens to petition for parents, spouses and children); *id.* § 1229b(b)(1) (allowing cancellation of removal for relatives of citizens and LPRs). But the immigration laws do not express comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. DACA recipients unquestionably lack lawful status in the United States. *See* DACA Toolkit at 8 ("Deferred action . . . does not provide you with a lawful status."). Although they may presumptively remain in the United States, at least for the duration of the grant of deferred action, that grant is both time-limited and contingent, revocable at any time in the agency's discretion. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the immigration system Congress has enacted and the policies that system embodies.

Second, as it has been described to us, the proposed deferred action program for the parents of DACA recipients would represent a significant departure from deferred action programs that Congress has implicitly approved in the past. Granting deferred action to the parents of DACA recipients would not operate as an interim measure for individuals to whom Congress has given a prospective entitlement to lawful status. Such parents have no special prospect of obtaining visas, since Congress has not enabled them to self-petition—as it has for VAWA self-petitioners and individuals eligible for T or U visas—or enabled their undocumented children to petition for visas on their behalf. Nor would granting deferred action to parents of DACA recipients, at least in the absence of other factors, serve interests that are comparable to those that have prompted implementation of deferred action programs in the past. Family unity is, as we have discussed, a significant humanitarian concern that underlies many provisions of the INA. But a concern with furthering family unity alone would not justify the

proposed program, because in the absence of any family member with lawful status in the United States, it would not explain why that concern should be satisfied by permitting family members to remain in the United States. The decision to grant deferred action to DACA parents thus seems to depend critically on the earlier decision to make deferred action available to their children. But we are aware of no precedent for using deferred action in this way, to respond to humanitarian needs rooted in earlier exercises of deferred action. The logic underlying such an expansion does not have a clear stopping point: It would appear to argue in favor of extending relief not only to parents of DACA recipients, but also to the close relatives of any alien granted deferred action through DACA or any other program, those relatives' close relatives, and perhaps the relatives (and relatives' relatives) of any alien granted any form of discretionary relief from removal by the Executive.

For these reasons, the proposed deferred action program for the parents of DACA recipients is meaningfully different from the proposed program for the parents of U.S. citizens and LPRs. It does not sound in Congress's concern for maintaining the integrity of families of individuals legally entitled to live in the United States. And unlike prior deferred action programs in which Congress has acquiesced, it would treat the Executive's prior decision to extend deferred action to one population as justifying the extension of deferred action to additional populations. DHS, of course, remains free to consider whether to grant deferred action to individual parents of DACA recipients on an ad hoc basis. But in the absence of clearer indications that the proposed class-based deferred action program for DACA parents would be consistent with the congressional policies and priorities embodied in the immigration laws, we conclude that it would not be permissible.

III.

In sum, for the reasons set forth above, we conclude that DHS's proposed prioritization policy and its proposed deferred action program for parents of U.S. citizens and lawful permanent residents would be legally permissible, but that the proposed deferred action program for parents of DACA recipients would not be permissible.

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The President and Immigration Law Redux

ABSTRACT. In November 2014, President Obama announced his intention to dramatically reshape immigration law through administrative channels. Together with relief policies announced in 2012, his initiatives would shield nearly half the population of unauthorized immigrants from removal and enable them to work in the United States. These events have drawn renewed attention to the President's power to shape immigration law. They also have reignited a longstanding controversy about whether constitutional limits exist on a central source of executive authority: the power to enforce the law.

In using the Obama relief policies to explore these dynamics, we make two central claims. First, it is futile to try to constrain the enforcement power by tying it to a search for congressional enforcement priorities. Congress has no discernible priorities when it comes to a very wide swath of enforcement activity—a reality especially true for immigration law today. The immigration code has evolved over time into a highly reticulated statute through the work of numerous Congresses and political coalitions. The modern structure of immigration law also effectively delegates vast screening authority to the President. Interlocking historical, political, and legislative developments have opened a tremendous gap between the law on the books and the law on the ground. Under these conditions, there can be no meaningful search for congressionally preferred screening criteria. Far from reflecting a faithful-agent framework, then, immigration enforcement more closely resembles a two-principals model of policymaking—one in which the Executive can and should help construct the domain of regulation through its independent judgments about how and when to enforce the law.

Second, when exploring limits on the enforcement power, we should focus not on *who* benefits from enforcement discretion but on *how* the Executive institutionalizes its discretion. The Obama relief initiatives are innovative: they bind the exercise of prosecutorial discretion to a more rule-like decision-making process, constrain the judgments of line-level officials by subjecting them to centralized supervision, and render the exercise of enforcement discretion far more transparent to the public than is customary. These efforts to better organize the enforcement bureaucracy ultimately advance core rule-of-law values without undermining deterrence or legal compliance, as some critics have worried. Moreover, while our focus on discretion's institutionalization requires contextualized judgments that may rarely translate into clear doctrinal rules to govern the enforcement power, we believe it is generally unnecessary and unwise to use constitutional law to limit the President's authority over how to organize the enforcement bureaucracy.

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INTRODUCTION

On November 20, 2014, President Obama announced sweeping executive reforms of immigration law.[1] The centerpiece of his announcement was an initiative designed to provide a measure of security to millions of unauthorized immigrants. Under it, executive branch officials would exercise discretion to defer the deportation of unauthorized immigrants who have lived for years in the United States and have U.S. citizen (or green-card holding) children. Parents who received this "deferred action" also would be eligible to receive work permits. As many as 3.6 million noncitizens may be eligible for relief under the program—a number that jumps to more than five million when the program for parents is combined with an earlier-announced initiative for unauthorized immigrants who arrived in the United States as children.[2] Together, President Obama's efforts could protect nearly fifty percent of today's unauthorized immigrant population.[3]

The President's decision to defer the deportation of millions of immigrants sparked sharp debate among scholars and political figures about his authority to create such a large-scale relief program. The Administration provided an unusually meaty framework for the debate by releasing an opinion, prepared by the Office of Legal Counsel (OLC) in the Department of Justice, concluding that the initiative was well within the Administration's statutory and

1. *See* President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), http://www.whitehouse.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration [http://perma.cc/LHK7-DZE4]. The President's address was accompanied by, and implemented through, a series of memoranda issued by U.S. Secretary of Homeland Security Jeh Johnson. *See Fixing Our Broken Immigration System Through Executive Action – Key Facts*, U.S. DEP'T OF HOMELAND SECURITY (Aug. 19, 2015), http://www.dhs.gov/immigration-action [http://perma.cc/U5K8-RE3R] (displaying the list of memos).

2. *See National and State Estimates of Populations Eligible for DACA and DAPA Programs, 2009-2013*, MIGRATION POL'Y INST. (2015), http://www.migrationpolicy.org/sites/default/files/datahub/DACA-DAPA-2013State%20Estimates-Spreadsheet-FINAL.xlsx [http://perma.cc/RE76-2TBJ].

3. For a detailed account of the President's initiatives, see *infra* notes 102-111 and accompanying text. In addition to the deferred action policies, the Department of Homeland Security (DHS) also announced a shift in enforcement priorities more generally. One study estimates that this shift, if "strictly implemented," coupled with the deferred action programs, could result in eighty-seven percent of unauthorized immigrants in the United States receiving some form of protection or relief from removal. Marc R. Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*, MIGRATION POL'Y INST. 2 (July 2015), http://migrationpolicy.org/research/understanding-potential-impact-executive-action-immigration-enforcement [http://perma.cc/Y2YS-SRQ8].

constitutional authorities.[4] Critics disagreed with OLC's conclusion, decrying President Obama's actions as not just unwise but unconstitutional—the latest installment in the rise of an imperial presidency.[5] The debate quickly made its way to the federal courts, as nearly two dozen states challenged the relief programs in a lawsuit that, as of this writing, remains pending and has resulted in the temporary injunction of the President's initiatives.[6]

These events have drawn renewed attention to the President's power to shape the substance of immigration law through the exercise of his enforcement power. They have also reignited the longstanding controversy over whether any limits exist on this central source of executive authority. Both of these issues were at the heart of our previous work, *The President and Immigration Law*.[7] Published in these pages six years ago, that article provided a historical account of the distribution of immigration lawmaking authority between the President and Congress. Our core claim in that piece was that a series of twentieth-century developments—constitutional, historical, and institutional—had, as a functional matter, given the President tremendous power over the immigrant-screening system: power to determine which immigrants would be permitted to remain in the United States, and which would be forced to leave.[8] We labeled this constellation of developments "de facto delegation" and argued that it constituted one of the most important features of modern American immigration law.

4. *See infra* Part II.A.

5. *See infra* Parts II.B, III.B.

6. *See infra* notes 109, 117, 310-311 and accompanying text.

7. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009).

8. In *The President and Immigration Law*, we identified three models that have defined the nature of executive power in immigration law. Each of these models finds some foundation in Supreme Court case law, but because the Court's opinions generally have been concerned with defining federal power writ large, they abstract from the institutional details of the separation of powers. *See id.* at 460-83. We therefore turned to historical practice to understand interbranch relations in immigration law and found that the President has derived considerable policymaking authority from three sources: (1) inherent power; (2) express delegation; and (3) de facto delegation. *Id.* at 483-519. With the rise of the modern administrative state, the inherent authority model has receded into history. Yet it was not supplanted by a widespread practice of express congressional delegations as has been true in some other regulatory areas (though, to be sure, formal delegations in limited areas of immigration law have also given presidents avenues to advance their own policy objectives in a unilateral fashion). Instead, a more complex phenomenon that we labeled "de facto delegation" has enabled the President to set immigrant-screening policy through enforcement judgments. For elaboration on the meaning of de facto delegation, see *id.* at 510-19; and *infra* Part I.

Developments since we last wrote, culminating in President Obama's recent announcement, have both confirmed our earlier account and raised important new questions. While our previous work was mostly descriptive and historical, intervening developments have sharpened the legal and theoretical separation of powers questions raised by our argument. Moreover, whereas in 2009 we chiefly addressed the allocation of power *between* the branches in immigration law, the passage of time has highlighted the importance of power allocations *within* the Executive Branch for understanding the on-the-ground practice of presidential immigration law. Thus, this Article seeks to move beyond our earlier arguments in two ways—by squarely confronting the legal and normative questions about the President's power over immigration policy, and by carefully unpacking the "unitary" Executive to develop better purchase on these questions and on our earlier descriptive account of the President and immigration law.

This Article makes two central claims about the relationship between enforcement discretion and the separation of powers, both in immigration law and more generally. The first concerns the *substantive limits* on enforcement discretion: what (if anything) constrains executive branch choices about which immigrants will be protected through the exercise of enforcement discretion? The second concerns the *institutionalization* of that discretion: what (if anything) constrains executive branch choices about how to institutionalize the exercise of enforcement discretion within the bureaucracy? While we address these questions by focusing on the Obama relief initiatives, the questions themselves implicate broader separation of powers debates and will remain pressing even if opponents of the President's relief initiatives emerge victorious in the pending federal litigation.[9]

With respect to our first argument, we show that efforts to constrain the President's enforcement authority with reference to "congressional enforcement priorities"—an approach taken by both defenders and critics of the President—are doomed to fail.[10] We recognize the appeal of this approach. By tying the exercise of enforcement discretion to inferences about congressional intent drawn directly from immigration statutes, the Administration can claim to be acting as Congress's faithful agent, following the principal's wishes rather than making policy unmoored from the dictates of

9. We discuss our views as to the likely outcome of this litigation *infra* Parts II, IV and *infra* notes 119-120, 310 and accompanying text.

10. For use by supporters, see Memorandum from the Office of Legal Counsel to the Sec'y of Homeland Sec. and the Counsel to the President 10 (Nov. 19, 2014), http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf [http://perma.cc/85Y5-N94M] [hereinafter OLC Memorandum Op.]. For use by critics, see *infra* notes 152-157 and accompanying text.

immigration law's elaborate statutory scheme. On this account, Congress makes the tough value judgments, not the President. He or she simply extracts those underlying value judgments from the statute through sophisticated legal analysis. The approach also provides a seemingly clear limiting principle to prevent the enforcement power from devolving into dispensation of the law—something that supporters of large-scale administrative relief had failed to provide until OLC shifted the tenor of the debate.

The trouble is that this faithful-agent model obscures the role that enforcement discretion plays in our modern system of separated powers. Even outside the immigration context, it would be passing strange to argue that the myriad discretionary decisions made by law enforcement officials should always be motivated and constrained *solely* or even primarily by the value judgments those officials can trace to a code enacted by Congress. Moreover, this model is especially limited as an account of immigration law. Our historical account of separation of powers in this domain highlights the ubiquity of presidents exercising discretionary immigration authority in ways that cannot be characterized as consistent with clearly identifiable congressional priorities.[11] That history has combined with a series of other developments—most notably the growth of the deportation regime and the size of the unauthorized population—to create the de facto delegation model of immigration policymaking. The tremendous authority wielded by the President under that model to shape our immigrant screening policies renders talk of "congressional priorities" for enforcement inapposite. We do not think it possible to coherently identify a set of congressional priorities for immigration enforcement through a careful, lawyerly exercise of intertextual fidelity to the 300-page immigration code.[12]

Far from fitting into a faithful-agent framework, therefore, our modern system of presidentially driven, ex post immigration screening is better understood as embodying a "two-principals" model of immigration policymaking. One possible response to the emergence of this model would be to decry it as lawless. But that would be a mistake. We see significant value in a model of the enforcement power according to which executive priorities stand

11. *See* Cox & Rodríguez, *supra* note 7, at 483-528; *see also* Adam Cox & Cristina Rodríguez, *Executive Discretion and Congressional Priorities*, BALKINIZATION (Nov. 21, 2014, 2:05 PM), http://balkin.blogspot.com/2014/11/executive-discretion-and-congressional.html [http://perma.cc/5A78-NCY9]. In fact, many historical episodes reveal the President exercising immigration enforcement authority in ways contrary to the plausible preferences of Congress. *See* Cox & Rodríguez, *supra* note 7, at 483-528.

12. *See infra* Part I.C; *see also* Cox & Rodríguez, *supra* note 7, at 510-18 (describing three key aspects of immigration law that effectively delegate "tremendous policymaking power to the President").

alongside congressional ones. As the history of immigration law has demonstrated, this model empowers the Executive to address the unanticipated costs and epistemic limits of ex ante congressional lawmaking, calibrate the policies enacted by Congress to changed circumstances, provoke constructive and innovative policy reforms in both branches, and guard against the perils of legislative stasis. Policymaking through enforcement may not advance these objectives all the time, and it could certainly be abused. But given the reality of de facto delegation and the benefits that flow from the President's current role, it would be a mistake to dismiss policymaking through enforcement as lawless.

While we reject substantive limits derived from congressional priorities, our second claim is that we can still meaningfully address the desirability or legality of particular regimes of enforcement discretion. As we explore in Part III, the better inquiry into the legality of President Obama's relief programs, and the use of the enforcement power more generally, asks whether the Executive should be constitutionally prohibited from *institutionalizing* enforcement discretion in particular ways. The most important aspects of the President's immigration initiatives have nothing to do with the substantive criteria for relief; the program's focus on children, families, long-term residence, and clean criminal records strongly resembles the approach contained in many earlier, much less controversial guidance documents intended to channel prosecutorial discretion.[13] Instead, the more important innovation was to make the exercise of discretion more rule-like, centralized, and transparent. These features have been the focus of prominent critics, who have argued that the President has wielded prosecutorial discretion in an impermissibly "categorical" way, rather than in a valid "individualized" fashion, or that he has extended substantive "legal benefits" to unauthorized immigrants, rather than mere forbearance.[14]

The institutional choices embodied in the President's initiatives thus raise issues far beyond immigration law: they concern broader debates about centralization, transparency, and bureaucratic justice. How one evaluates the choices embodied in the President's plans, therefore, cannot be divorced

13. *See infra* text accompanying notes 234-236.

14. *See, e.g.*, 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); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014); Peter Margulies, *President Obama's Immigration Plan: Rewriting the Law*, LAWFARE (Nov. 23, 2014, 4:15 PM), http://www.lawfareblog.com/2014/11/president-obamas-immigration-plan-rewriting-the-law [http://perma.cc/ND78-RDGL]; David A. Martin, *Concerns About a Troubling Presidential Precedent and OLC's Review of Its Validity*, BALKINIZATION (Nov. 25, 2014, 9:30 AM), http://www.balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html [http://perma.cc/H4M8-B4MP].

entirely from one's views on some classic debates about the theoretical and legal underpinnings of the American administrative state. In that sense, the President's critics are correct that much more is at stake than the justice of deferring the removal of long-term residents of the United States.

At the same time, critics err in thinking that those debates can be resolved in this instance without a historically grounded understanding of the immigration separation of powers. The institutional account of immigration law that we have jointly developed over the course of the last several years ultimately helps explain exactly why the President's immigration initiatives are both lawful and desirable. They promote important rule-of-law values, such as transparency and accountability, as well as the age-old aim of treating like cases alike. And they do so without threatening to undermine another rule-of-law value—legal compliance—that some have claimed will be compromised by the President's initiatives.[15] Conjuring out of Article II ether a constitutional prohibition on the way the President has institutionalized discretion in his recent immigration initiatives would significantly undermine these values, and for essentially no benefit. Moreover, it would entrench the authority of low-level bureaucrats against alternative judgments about how best to arrange power within the bureaucracy—even judgments by the very Congress that created the bureaucracy.

Our complementary arguments—against the congressional priorities approach and in favor of a focus on discretion's institutionalization—ultimately show how the leading critiques of the President's relief initiatives go wrong.[16] Yet our two central claims are important not only (or even primarily) because they help us properly evaluate the legality of the most important presidential immigration initiative in several decades. They also address a set of shortcomings in modern separation of powers and administrative law theory. Principal-agent models borrowed from contract theory and positive political theory have been invaluable tools for analyzing the administrative state. But those models also have serious limitations. In this Article, we illuminate one crucial area of executive power where standard principal-agent models obscure much more than they illuminate. We also show that the project of fleshing out separation of powers theory, descriptively and normatively, must occur with much more institutional and domain-specific context than is typical in contemporary constitutional scholarship. Far from an argument for immigration exceptionalism, our analysis highlights how immigration is just like multiple other domains of regulation, in that each evolves according to particular legal, practical, and political dynamics. Though we may be able to

15. *See* Price, *supra* note 14.

16. *See infra* Part III.A and *infra* notes 152-157, 286-294 and accompanying text.

identify abstract goals that a system of separated powers should serve, how power has been and ought to be allocated among the branches to serve those goals will differ across time and setting.

This emphasis on context does not mean that the search for generalizable limiting principles or theories in separation of powers contexts is doomed. In fact, the arguments we make in Parts II and III together provide a framework, which we develop in Part IV, for thinking about limiting principles that can serve separation of powers values while accounting for institutional and historical context. Moreover, our defenses of presidential immigration law in general, and President Obama's immigration initiatives in particular, do not amount to a conclusion that current congressional-executive dynamics are optimal. We conclude in Part IV, therefore, by taking seriously the second-best nature of immigration law's current structure. We consider reforms—both modest and radical—that would promote and discipline the role that the President currently plays in American immigration law.

I. A BRIEF HISTORY OF PRESIDENTIAL IMMIGRATION LAW

Before we can evaluate the immigration enforcement initiatives announced by President Obama and understand the scope of the contemporary enforcement power, some history is in order. This Part situates the initiatives within a century-long story of administrative innovation that produced modern American immigration law. Only with this context can we make sense of the motivations for, and the legality of, the President's deportation relief programs.

We show that the Obama relief initiatives represent only the most recent examples of the executive policymaking that has been part and parcel of immigration history. The President has always been an immigration policymaker alongside and sometimes in competition with Congress. President Obama's recent actions simply reinforce the ways in which the content and scope of the President's regulatory authority have evolved in response to the actions of Congress, as well as underlying historical and social factors. That evolution has been complex, involving a combination of partisan politics, economic and demographic forces, social movement pressures, and institutional demands. This specificity of context, however, does not turn our account into a tyranny of particularism. The trajectory we trace provides important, generalizable lessons that, as we will show in Parts II and III, have direct implications for how we judge the legality and desirability of the

President's relief initiatives and the use of the enforcement power more generally.[17]

These lessons ultimately differ considerably from the ones that some supporters of the President's initiatives have drawn from pieces of the history we recount below. Some commentators have argued that the initiatives are lawful because they sufficiently resemble actions by previous administrations—in particular, the use of administrative relief by Presidents Reagan and Bush during the implementation of a legalization program enacted by Congress in 1986. We neither treat this history as quasi-legal precedent, nor rely on debatable notions of congressional acquiescence to executive branch practice to make claims about constitutional settlements between the branches. Instead, we use this history to provide a thorough account of the structure of modern

17. In much of the debate over the 2014 policies, commentators have drawn a distinction between legal arguments and policy arguments. *See, e.g.*, Muzaffar Chishti et al., *As Implementation Nears, U.S. Deferred Action Programs Encounter Legal, Political Tests*, MIGRATION POL'Y INST. (Feb. 11, 2015), http://www.migrationpolicy.org/article/implementation-nears-us-deferred-action-programs-encounter-legal-political-tests [http://perma.cc/7CQH-CNDZ] (analyzing separately political and legal opposition to the President's actions); *Understanding the Legal Challenges to Executive Action: Long on Politics, Short on Law*, AM. IMMIGR. COUNCIL (June 2, 2015), http://www.immigrationpolicy.org/sites/default/files/docs/understanding_initial_legal_challenges_to_immigration_accountability_executive_actionlong_on_politics_short_on_law_final.pdf [http://perma.cc/5Z7B-3H2Y] (characterizing legal challenges to the 2014 policies as in fact predicated on policy arguments). Defenders of the President's actions have insisted that the legal authority for Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) is clear and that the only source of debate is whether it makes good policy sense to defer the removal of unauthorized immigrants. *See, e.g.*, *The Unconstitutionality of President Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 83-84 (2015) (written testimony of Stephen H. Legomsky, Professor, Washington University School of Law) [hereinafter Legomsky, Written Testimony] ("While I appreciate that reasonable minds can and do differ about the *policy* decisions, I take this opportunity to respectfully share my opinion that the President's actions are well within his *legal* authority."); Hiroshi Motomura, *The President's Discretion, Immigration Enforcement, and the Rule of Law*, AM. IMMIGR. COUNCIL (Aug. 26, 2014), http://www.immigrationpolicy.org/perspectives/president%E2%80%99s-discretion-immigration-enforcement-and-rule-law [http://perma.cc/77F3-JVZV] ("[N]o matter how one might debate how the President should weigh these considerations, the fact remains that this is a policy debate."). But there is a third line of debate, legal in nature, that defenders of the policy sometimes obscure—whether the President's use of his prosecutorial discretion in the form of the 2014 initiatives reflects a desirable or healthy form of executive decision making. With this Article, we illuminate that terrain. It is possible to conclude that the President's actions are legal in the sense of being within his constitutional powers historically understood, but to also debate whether they embody a form of presidentialism that advances the objectives of the general separation of powers—a debate we take up throughout this Article. The answer to the latter question may be informed by whether deferring removal of millions of unauthorized immigrants is a good idea, but the two questions are not the same.

immigration law, identify the imperatives and temptations that attend the use of the enforcement power in light of that structure, and explain the motivations for present-day uses of that power.[18] Our history underscores what critics fail to understand about the nature of enforcement today, and in that sense it provides the context for a reality-based articulation of the scope of the enforcement power.

In this Part, we begin by summarizing our 2009 account of how the President historically has used the powers expressly delegated to him to advance his own policy agenda, resulting in what we term executive unilateralism. We then turn to the central source of power at issue in this Article—enforcement discretion. We demonstrate how the underenforcement of certain parts of the immigration code, as in many domains, has transformed the law enacted by Congress into regulation that reflects executive branch priorities. We then elaborate on the concept of de facto delegation introduced in our earlier work and explain its relevance to current controversies. In keeping with our focus on the internal organization of the Executive Branch, we close by documenting the trend in recent decades toward the Executive's centralization of its enforcement discretion. Taken together, these perspectives on executive power help make the descriptive case for the two-principals model defended in Part II and provide the institutional detail required to understand what precisely is at stake with the Obama relief initiatives.

A. From Delegation to Unilateralism

In our 2009 work, we identified three models of executive authority that emerged over the course of the twentieth century: inherent presidential authority,[19] express delegation,[20] and de facto delegation.[21] Each model arose through institutional practice and amidst confusion in the courts about the constitutional role each branch was supposed to play in the exercise of the federal government's immigration power. By the late twentieth century, consonant with the dramatic expansion of the delegated administrative state,

18. *See, e.g.*, Mark Noferi, *When Reagan and GHW Bush Took Bold Executive Action on Immigration*, HILL (Oct. 2, 2014, 12:00 PM), http://thehill.com/blogs/congress-blog/foreign-policy/219463-when-reagan-and-ghw-bush-took-bold-executive-action-on [http://perma.cc/H5QF-ZQN2]; *see also* Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. 255 (2013).

19. Cox & Rodríguez, *supra* note 7, at 465-66.

20. *Id.* at 492.

21. *Id.* at 510.

the first tradition of inherent authority had receded.[22] But presidents looking to mold immigration law to advance their own objectives have rarely needed to resort to claims of inherent constitutional authority. Instead, they have used authorities expressly delegated to them by Congress, or taken advantage of their role in enforcing congressional schemes (the source of de facto delegation) to advance their own agendas.

Throughout the twentieth century, and up to the present, the President has used powers expressly delegated to him by Congress to advance his own immigration agenda. Importantly, these uses have often been innovative, accomplishing objectives Congress almost certainly did not intend and

22. *See id.* at 474. The most prominent (and likely only explicit) example of the President claiming inherent authority over immigration policy today is his use of Deferred Enforced Departure (DED) to defer the removal of certain noncitizens from the United States. *See* Memorandum from President Barack Obama to the Sec'y of Homeland Sec. (Sept. 26, 2014), http://www.whitehouse.gov/the-press-office/2014/09/26/presidential-memorandum-deferred-enforced-departure-liberians [http://perma.cc/3RCD-9P8Y] (extending President Bush's 2007 grant of deferred enforced departure to Liberians "[p]ursuant to [his] constitutional authority to conduct the foreign relations of the United States"); *Adjudicator's Field Manual, § 38.2: Deferred Enforced Departure*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-16606/0-0-0-16764.html [http://perma.cc/JK68-927C]. Citing inherent Article II authorities, Presidents since at least George H.W. Bush have halted the removal of nationals to their countries of origins where doing so would have foreign policy implications. DED has been exercised in a very limited fashion, but the President's turn in these discrete cases to inherent foreign affairs powers as justification presents a puzzle. On the one hand, it may be that the existence of the Temporary Protected Status (TPS) statute, 8 U.S.C. § 1254a (2012), enacted in 1990 to enable the Executive to defer removal of nationals from states coping with environmental calamities or civil strife, requires the President to resort to extra-statutory sources to provide relief for groups who do not fall within the TPS criteria. But it is not altogether clear why the groups given relief pursuant to DED could not have their removal deferred under the theories of prosecutorial discretion advanced to support DAPA and DACA. In other words, why must DED even exist?

The answer is likely that the justifications or legal frameworks for various executive policies emerge in an ad hoc fashion and in response to the particular circumstances at issue in a given case. DED evolved out of another exercise of enforcement discretion—extended voluntary departure (EVD), *see infra* notes 42-48 and accompanying text—and served the very particular foreign affairs needs to which it has been put, namely protecting groups of noncitizens based on their nationality. At the time Presidents began invoking DED, the use of "ordinary" prosecutorial discretion in the form of deferred action does not appear to have been used in a categorical fashion, *see infra* note 38 and accompanying text (discussing other "categorical" uses of deferred action), and so deferred action might not have appeared as the obvious framework through which to grant relief to the groups given DED, leading Presidents to devise a form of enforcement discretion grounded in inherent presidential authorities, hence the link to foreign affairs. The collection of enforcement powers or programs—EVD, DED, deferred action—highlights how the content of the enforcement power develops historically and iteratively, as opposed to emanating from some sort of ex ante, coherent constitutional scheme of powers.

expanding or repurposing Congress's original design. Congress has at different moments resisted and accommodated these efforts, in some moments moving to limit the originally delegated power in an effort to rein in executive branch efforts, while at others creating new statutory frameworks to accomplish some of the Executive's objectives.

Perhaps the best twentieth-century example of this phenomenon is the President's use of the parole power. Contained within the original Immigration and Nationality Act (INA) of 1952, the parole power permits the President to exercise discretion and allow otherwise inadmissible noncitizens into the United States.[23] As we explained in 2009, beginning with President Eisenhower's admission of 15,000 Hungarians fleeing the communist crackdown in their country, the power served as "the central tool of American refugee policy," enabling the President to control refugee admissions for over twenty years.[24] Though Congress attempted to curtail the President's use of the power by enacting a refugee preference regime in 1965, presidents continued to wield the discretionary power that Congress intended only for "emergent, individual, and isolated situations" in order to admit large groups of noncitizens, including during refugee crises from Cuba, Haiti, and Vietnam.[25] A combination of settled expectations and political pressures eventually led Congress to make those temporary admissions permanent, underlining the President's agenda-setting power.[26]

With the Refugee Act of 1980, Congress directly responded to the executive-driven agenda in two ways. First, it added language to the parole provision requiring that the discretionary act serve compelling reasons in the public interest—an addition many in Congress (perhaps mistakenly) regarded

23. Today, the parole power is codified at 8 U.S.C. § 1182(d)(5) (2012) and permits the President to parole otherwise inadmissible noncitizens into the country "for urgent humanitarian reasons or significant public benefit."

24. Cox & Rodríguez, *supra* note 7, at 502.

25. *Id.* at 503.

26. *Id.* at 506. Episodes such as these help explain some of the Republican resistance to the President's recent uses of deferred action. Even though deferred action is styled as temporary, its opponents believe, with reason, that its extension will create settled expectations, which, when they exist on a large scale, may effectively tie the hands of future administrations and perhaps even require Congress eventually to recognize the temporary status as permanent. We discuss this phenomenon of entrenchment further *infra* notes 286-294 and accompanying text. In our view, we think it is far more likely that the Obama relief initiatives will tie the hands of future administrations rather than force Congress to adopt a legalization program. As a result, the initiatives do present a risk of further entrenching the unauthorized population, thus threatening the creation of a permanent underclass. That said, we could describe the state of affairs pre-DACA and DAPA the same way, suggesting that the President's relief initiatives make the best of a bad situation.

as a means of "bring[ing] the admission of refugees under greater Congressional and statutory control."[27] Second, and more importantly, it created a scheme for overseas refugee selection that expressly delegated power to the President to set the number of annual refugee admissions and to select the countries from which they would be accepted.[28] In 1990, Congress further systematized the process of admitting noncitizens fleeing disaster by creating the Temporary Protected Status (TPS) designation, which authorizes the President to permit categories of noncitizens to remain in the United States on a temporary basis, provided they meet statutory criteria defining the types of calamities Congress deemed worthy of response through protection.[29] The combination of these new provisions suggests that Congress sought to replace the nontransparent use of parole and other discretionary mechanisms with semi-supervised and controlled schemes of delegation that required the President to submit his recommendations to congressional committees and to consult with various agency heads in the process.[30]

As we will explain later, the substitution of delegated and visible authority for discretionary and opaque authority generally should be welcomed. But here, it is important to see how the President made these supposed new constraints on his authority his own. A common critique of the President's implementation of the refugee selection system in the 1980s and 1990s, for example, was that admissions during that period skewed toward nationals of

27. Edward M. Kennedy, *Refugee Act of 1980*, 15 INT'L MIGRATION REV. 141, 146 (1981).

28. Refugee Act of 1980, Pub. L. No. 96-212, § 201, 94 Stat. 102, 102-03.

29. 8 U.S.C. § 1254a (2012). TPS replaced the Executive's use of a discretionary mechanism, known as Extended Voluntary Departure (EVD), to provide relief from removal for persons fleeing certain kinds of disasters. *See* KATE M. MANUEL & MICHAEL JOHN GARCIA, CONG. RESEARCH SERV., R43782, EXECUTIVE DISCRETION AS TO IMMIGRATION: LEGAL OVERVIEW 6 (2014). For further discussion of EVD, see *infra* notes 42-46 and accompanying text. TPS filled a gap in the statutory protection of noncitizens fleeing calamities. The Refugee Act's asylum provisions, and pre-existing provisions authorizing the withholding of removal, applied only to those who met the definition of refugee, which required having a fear of persecution on account of one of several recognized grounds, including political opinion, race, and religion—the classic definition of refugee. The TPS statute provided a statutory mechanism for the Executive to protect persons fleeing disaster and civil strife. *See* Bill Frelick & Barbara Kohnen, *Filling the Gap: Temporary Protected Status*, 8 J. REFUGEE STUD. 339 (1995).

30. Cox & Rodríguez, *supra* note 7, at 539. The statutory scheme requires the President's "appropriate consultation" with Cabinet members and members of congressional committees in determining that refugee admissions are justified and in setting admissions numbers. Immigration and Nationality Act § 207(a)(3)-(e), 8 U.S.C. § 1157(a)(3)-(e) (2012); *see also* Stephen H. Legomsky, *The Making of United States Refugee Policy: Separation of Powers in the Post-Cold War Era*, 70 WASH. L. REV. 675, 697 (1995) (characterizing section 1157(e) as requiring "personal discussion").

then-Communist regimes, suggesting that the President used the system in order to advance his particularistic foreign policy goals rather than the more universal humanitarian objectives of the 1980 Act.[31] This critique simultaneously assumes that the two goals are mutually exclusive and that Congress had a clear purpose it thought should drive refugee selection.

Whether either of these claims has merit is beside the point for our purposes. Instead, what matters is that the President utilized his delegated authority to serve a decidedly executive agenda. The creation of the refugee selection process in 1980 and TPS authority in 1990 may have diminished the need for sweeping and categorical use of the parole power, as well as the political and legal flexibility of the President to rely on parole as he had in the past. But these effects have been more modest than one might suppose, and parole remains an important alternative route of admission for those who may not qualify for refugee status.[32] The authority also continues to serve as a basis for innovation. Most recently, the Obama Administration has invoked parole in place—itself an innovation on the parole power[33]—to provide relief for a large group of unauthorized immigrants already in the United States—relatives of members of the military. Though the application for and granting of parole continues to be framed as case-by-case, the memorandum announcing parole in place for military families clearly reflects an intent to provide relief to a favored category of unauthorized immigrants.[34]

This sort of creative unilateralism, which we identified in our 2009 article, has arisen in many other instances. A vivid example is the once obscure but now frequently invoked "family fairness" policies adopted by Presidents

31. *See* Legomsky, *supra* note 30, at 699-700.

32. *See In-Country Refugee/Parole Processing for Minors in Honduras, El Salvador and Guatemala (Central American Minors—CAM)*, U.S. CITIZENSHIP & IMMIGR. SERVICES (Feb. 9, 2015), http://www.uscis.gov/humanitarian/refugees-asylum/refugees/country-refugeeparole-processing-minors-honduras-el-salvador-and-guatemala-central-american-minors-cam [http://perma.cc/782B-GPEK].

33. The parole provision of the INA authorizes parole for "any alien applying for admission." Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(a)(5)(A) (2012). Section 235(a)(1) of the INA (8 U.S.C. § 1125(a)(1) (2012)), in turn, defines "applicant for admission" to include noncitizens present in the United States without having been admitted. Thus, while parole was available, prior to some 1996 changes to immigration law, only to noncitizens who had yet to enter the United States, the Executive has now interpreted its parole authority to extend to immigrants who have entered the country without having been admitted. *See, e.g.*, Memorandum from the U.S. Dep't of Justice Office of the Gen. Counsel to Immigration & Naturalization Serv. Officials (Aug. 21, 1998), *reprinted in* 76 INTERPRETER RELEASES 1050 app. (1999).

34. *See* Policy Memorandum from the U.S. Citizenship & Immigration Servs. (Nov. 15, 2013), http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf [http://perma.cc/4VUN-K2TV].

Reagan and George H.W. Bush after Congress enacted a large-scale legalization program in 1986. The legalization program, part of the Immigration Reform and Control Act (IRCA), provided a path to legal status for millions of unauthorized migrants, but it did not extend to many of the spouses and children of those immigrants. Despite this, President Reagan's Immigration and Naturalization Service (INS) in 1987 elected to defer the removal of many of these family members[35]—a deferral President Bush continued, and then expanded in 1990 when legislation to legalize their status stalled in Congress.[36] Later that year, Congress enacted a statutory legalization for the group.[37]

These deferrals of removal can be cast in two very different lights. First, we might see them as nothing more than a form of transitional relief. On this account, Presidents Reagan and George H.W. Bush operated within a statutorily created legalization framework, but in the course of implementation

35. Memorandum from Gene McNary, Comm'r, Immigration & Naturalization Serv., to Reg'l Comm'rs (Feb. 2, 1990); *INS Reverses Family Fairness Policy*, 67 INTERPRETER RELEASES 153 (1990). The Reagan Administration deferred removal of minor children where all parents with whom the child was living had permanently legalized their status pursuant to IRCA. *INS Announces Limited Policy on Family Unity*, 64 INTERPRETER RELEASES 1191 (1987). The Administration also deferred removal of spouses on a case-by-case basis, where "compelling or humanitarian factors" existed. *Id.* When the Immigration and Nationalization Service (INS) continued the policy under President Bush in 1990, the agency amended the policy to include most spouses and unmarried minor children. *See INS Reverses Family Fairness Policy*, 67 INTERPRETER RELEASES 153, 153-54 (1990) (enumerating the prerequisites for spouses and children to benefit from the family fairness policy, including admissibility as immigrants and a maximum number of criminal convictions).

36. It is worth pausing for a moment in thinking about this episode to observe that the actions of Presidents Reagan and Bush arguably defy conventional understandings of how party dynamics affect immigration policy. We might not have expected Republican presidents to extend the reach of a legislative "amnesty." These Presidents' actions might be evidence of how the Republican Party in particular has evolved, as well as evidence of the way in which American presidents have often supported more open immigration policies than have their contemporaries in Congress. For a discussion of this pattern over time, see Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31. *See also* Cox & Rodríguez, *supra* note 7, at 484 (discussing presidents' repeated veto of literacy tests for immigrant screening adopted by Congress).

37. Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 4978, 5029-39; *see also* JOYCE C. VIALET, CONG. RESEARCH SERV., 91-493 EPW, IMMIGRATION LEGISLATION—QUESTIONS AND ANSWERS 1 (1991) (explaining the deferral and work authorization provisions for spouses and unmarried children of legalized noncitizens in the Immigration Act of 1990's "Family Unity" section); Applicant Processing for Family Unity Benefits, 57 Fed. Reg. 6457, 6457-62 (Feb. 25, 1992) (interim rule implementing the Family Unity Program); *The Immigration Act of 1990 Analyzed: Part 2—Family-Sponsored Immigrants*, 67 INTERPRETER RELEASES 1393, 1397-99 (1990) (detailing the Family Unity Program's statutory provisions and legislative history).

identified inequities (and perhaps oversights) in the design of IRCA's original program. They used their discretion to ameliorate those inequities—to prevent the removal of family members who eventually would be eligible for immigration status through their newly legalized spouses or parents. Once debate began in Congress over new legalization legislation that would reach family members left out of the initial legislation, thus obviating the need for those family members to petition through the ordinary immigration process, the actions of the Presidents truly became transitional amelioration pending congressional action.[38] If the statutory legalization scheme would soon encompass those family members, it would make little sense—as a matter of resource allocation or justice—to deport large numbers of them during the period of legal transition.[39] Far from being oppositional, the President's actions could be seen to exemplify cooperation between the Executive and Congress in the implementation of a large new initiative.

Of course, the family fairness regulations could also be seen as an act of executive defiance. On this account, Congress's intent as reflected in IRCA was to provide legal status to a precisely defined group of unauthorized

38. In this sense, the "family fairness" initiatives resemble decisions by President Clinton to defer the removal of victims of domestic abuse during debate over the reauthorization of the Violence Against Women Act (VAWA), which contained provisions that would have made them eligible for visas. They also resemble President George W. Bush's decision to defer the removal of student visa holders who temporarily lost their enrolled student status in the wake of Hurricane Katrina. *See* Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm'r, Immigration & Naturalization Serv., to Reg'l Dirs., Dist. Dirs., Officers-in-Charge & Serv. Ctr. Dirs. (May 6, 1997), http://www.asistahelp.org/documents/resources/Virtue_Memo_97pdf_53DC84D782445.pdf [http://perma.cc/RH5S-SWGE] (explaining the process for deferred action and work authorization during the debates over VAWA); Press Release, U.S. Citizenship & Immigration Servs., USCIS Announces Interim Relief for Foreign Students Adversely Impacted by Hurricane Katrina (Nov. 25, 2005), http://www.uscis.gov/sites/default/files/files/pressrelease/F1Student_11_25_05_PR.pdf [http://perma.cc/H9PK-X5YG] (announcing the deferral of removal for F-1 visa holders whose enrollment was affected by Hurricane Katrina). The deferrals, while categorical, can also be characterized as transitional.

39. Because those legalized by the IRCA would become eligible to petition for the admission of their spouses and children through the already existing immigration system, deferring their removal would arguably have simply facilitated the inevitable operation of the law. The fight in Congress was about whether to allow spouses and children to "skip the line," or become permanent residents without having to wait for the green card queue to run its course. *See* S. COMM. ON THE JUDICIARY, IMMIGRATION REFORM AND CONTROL ACT OF 1985, S. REP. NO. 99-132, at 16 (1985) ("It is the intent of the Committee that the families of legalized aliens will obtain no special petitioning rights by virtue of the legalization. They will be required to 'wait in line' in the same manner as immediate family members of other new resident aliens."). In IRCA, Congress initially rejected that option, but in so doing it did not expressly or even impliedly preclude the President from deferring removal of that same group of noncitizens.

immigrants. And President Reagan's actions, in particular, amounted to a kind of executive rejection of the parameters of IRCA's legalization program and a unilateral decision to protect a group that the President, but not Congress, regarded as deserving. Perhaps these very actions forced the issue onto Congress's agenda and helped secure the statutory change adopted in 1990. Such unilateralism might have made Presidents Reagan and George H.W. Bush's judgments at the time more subject to question, but this characterization would also make so-called family fairness more of an on-point precedent for the Obama relief initiatives,[40] which emerged through the President's use of quintessentially executive authority, rather than in the implementation of a congressional legalization scheme.[41]

Whatever the appropriate characterization of family fairness, the episode embodies two of the characteristics of the separation of powers in immigration law that we have emphasized here and in other work. First, the particular tool Presidents Reagan and George H.W. Bush used to extend relief to the "ineligible spouses and children of legalized aliens"—extended voluntary departure (EVD)—was an innovation on enforcement discretion that emerged to address particular contingencies and grew in scope over time. The origins of, justifications for, and evolution of EVD are somewhat obscure and poorly understood. But it appears to have developed in an ad hoc fashion in the 1960s and 1970s, as a class-based form of relief from deportation. The Executive typically, though not exclusively, directed it at nationals of particular countries, often for humanitarian reasons or because conditions in the noncitizens' home countries were dangerous or chaotic.[42] Certain Cuban nationals permitted by President Eisenhower to remain in the United States in 1960, for example, benefitted from EVD.[43] And though it was most often used to address foreign

40. We think this claim of defiance would go too far, for the reasons expressed *supra* note 39.

41. As we discuss *infra* Part II, the Office of Legal Counsel in the Department of Justice found the President's decision to initiate DAPA lawful in part because it concluded that DAPA cohered with congressional priorities of family unity expressed in the Act. As we note there, however, this claim is not that Congress delegated authority to the President to initiate DACA and DAPA. Rather, it is a claim that, in the enforcement of the INA, the President's DACA and DAPA programs advance a congressional priority, which implies that for the exercise of enforcement discretion to be lawful, it must match up with some goals of Congress.

42. Certain class-based deferrals, characterized after the fact as examples of EVD, were not understood at the time to be exercises of EVD, underscoring the murkiness of the sources of discretionary decision making by the President in immigration law. SHARON STEPHAN, CONG. RESEARCH SERV., 85-599 EPW, EXTENDED VOLUNTARY DEPARTURE AND OTHER GRANTS OF BLANKET RELIEF FROM DEPORTATION 10 (1985).

43. *See* H.R. REP. NO. 89-1978, at 2 (1966) (observing that in September 1966, prior to the Cuban Adjustment Act, roughly 47,000 Cubans benefited from EVD).

policy-related exigencies, presidents came to use EVD to exert considerable authority over who could remain in the United States even when foreign policy was not at issue.[44]

The innovative nature of EVD extended to the legal justifications for the power: executive branch officials appear to have toggled between at least two different sources of legal authority to support its use. In 1985, officials in the Reagan Administration testified that EVD stemmed from the "Executive's constitutional authority in the areas of foreign and prosecutorial policy (supplemented by the general delegation of power over immigration in 8 U.S.C. § 1103(a))."[45] In 1987, however, officials claimed a more specific statutory source for the authority, contending that the power expressly delegated in the INA to grant voluntary departure (an alternative to formal removal whereby a noncitizen departs of his own volition) implied the power to grant EVD, or a temporary reprieve from removal.[46] Though the latter justification appears to have prevailed, probably because it points to a firmer statutory foundation than the former, it is clear that the legal authority for the practice emerged and evolved alongside (and not in advance of) the practice itself.

Second, the family fairness episode highlights the dynamic nature of the congressional-executive relationship. Executive actions like those taken by

44. *See Oversight of INS Policies and Legal Issues: Hearing Before the Subcomm. on Immigration, Citizenship, & Int'l Law of the H. Comm. on the Judiciary*, 95th Cong. 86-87 (1978) [hereinafter *Oversight Hearing*] (statement of David Crosland, General Counsel, Immigration and Naturalization Service) (describing the INS Operations Instructions in effect from 1956 to 1972 granting voluntary departure to certain highly skilled noncitizens, including foreign medical graduates); 93 CONG. REC. 13,844 (1973) (including INS associate commissioner stating that certain individuals from the Western Hemisphere with family-based visa preference would receive EVD); MANUEL & GARCIA, *supra* note 29, at 6 (listing EVD grants, at various times during the 1960s and 1970s, to those from, inter alia, Chile, Czechoslovakia, the Dominican Republic, Ethiopia, Hungary, Romania, Iran, Nicaragua, and Uganda).

45. *Extended Voluntary Departure Issues: Hearing on S. 337 Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 67 (1985) (statements of Elliott Abrams, Assistant Secretary of State, Bureau of Human Rights and Humanitarian Affairs, and Alan C. Nelson, Comm'r, Immigration and Naturalization Service).

46. The Reagan Administration cited statutory provisions that, after changes in the immigration laws' organization, are now codified at 8 U.S.C. § 1229c(a)(1) (2012), which provides that "[t]he Attorney General may permit an alien voluntarily to depart the United States at the alien's own expense." *See Temporary Safe Haven Act of 1987: Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 100th Cong. 163 (1987) [hereinafter *Temporary Safe Haven Act Hearing*] (statement of the Office of Legislative Affairs to questions posed by Rep. Romano L. Mazzoli). On this reading, the statute's lack of a specific required time period for the voluntary departure confers on the Attorney General the power to grant EVD to classes of individuals.

Presidents Reagan and George H.W. Bush can powerfully shape the congressional agenda and the future path reform takes in the legislature. They can also, as the broader history of EVD highlights, prompt Congress to attempt to control executive discretion in order to advance Congress's own policy goals. In the 1980s, for example, House and Senate subcommittees called hearings to insist that the President exercise his EVD power to defer the removal of noncitizens from El Salvador.[47] The appropriations process was used for a similar purpose: appropriations bills for fiscal years 1982-1983 and 1984-1985 contained statements, admittedly nonbinding, that it was "the sense of the Congress" that Salvadorans should be granted EVD.[48] In other words, Congress sought to use *and* constrain novel forms of executive decision making to advance the congressional agenda, ultimately replacing the Executive's ad hoc discretionary tool with clear statutory authority to extend relief under circumstances specified by Congress.[49] These dynamics are by no means unique to immigration law, but they have been notable throughout its history.

B. Policymaking Through (Under)Enforcement

A central feature of the examples of innovation discussed above is that they all emanated in some way from either express congressional delegation or the process of implementing a discrete congressional program over which Congress had given the Executive expansive implementation authority. These historical instances of executive policymaking therefore differ in significant respects from the Obama relief initiatives.[50] The latter were formulated

47. *See Temporary Suspension of Deportation for Nationals of Certain Countries: Hearing on H.R. 822 Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 99th Cong. 1 (1985); *Extended Voluntary Departure Issues: Hearing on S. 337 Before the Subcomm. on Immigration & Refugee Policy of the S. Comm. on the Judiciary*, 99th Cong. 1 (1985); *Extended Voluntary Departure for Salvadorans: Hearing on H.R. 4447 Before the Subcomm. on Rules of the H. of the H. Comm. on Rules*, 98th Cong. 1 (1984); *Temporary Suspension of Deportation of Certain Aliens: Hearing on H.R. 4447 Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 98th Cong. 1 (1984).

48. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 731, 95 Stat. 1519, 1557 (codified at 8 U.S.C. § 1157 (2012)); Department of State Authorization Act, Fiscal Years 1984 and 1985, Pub. L. No. 98-164, § 1012, 97 Stat. 1017, 1062 (1983).

49. For a discussion of the TPS program that replaced EVD, see *supra* note 29 and accompanying text.

50. As noted above, supporters of the Administration have enthusiastically cited family fairness as precedent for the President's actions, both because the policy was based not on delegated authority but on the President's enforcement power, and because of the scale of relief it provided. *See* Noferi, *supra* note 18; *cf.* Legomsky, Written Testimony, *supra* note 17, at 83-84 (discussing the "family fairness" policies of Presidents Reagan and George H.W. Bush and their similarities to President Obama's policies). Though Congress considered and

pursuant to the President's determination as to how to go about enforcing the INA as a whole, not as the result of an express statutory delegation to defer the removal of certain categories of noncitizens or as part of the implementation of a larger program. To be sure, the INA expressly grants the Secretary of the Department of Homeland Security (DHS) broad authority to enforce the Code—a provision numerous defenders of the Administration have cited to support the Obama relief initiatives.[51] But this general authority to enforce the Code cannot reasonably be characterized as an express delegation of any particular form of authority; it is instead a recognition that the Executive will need to develop policies and protocols to accomplish all that the INA does expressly delegate.

The scope for executive policymaking in law enforcement contexts is vast, as commentators have emphasized with respect to numerous domains.[52] Immigration law is no exception to this basic fact of the American system of

rejected the inclusion of spouses and children in IRCA's legalization program, we still think it possible to regard Presidents Reagan and George H.W. Bush's enforcement actions as transitional, in the sense that the legalization program gave immigration status to its beneficiaries that in turn would have enabled them to petition for the admission of their spouses and children through already existing channels. DACA cannot be characterized in that fashion, because there is no clear existing route in the law for its beneficiaries to petition for lawful status. *See infra* note 105 and accompanying text. As for the beneficiaries of DAPA, while they may one day be able to adjust status, without DAPA, because of their relationships to U.S. citizens and lawful permanent residents (LPRs), in many cases that adjustment would be so far in the future as to stretch thin the meaning of transition. *See infra* notes 150-151 and accompanying text. More important, the political context of IRCA differs dramatically from the present one. We think it at least arguable that Congress's creation of a legalization program in 1986 licensed executive authority to engage in gap filling and other forms of ameliorative action throughout implementation. To be clear, *the absence* of such license in the current context does not make the Obama relief initiatives unlawful. It just makes them different from family fairness. Ultimately, however, we think these debates about the details of family fairness and its resemblance to DACA and DAPA amount to a red herring because they obscure the larger difficulties of using history as legal precedent.

51. *See* 6 U.S.C. § 202 (2012) ("The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following . . . (5) Establishing national immigration enforcement policies and priorities."); 8 U.S.C. § 1103 (2012); Legomsky, Written Testimony, *supra* note 17, at 90 (citing "the additional broad authority conferred by 8 U.S.C. § 1103(a)"); OLC Memorandum Op., *supra* note 10, at 3-4.

52. For a discussion of the power of prosecutors and proposals for how to rein in that power through institutional design, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); and Rachel E. Barkow, *Prosecutorial Administration: Prosecutor Bias and the Department of Justice*, 99 VA. L. REV. 271 (2013). For an account of the President's use of the enforcement power to advance his objectives in civil contexts, see Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1031 (2013), which argues that the President's enforcement authority has been extensive but also "ad hoc, crisis-driven, and frequently opaque."

separated powers. As is true in other arenas, the way the Executive exercises its enforcement discretion over time powerfully shapes the meaning and significance of the law. In enforcing the INA—a multi-faceted and complex code—the Executive must make numerous decisions, large and small, about how and when to wield its power.[53] In so doing, it must navigate the vagaries of ideologically diverse public and congressional opinion; observers will often criticize the same enforcement strategy as both feckless and draconian. In addition to addressing the basic question of how to allocate enforcement resources between the border and the interior,[54] the President and officials within DHS must determine the specific means for each sort of enforcement. At the border, should it rely on fencing and technology as deterrents,[55] or apprehensions and quick returns? In the interior, should its focus be on employers who hire unauthorized workers, on identifying and removing noncitizens who have committed crimes,[56] or on removing unauthorized noncitizens generally? Congress sometimes sets the stage for or constrains these choices through authorization and appropriations laws,[57] but in the main, the complexity and breadth of the tradeoffs required of the Executive transform him into a policymaker.

Historically, the President has exercised this power using a variety of legal tools. Prosecutorial discretion in the form of "deferred action"—the mechanism for the Obama relief initiatives—represents just one. We reserve analysis of that law enforcement tool until Part III and focus here instead on another crucial but oft-overlooked example of the President's use of the enforcement power to advance his agenda (arguably at the expense of Congress): underenforcement of the employer sanctions regime. The history of the Executive's weak (some might say irresponsible) implementation of this major congressional initiative illuminates how the President's constitutionally

53. These choices sometimes but do not always track partisan lines, for Republicans and Democrats alike have reasons to support both strong and lax enforcement. For a discussion of these dynamics with reference to the enforcement of a particular statutory framework—in this case, the employer sanctions provisions—see *infra* notes 58-77 and accompanying text.

54. Under the Obama Administration, there is some evidence that enforcement resources have been shifting toward the border. For example, the number of interior removals has been falling for several years. *See* Rosenblum, *supra* note 3, at 6.

55. For a discussion of Congress's grants of power to the Executive to build physical barriers at the border and a more general analysis of the utility of border enforcement as a screening mechanism, see Cox & Rodríguez, *supra* note 7, at 524-28.

56. For recent developments related to this sort of enforcement, see *infra* notes 96-98 and accompanying text.

57. For a discussion of the use of appropriations law, see *infra* notes 170-172 and accompanying text.

assigned role to execute the laws gives him power over the contours and significance of a statutory scheme.

Created in 1986 by Congress in tandem with IRCA's large-scale legalization program in 1986, the employer sanctions regime imposes both civil and criminal sanctions on employers who hire immigrants not authorized to work in the United States.[58] The theory behind employer sanctions was that penalizing employers who hired unauthorized workers would reduce the labor market incentive for illegal immigration. Congress also included employer sanctions to help justify legalization—as a promise that future legalizations would be unnecessary because IRCA would eliminate one of the primary reasons for illegal immigration.[59]

From its inception, however, the employer sanctions regime has been largely ineffectual.[60] Its weaknesses stem in part from the statute itself and the tradeoffs built into it. As the Supreme Court recognized in *Arizona v. United States*, IRCA reflects Congress's efforts to balance the desire to prevent the hiring of unauthorized immigrants with the concern that overzealous prosecution could give employers incentives to discriminate against potential workers on the basis of race or national origin.[61] But these legislative tradeoffs form only part of the story. The Executive itself has taken much of the bite out of this signature congressional enforcement initiative. Across administrations, different combinations of political desires and institutional concerns have led to varying degrees of underenforcement of the statute, leading lawmakers and scholarly commentators to doubt that IRCA has played a significant role in curbing unauthorized immigration to the United States.[62] This

58. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 101, 100 Stat. 3359, 3360-72 (codified at 8 U.S.C § 1324a (2012)).

59. *See* Michael J. Wishnie, *Prohibiting the Employment of Unauthorized Immigrants: The Experiment Fails*, 2007 U. CHI. LEGAL F. 193, 200-04 (describing IRCA's employer sanctions as part of a one-time "grand bargain" among interest groups).

60. Data on the enforcement of employer sanctions is spotty and often relies on inconsistent methodologies. ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 4 (2015) (noting that assessments of worksite enforcement programs have been complicated by "data reporting problems, the existence of conflicting data," and the paucity of data before the creation of Immigration and Customs Enforcement (ICE)). But data pertaining to different discrete periods of IRCA enforcement are suggestive of underenforcement. *See, e.g.*, *id.* at 5 tbl.1 (showing low numbers of final orders and administrative fines relative to the number of employers from 1999-2012).

61. Arizona v. United States, 132 S. Ct. 2492, 2503-08 (2012).

62. *See Verification of Eligibility for Employment and Benefits: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong. 8 (1995) (statement of Barbara Jordan, Chair, U.S. Commission on Immigration Reform) (arguing that IRCA's

underenforcement may reflect the Executive's desire to satisfy business or labor constituencies (to varying degrees depending on the party in office). It could also reflect the government's desire to target enforcement resources in the direction most saleable to the general public—toward safety risks and border enforcement—goals also reflected in Congress's expansion of the criminal law grounds for removal and appropriation of funds for border enforcement.[63]

Considered at a more granular level, it also becomes clear how each administration has calibrated its enforcement judgments under IRCA to address the particular mix of political and institutional pressures it has faced, managing the domain of enforcement according to its own policy preferences. Studies of the early years of implementation point to low levels of enforcement that declined over time, accompanied by the failure to develop strong incentives for compliance in immigrant-heavy industries.[64] One leading history of IRCA argues that the Reagan and George H.W. Bush Administrations' commitments to deregulation led to INS policy focused on educating businesses, rather than imposing penalties on them.[65]

Not much changed in later years. With one limited exception, the number of investigations, warnings, and fines directed at employers all declined steadily and dramatically from around 1990 into the 2000s.[66] A brief uptick in enforcement occurred during the mid-1990s,[67] following a Clinton Administration directive that called for "strengthening worksite enforcement and work authorization verification . . . to better protect American workers and

work authorization verification system failed to "[r]educ[e] the employment magnet"); S. REP. NO. 113-40, at 11 (2013) (criticizing IRCA's employer sanctions and legalization scheme for having "significant gaps"); H.R. REP. NO. 104-469, pt. 1, at 129 (1996) (faulting INS's enforcement of IRCA sanctions as "[t]epid"); Wishnie, *supra* note 59, at 209-11 (discussing the "decline in government enforcement" as part of an argument for repealing IRCA's employer sanctions).

63. *See generally* Doris Meissner et al., *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POL'Y INST. 23-47, 92-116 (Jan. 2013), http://www.migrationpolicy.org/sites/default/files/publications/enforcementpillars.pdf [http://perma.cc/R38H-GQRE] (describing the implementation of IRCA and other immigration enforcement systems, including border enforcement and criminal justice system intersections).

64. *See* MICHAEL FIX & PAUL T. HILL, ENFORCING EMPLOYER SANCTIONS: CHALLENGES AND STRATEGIES 3 (1990) (describing concerns with the implementation of the employer sanctions); Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION POL'Y INST. (Sept. 1, 2005), http://www.migrationpolicy.org/article/declining-enforcement-employer-sanctions [http://perma.cc/WV33-3XL8].

65. DANIEL J. TICHENOR, DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA 262-63 (2002).

66. *See* Brownell, *supra* note 64.

67. *Id.* at fig.1.

businesses that do not hire illegal immigrants."[68] But this strengthening of enforcement dissipated within two years as the Clinton Administration shifted its efforts away from both sanctions and worksite raids and toward targeting the removal of noncitizens with criminal convictions.[69]

This trend toward targeting noncitizens who had committed crimes continued under the George W. Bush Administration, which seemed uninterested in employer sanctions and was focused on national security targets in the wake of the attacks of September 11, 2001. While we know that millions of unauthorized immigrants have long been employed by hundreds of thousands of employers,[70] for years during the Bush Administration, DHS fined fewer than one hundred employers for violating IRCA.[71] For several years, the number of both final orders issued and fines levied hovered close to zero,[72] suggesting the Administration was doing next to nothing to enforce the statute.[73] Even when the Administration increased scrutiny of workplaces near the end of President Bush's second term, the enforcement that resulted took the form of a series of high-profile worksite

68. Deterring Illegal Immigration: Memorandum for the Heads of Executive Departments and Agencies, 60 Fed. Reg. 7885, 7885-86 (Feb. 10, 1995). For a time in 1996, the Administration also launched a series of high-profile worksite raids. ALISON SISKIN ET AL., CONG. RESEARCH SERV., RL33351, IMMIGRATION ENFORCEMENT WITHIN THE UNITED STATES 37-38 (2006); *INS Steps Up Worksite Enforcement, Targets Eastern U.S.*, 73 INTERPRETER RELEASES 531 (1996). But by 1998, criticism from Congress, industry, and advocacy groups led the Administration to soften its enforcement strategy by curbing the abusive tactics critics had identified. *INS Distributes New Guidelines for Worksite Raids*, 75 INTERPRETER RELEASES 979 (1998). In December 1998, further responding to advocates' concerns over the implications of worksite enforcement for the protection of workers, the INS and the Department of Labor (DOL) entered into a memorandum of understanding, according to which DOL would cease referring suspected immigration law violators who complained about worksite violations to INS. *See Labor Department, INS Sign MOU on Labor Standards and Employer Sanctions*, 75 INTERPRETER RELEASES 1696 (1998).

69. The focus on noncitizens with criminal convictions was also facilitated by a series of legislative changes in the Illegal Immigrant and Immigration Reform Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009.

70. According to the Pew Hispanic Center, between 2000 and 2010, the estimated unauthorized labor force ranged from 5.5 million in 2000 to as high as 8.4 million in 2007. *See* Jeffrey S. Passel & D'Vera Cohn, *Unauthorized Immigrant Population: National and State Trends, 2010*, PEW RES. CTR. 17 (Feb. 1, 2011), http://www.pewhispanic.org/files/reports/133.pdf [http://perma.cc/ZDP3-YLJR].

71. *See* BRUNO, *supra* note 60, at 5 tbl.1.

72. *Id.*

73. Interestingly, even in this period we are not aware of anyone arguing that the lack of enforcement violated the statute or the Take Care Clause of the Constitution.

raids that led to the arrests of hundreds of workers. DHS issued only thirty administrative fines against employers.[74]

The Obama Administration disavowed high-profile raids in favor of employer audits, while continuing the focus on noncitizens who had committed criminal offenses.[75] The emphasis on audits led to increasing numbers of employer sanctions during President Obama's first term.[76] Yet even with the Obama Administration's increased attention to employer compliance, weak enforcement of IRCA has been a perennial feature of the immigration system. This underenforcement likely stems in part from Congress's ever-growing focus on border enforcement in the appropriations process[77]—an indirect means of de-prioritizing employer sanctions. But the Executive has been more directly responsible for deflating the 1986 statute. It has consistently chosen to focus its enforcement strategy elsewhere, rendering a signature congressional enforcement initiative largely irrelevant to immigration policy.

The complex enforcement history of IRCA reflects a crucial feature of the enforcement power we take up in more detail in Part II—that the President (through enforcement) and Congress (through appropriations and oversight) together continue to make policy and redefine the meaning of a statutory regime long after its enactment, as the regime unfolds in practice. This history also underscores how the President's enforcement judgments drive much of that development, constructing over time the domain of regulation. These enforcement judgments may take the scheme in practice far from the intentions of the enacting Congress, but such is the consequence of enforcement.[78]

C. The Rise of De Facto Delegation

In our 2009 article, we juxtaposed how presidents have used authorities expressly delegated to them, such as the parole power, with a phenomenon we termed *de facto delegation*. The concept relates to the sort of ordinary enforcement discretion that requires priority setting and judgment and can

74. *See* BRUNO, *supra* note 60, at 5-6.

75. *Id.* (showing how trends in arrests and administrative fines issued to employers moved in opposite directions as the Bush Administration gave way to the Obama Administration).

76. *See* Meissner et al., *supra* note 63, at 84 (citing Bruno, *supra* note 60).

77. *See, e.g.*, *id.* at 22 (noting that Customs and Border Patrol (CBP) receives more funding than all other immigration agencies combined, and that CBP's budget increased by eighty-five percent between fiscal years 2005 and 2012).

78. The Supreme Court has recognized as much, for reasons we explore in the immediately following section, Part I.C. *See infra* notes 88-90 and accompanying text.

lead to the underenforcement we describe above. But the phenomenon is also more radical, amounting to a system of executive decision making about who may remain in the United States—a system that effectively substitutes for congressional judgment. Importantly, this delegation of de facto screening authority comes not from specific statutory enactments, but emerges instead from the modern structure of immigration law as a whole.

At bottom, de facto delegation is the result of a profound mismatch between the law on the books and reality on the ground, which has resulted from a series of legal, political, and demographic developments that have accelerated over the last four decades.[79] Three features of the immigration code produced by Congress helped establish the conditions for de facto delegation. First, the Code renders removable any noncitizen who enters the United States without authorization. This seemingly simple legal command has intersected with complex demographic and social trends—in particular, record levels of migration, both legal and illegal, over the last thirty years[80]—to produce an unauthorized population that reached over twelve million at its peak in 2007 and has remained above eleven million in recent years.[81] This is an arrestingly

79. A key consequence of this mismatch has been the emergence of a large gap between formal citizenship and a sociological account of membership—a distinction even courts have recognized when assessing whether and how unauthorized immigrants constitute subjects under the Constitution. *See* Cristina M. Rodríguez, *Immigration, Civil Rights & the Evolution of the People*, 142 DAEDALUS 228, 232-35 (2013). This sociological understanding of membership helps to explain the power of de facto delegation and executive branch policymaking, which arises from the fact that a perfect world is not a world of perfect compliance with current immigration law. *See infra* Part III.C.2.

80. These trends, in turn, have been the function of complex legal, economic, labor market, and social forces in the United States, Mexico, and elsewhere. *See, e.g.*, MARCELO SUÁREZ-OROZCO ET AL., THE NEW IMMIGRATION: A READER, at ix-x (2005) (noting that "[t]he current pattern of U.S. immigration" began "to intensify in 1965 and gained extraordinary momentum in the last two decades" and attributing this pattern to the combination of the postindustrial economy's "voracious appetite" for labor, the emphasis of the 1965 immigration reforms on family unity, social forces such as the ease of transportation and dissemination of information, and variables such as armed conflict and political repression).

81. *See* Jeffrey S. Passel et al., *Population Decline of Unauthorized Immigrants Stalls, May Have Reversed*, PEW RES. CTR. (Sept. 23, 2013), http://www.pewhispanic.org/2013/09/23/population-decline-of-unauthorized-immigrants-stalls-may-have-reversed [http://perma.cc/Z8ZE-VEBB]. Demographers pinpoint the peak of illegal immigration to the United States to sometime in the early 2000s. The size of the unauthorized population present in the United States has remained relatively constant in recent years, even as net migration has approached near zero, as the result of factors such as the Great Recession, demographic shifts in Mexico, and U.S. enforcement policy at the border. *See* Jeffrey S. Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RES. CTR. (Apr. 23, 2012), http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less [http:// perma.cc/96PZ-ZLLV].

large number. It means that nearly half of all noncitizens currently living in the United States are formally deportable under the immigration code.[82]

Second, since the late 1980s, Congress has made increasing numbers of criminal offenses predicates for removal, sweeping even minor drug crimes into the Code and expanding the definition of so-called "aggravated felonies." That term of art initially only encompassed very serious crimes, such as murder and rape, but has come to encompass numerous minor offenses, including many misdemeanors.[83] This makes the pool of deportable noncitizens significantly larger, adding to those who are unauthorized many legal immigrants, including large numbers of lawful permanent residents. The size and complexity of the population thus eligible for removal, coupled with the fact that removal requires investigations, arrests, and charging decisions by immigration police and prosecutors, means that the Executive wields tremendous screening power—functional authority to make judgments about the types of noncitizens who should be permitted to remain in the United States.

Finally, the scope of the Executive's discretion at the enforcement stage has only been augmented by recent congressional decisions to constrain the authority of immigration judges to grant relief from removal at the end of deportation proceedings.[84] These restrictions on relief have often been conceptualized as limiting the role discretion plays in immigration enforcement. But far from eliminating executive discretion, these provisions have simply moved the power to provide relief to the arrest and charging phase, shifting the exercise of discretion from immigration judges to prosecutors and immigration police.[85]

Given the central role Congress has played in the rise of de facto delegation, we chose in 2009 to describe it as a cousin to ordinary delegation. But in using the term "delegation," we do not mean to suggest that Congress clearly intended at any moment in time to create a system of vast ex post executive screening. Instead, the concept describes a structural reality inherited from a series of choices over time—choices that have created a parallel executive

82. According to the 2010 Census, approximately 22,480,000 noncitizens reside in the United States. *See* Elizabeth M. Grieco et al., *The Foreign-Born Population in the United States: 2010*, U.S. CENSUS BUREAU 2 (May 2012), http://www.census.gov/prod/2012pubs/acs-19.pdf [http://perma.cc/SBG6-UT8T].

83. *See* 8 U.S.C. § 1101(a)(43) (2012) (defining "aggravated felony"). For an accounting of these trends and an explanation of how a once narrow definition has become a "colossus," see STEPHEN H. LEGOMSKY & CRISTINA M. RODRÍGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 597-99 (6th ed. 2015).

84. Cox & Rodríguez, *supra* note 7, at 511-19.

85. *Id*.

screening regime through which the Executive exercises its own value judgments about the scope of our immigration policy.

Moreover, it would be a mistake to describe de facto delegation as the product solely of congressional choices. Enforcement judgments also have contributed to its rise during the era of mass migration, through the sorts of enforcement tradeoffs described in Part B. For instance, the Executive arguably has contributed to the scope of illegal immigration by declining to either prevent the entry of or remove in large numbers unauthorized immigrants who do not pose public safety or national security risks.[86] Even in a world of ever-increasing resources for immigration enforcement,[87] the gap between law on the books and on the ground has failed to close in any meaningful way, in part because of executive policy judgments. Seen in this light, Congress's decision to shower the enforcement bureaucracy with resources has served only to further increase the Executive's capacity to shape the pool of immigrants living in the United States.

Even the Supreme Court has embraced the central role the President plays in structuring the modern immigration screening system. In *Arizona v. United States*, the Court struck down most provisions of an Arizona law designed to augment federal immigration enforcement. While many of the provisions of the Arizona statute precisely tracked the INA—statutory text one might think embodied Congress's enforcement priorities—the Court rejected Arizona's attempt at redundant enforcement. Under the Court's theory of preemption, federal immigration law consists not only of the legislature's work, or the terms of the Code, but also of the enforcement choices the Executive makes. These choices elevate certain elements of the Code over others or reflect the Executive's desire to emphasize "human concerns" that the Executive has come to appreciate in the course of its enforcement but that might not be embedded

86. *See* Adam B. Cox & Eric A. Posner, *The Second-Order Structure of Immigration Law*, 59 STAN. L. REV. 809, 843-44 (2007) (arguing that the Executive may prefer a system of illegal immigration because it poses fewer constitutional obstacles to removal); Cristina M. Rodríguez, *The Citizenship Paradox in a Transnational Age*, 106 MICH. L. REV. 1111, 1123-24 (2008) (reviewing HIROSHI MOTOMURA, AMERICANS IN WAITING: THE LOST STORY OF IMMIGRATION AND CITIZENSHIP IN THE UNITED STATES (2006)) (arguing that citizens and lawmakers have tolerated illegal immigration because of its economic benefits). Whether any given administration has in fact tolerated illegal immigration may be in the eye of the beholder. For immigrants' rights activists, enforcement policy in recent years has seemed to mercilessly target large numbers of unauthorized immigrants with families and ties in the United States. For enforcement enthusiasts, the presence of millions of unauthorized immigrants suggests a lack of will on the Executive's part to remove.

87. *See generally* Meissner et al., *supra* note 63 (describing the build-up of federal immigration enforcement resources over the last several decades).

in the Code.[88] By conceptualizing immigration law in this way, the Court converted the ordinary exercise of prosecutorial discretion into binding federal law that preempted Arizona's immigration initiatives.[89] Thus, even though the state sanctions mirrored the federal statute, they were preempted because they conflicted with the way in which the Executive Branch had wielded its enforcement discretion. Whether we think federal enforcement priorities ought to have preemptive effect—a move that could be quite disruptive to federalism in the administrative state—the Court's move speaks powerfully to the independent role the Executive plays in the development of the very meaning of a statutory scheme.[90]

For our purposes here—dissecting and understanding the enforcement power—the signal feature of de facto delegation has been the priority setting it entails, which can result in profound and widespread policy effects. As we argued in 2009, "[T]he President's inability to set formal admissions and removal criteria has not precluded him from playing a major role in shaping screening policy."[91] This ex post form of screening authority has amplified the President's control over our immigration policy, despite the fact that (and paradoxically because) Congress has maintained a virtual monopoly over ex ante screening. Congress, perhaps unwittingly, has borne considerable responsibility for expanding the domain of enforcement in a way that has magnified executive policymaking power, by making the INA more and more complicated and rule-bound since its adoption in 1952. As we will argue in Part II, the fact that Congress may not have contemplated or intended these effects does not render the presidential actions producing them unlawful. Instead, the

88. *See* Arizona v. United States, 132 S. Ct. 2492, 2499 (2012) ("Discretion in the enforcement of immigration law embraces immediate human concerns. Unauthorized workers trying to support their families, for example, likely pose less danger than alien smugglers or aliens who commit a serious crime. The equities of an individual case may turn on many factors, including whether the alien has children born in the United States, long ties to the community, or a record of distinguished military service. Some discretionary decisions involve policy choices that bear on this Nation's international relations. . . . The foreign state may be mired in civil war, complicit in political persecution, or enduring conditions that create a real risk that the alien or his family will be harmed upon return. The *dynamic* nature of relations with other countries requires the Executive Branch to ensure that enforcement policies are consistent with this Nation's foreign policy with respect to these and other realities." (emphasis added)).

89. *See* Cox, *supra* note 36, at 54.

90. Justice Kennedy's conception of federal law even seems to contemplate that the enacting Congress understands the Executive Branch will make crucial choices about the reach of a statute when it creates the enforcement scheme to begin with. *See Arizona*, 132 S. Ct. at 2499. As we explain below, however, our account does not turn on ascribing specific intent to the enacting Congress(es). *See infra* text accompanying notes 139-148.

91. Cox & Rodríguez, *supra* note 7, at 511.

rise of de facto delegation underscores how regulatory domains evolve over time through the interplay of legislative acts and discretionary enforcement choices.

D. Centralizing Enforcement Within the Executive

As we explained in 2009, there are reasons to be concerned about the increasingly outsized role enforcement policy has come to play in the formulation of immigration policy. The scale of de facto delegation, in particular, has given rise to a variety of good governance and rule-of-law concerns. As has been emphasized recently in debates about policing and criminal justice, enforcement judgments are often opaque and, for that reason, frequently resist accountability.[92] In addition, enforcement imperatives often empower low- and mid-level officials, especially as the size of the enforcement pool expands.[93] The diffusion of responsibility that results may make it more difficult to structure and control enforcement policy according to priorities established by executive branch leadership, let alone by Congress.

Presidential administrations are, of course, attentive to these concerns, if only because they implicate the territorial tussle between political leadership in Washington and agents in the field. Without control over the bureaucracy, it can be difficult, if not impossible, for a modern administration to implement its agenda. Accordingly, the modern history of presidential immigration law is as much a story about the organization of the Executive Branch, and dynamics among actors within it, as it is an account of the relationship between the Executive and Congress. Whereas in our 2009 article we focused exclusively on the latter, here we also seek to highlight how the former should factor into our account of the enforcement power and the separation of powers.

The Obama Administration, in particular, has responded to the demands engendered by de facto delegation with systemic and organizational changes, of which the 2014 relief policies represent only one example. The Administration's enforcement policy as a whole has become increasingly directed at regularizing and making more consistent the operation of the de facto, ex post screening system—a system executive leadership came to see as too random and overly subject to the views of low-level bureaucrats and state

92. *See* DAVID ALAN SKLANSKY, DEMOCRACY AND THE POLICE (2008); David Alan Sklansky, *Prosecutorial Discretion Through the Looking Glass*, BALKINIZATION (Nov. 23, 2014, 10:30 AM), http://balkin.blogspot.com/2014/11/prosecutorial-discretion-through.html [http://perma.cc/H8AD-Q9DV].

93. *See* Cox & Rodríguez, *supra* note 7, at 528-36.

and local officials.[94] The motivations for its various regularization efforts have been simultaneously institutional and political. As a Democratic administration, the politics of immigration required that it commit to enforcing the law, but also that it respond to enforcement's perceived excesses. And from DHS's institutional point of view, agents in the field (both federal and local) had become too powerful in dictating the direction of administration policy.

The Administration's centralizing and regularizing moves have been myriad, but three prior to the announcement of the first relief initiative in 2012—Deferred Action for Childhood Arrivals (DACA)—stand out. First, the Administration's virtually unprecedented decision to file preemption lawsuits against Arizona and several other states, challenging state laws designed to buttress the federal enforcement regime, reflected a desire to retake federal control over the immigration debate and suppress state efforts to shape both immigration policy and politics.[95] Second, in 2011, DHS released the so-called Morton Memos, a pair of agency memoranda designed to regulate the use of prosecutorial discretion by line-level enforcement officials. These memos grew out of a long tradition of similar efforts in previous administrations to provide guidance to immigration enforcement officials.[96] But the Morton Memos

94. The role of state and local officials in driving federal immigration enforcement has been a subject of extended scholarly inquiry. Studies of the 287(g) Program, for example, have shown that the priorities of state and local officials involved in immigration enforcement often veer from those of federal officials, though federal agents in the field can also develop common cause with local officials, creating tension with officials in Washington. *See, e.g.*, Randy Capps et al., *Delegation and Divergence: A Study of 287(g) State and Local Immigration Enforcement*, MIGRATION POL'Y INST. (2011), http://migrationinformation.org/sites/default/files/publications/287g-divergence.pdf [http://perma.cc/EB3H-B98R]. In addition, because convictions under state law serve as predicates for removal, the federal government has been dependent on cooperation from state police to identify potentially removable noncitizens, and state and local arrests and prosecutions can determine who gets funneled into removal proceedings. *See* Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011) (showing how Arizona employed criminal anti-smuggling laws in ways that redefined and restructured the system of immigration enforcement); Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819 (2011) (arguing that state and local police have de facto power to set the immigration enforcement agenda through ordinary policing and that any policy that permits state and local police to act as gatekeepers can undermine federal authority).

95. For a discussion, see Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2104-05 (2014); and Cox, *supra* note 36.

96. *See, e.g.*, Memorandum from John Morton, Dir., Immigration and Customs Enf't (ICE), to Field Office Dirs., Special Agents in Charge & Chief Counsel 1 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [http://perma

reached significantly beyond their predecessors by creating a tiered enforcement scheme. Accordingly, the immigration law world regarded them as more serious efforts to regularize discretion than past guidance documents. Finally, the Obama Administration's decision to make Secure Communities (launched during the waning days of the Bush Administration) the centerpiece of its enforcement strategy reflected a turn to technology to systematize enforcement against criminal offenders. Secure Communities promised to displace the unpredictable human element of formal and informal cooperation with local police.[97] Even though the President, as part of his November 2014 announcement, declared an end to the program and DHS replaced it with the Priority Enforcement Program, the core centralizing, data-sharing feature remains in place and likely reflects a permanent shift in the way DHS collects the information essential to its enforcement activities.[98]

With these moves as prelude, the motivations for the Obama relief initiatives come into sharper focus. Two of the centralizing moves succeeded, but one resulted in limited, if any, success and required recalibration. Federal lawsuits in Arizona and elsewhere successfully muted the state policymaking initiatives that had been accelerating prior to the litigation.[99]

.cc/V3FE-DTUG] [hereinafter Morton, Exercising Prosecutorial Discretion]; Memorandum from John Morton, Dir., ICE, to Field Office Dirs., Special Agents in Charge & Chief Counsel 1 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/domestic-violence.pdf [http://perma.cc/XN2F-ZG33]; Memorandum from Julie L. Myers, Assistant Sec'y, ICE, to Field Office Dirs. & Special Agents in Charge 1 (Nov. 7, 2007), http://www.ice.gov/doclib/foia/prosecutorial-discretion/custody-pd.pdf [http://perma.cc/9XEQ-LLDJ]; Memorandum from Doris Meissner, Comm'r, Immigration and Naturalization Service, to Reg'l Dirs., Dist. Dirs., Chief Patrol Agents & Reg'l & Dist. Counsel 1 (Nov. 17, 2000), http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf [http://perma.cc/2DEH-8TLB].

97. *See* Adam B. Cox & Thomas J. Miles, *Policing Immigration*, 80 U. CHI. L. REV. 87 (2013); Rodríguez, *supra* note 95, at 2105 n.26 (describing Secure Communities as reflecting a desire to use "federalism's institutions while holding its actors at bay"). Under the program, the FBI shares with DHS the fingerprint and arrest data sent to it by state and local police. DHS then runs the data through its own database to determine if state and local police have identified a potentially removable noncitizen. ICE then determines whether to request that local officials hold the noncitizen until it can decide whether to take custody for removal purposes. *See* Cox & Miles, *supra*, at 93-96. The 2014 replacement of Secure Communities with the Priority Enforcement Program leaves the data-sharing function in place and simply changes what the Administration will do with the information it receives from the FBI and, by extension, state and local officials.

98. It should be noted that this centralization is relative. Because ICE depends on information held by local and state officials to do its job, it cannot avoid interacting with those bureaucracies.

99. *See, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012). The Court struck down most of Arizona's attempt to augment federal immigration enforcement, though it left in place the most notorious provision of the statute, which requires law enforcement officials to inquire

Secure Communities took center stage and has come to account for the vast majority of removals from the interior of the country, superseding the more limited 287(g) Program, and systematizing long-standing informal cooperation between local and federal officials.[100] But for reasons we discuss in detail in Part III, the Morton Memos did not achieve their objectives, at least to the extent they were motivated by a genuine desire to significantly curb line-officer discretion to initiate the removal of unauthorized immigrants without criminal records. These institutional developments, in turn, coincided with a powerful social movement of unauthorized youth demanding recognition of their rightful place in the United States. The movement eventually made its way into the White House, while the larger campaign against deportations made a strong impression on powerful local officials in places such as California, Chicago, and New York City, who began to resist participation in federal enforcement.[101]

The combination of these institutional and social movement pressures, along with the imperatives of the 2012 election, created the context in which the White House announced DACA and then, a little more than a year later,

into immigration status in certain circumstances. *Id.* at 2510 ("At this stage . . . it would be inappropriate to assume § 2(B) will be construed in a way that creates a conflict with federal law."). It remains unclear the extent to which that provision has been used, for good or for ill, and much of the political momentum behind provisions of this sort appears to have subsided for now. *See* Cristina M. Rodríguez, *Toward Détente in Immigration Federalism*, 30 VA. J.L. & POL. (forthcoming 2015) (manuscript at 17 & n.49), http://ssrn.com/abstract=2624672 [http://perma.cc/AE2Q-3A3J].

100. *See* MARC R. ROSENBLUM & WILLIAM A. KANDEL, CONG. RESEARCH SERV., R42057, INTERIOR IMMIGRATION ENFORCEMENT: PROGRAMS TARGETING CRIMINAL ALIENS 25 tbl.6 (2012) (presenting interior enforcement actions by the program from fiscal year 2004 to fiscal year 2011).

101. *See* Rodríguez, *supra* note 95, at 2121; Rodríguez, *supra* note 99 (manuscript at 12-14). This resistance helped prompt the Administration's change in policy and demonstrated the power of the local in cooperative ventures. As Homeland Security Secretary Johnson wrote at the time of the program's discontinuation:

> The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens in the custody of state and local law enforcement agencies. But the reality is the program has attracted a great deal of criticism, is widely misunderstood, and is embroiled in litigation . . . . Governors, mayors, and state and local law enforcement officials around the country have increasingly refused to cooperate with the program . . . . The overarching goal of Secure Communities remains in my view a valid and important law enforcement objective, but a fresh start and a new program are necessary.

Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to Thomas S. Winkowski, Acting Dir., ICE, et al. 1 (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf [http://perma.cc/UYG3-EWVK] [hereinafter Johnson, Secure Communities Memo].

Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). The "Obama relief initiatives," as we call them, emerged in two phases. In June 2012, then-Secretary of Homeland Security, Janet Napolitano, announced what became known as DACA.[102] According to the DHS memorandum accompanying the announcement, noncitizens without legal status who met certain criteria were eligible to apply for a renewable two-year period of relief from removal, as well as for the authorization to work in the United States.[103] The central feature of DACA was that it covered blameless youth with longstanding presence in the United States, namely, unauthorized immigrants who had come to the United States before the age of sixteen and had resided continuously in the United States for at least five years.[104]

The Administration styled relief for that group as an exercise of prosecutorial discretion—a large-scale extension of the "deferred action" immigration authorities had utilized for decades as a case management and humanitarian relief tool.[105] To underscore that the initiative fell within the

102. Press Release, U.S. Dep't of Homeland Sec., Secretary Napolitano Announces Deferred Action Process for Young People Who Are Low Enforcement Priorities (June 15, 2012), http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low [http://perma.cc/83EK-N89S].

103. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012) [hereinafter Napolitano, Prosecutorial Discretion Memo], http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [http://perma.cc/2HX6-G4H4].

104. *Id.* at 1. In addition, to receive relief under the 2012 version of DACA, an applicant must have been under the age of thirty-one as of June 15, 2012; not have been convicted of certain crimes; and, at the time of application, either be in school or have graduated from high school, have obtained a GED certification, or have been honorably discharged from the Coast Guard or Armed Forces. *Id.*

105. The decision to defer action, or delay or decline removal, functions like the criminal prosecutor's choice not to pursue a case. In the immigration setting, noncitizens whose prosecutions have been deferred have historically been eligible to apply for work permits pursuant to INS and now DHS regulation and are considered to be lawfully present for certain purposes, though deferred action does not confer on them a lawful immigration status. *See Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions [http://perma.cc/4KVM-P4G5]. Though Congress has not affirmatively authorized the practice or weighed in on its scope and the Supreme Court has not directly addressed its permissibility, both had acknowledged deferred action as part of the system of immigration enforcement prior to the announcement of DACA. *See* 8 U.S.C. § 1154(a)(1)(D)(i)(IV) (2012) (characterizing certain petitioners for immigrant status subjected to familial abuse as "eligible for deferred action and work authorization"); *id.* §1227(d)(2) (2012) (stating that the denial of a request for an administrative stay of removal is no bar to applying for "deferred action"); Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 484 (1999) (describing deferred action as

President's enforcement powers, the Administration emphasized that DACA would not confer a lawful status on its recipients, that the adjudicators of DACA petitions in United States Citizenship and Immigration Services (USCIS) retained discretion to deny applications of even those who satisfied the eligibility criteria, and that DHS retained the discretion to terminate the status at any time. By the end of 2014, approximately 638,897 noncitizens had been granted relief under DACA.[106]

In an address to the nation in November 2014, the President himself announced a second round of administrative actions designed to advance a variety of long-sought policy objectives.[107] The centerpiece again consisted of a large-scale deferred action initiative, this time for the unauthorized parents of U.S. citizens and lawful permanent residents. Pursuant to this program, known as DAPA,[108] eligible noncitizens who are not otherwise enforcement priorities for the government would be permitted to apply for the deferral of their removal, as well as work authorization, for three years.[109] Alongside this

INS's "regular practice . . . of exercising . . . discretion for humanitarian reasons or simply for its own convenience").

106. *See* U.S. Citizenship & Immigration Servs., *Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2015 (December 31)*, U.S. DEP'T HOMELAND SECURITY (2015), http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2015_qtr1.pdf [http://perma.cc/RNW2-9WNJ] (listing total cumulative initial DACA grants from the program's start through December 31, 2014). In August 2014, after the initial two-year period of DACA expired, the Administration began processing applications for renewal of deferred action status. *Cf.* U.S. CITIZENSHIP & IMMIGR. SERVICES, *supra* note 105 (indicating the procedure for renewal of DACA). Roughly 148,171 cumulative renewals have been granted. U.S. Citizenship & Immigration Servs., *supra* (listing total cumulative renewal grants through December 31, 2014).

107. *See* Michael D. Shear, *Obama, Daring Congress, Acts To Overhaul Immigration*, N.Y. TIMES, Nov. 20, 2014, http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html [http://perma.cc/352G-VHR2]; Press Release, Office of the Press Sec'y, White House, Weekly Address: Immigration Accountability Executive Action (Nov. 22, 2014), http://www.whitehouse.gov/the-press-office/2014/11/22/weekly-address-immigration-accountability-executive-action [http://perma.cc/Q2B3-2RK4].

108. *See* Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. 4 (Nov. 20, 2014) [hereinafter Johnson, DACA and DAPA Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [http://perma.cc/Z7B9-K5MG]. The Administration originally called the program Deferred Action for Parental Accountability.

109. On February 16, 2015, a judge in the Southern District of Texas enjoined the implementation of DAPA, concluding that the Administration violated the Administrative Procedure Act (APA) by failing to initiate notice-and-comment rulemaking for what the

new deferred action initiative, the Administration proposed to tweak the existing DACA program, expanding eligibility and extending the relief period to three years.[110] Together with the announcement of DAPA, DHS Secretary Johnson also issued a memorandum identifying department-wide guidelines intended to govern removal and detention policies and budget requests more generally. The "Johnson Memo" reinforced the Department's longstanding emphasis on public safety, national security risks, and border enforcement. To implement these priorities, however, the memo superseded all previous enforcement guidance with a new three-tiered scheme for prioritizing enforcement efforts.[111]

These Obama relief policies are thus best understood as the most dramatic and politically salient examples of a larger effort to centralize the vast enforcement authority that modern de facto delegation has given to the Executive. This centralization has entailed experimenting with different means of ensuring that political leadership within the agencies, as well as the White House, exert greater control over the structure of the immigrant screening system in order to advance the policy objectives of leadership, as well as to promote consistency and predictability in enforcement. Some aspects of this centralization have elevated decision-making authority within the bureaucracy—moving it from lower-level to higher-level decision makers. Other aspects have drawn power into the bureaucracy that otherwise might lie outside it—as is true in efforts to reduce the role of state and local actors in shaping the enforcement system.

judge characterized as a legislative rule. *See* Texas v. United States, Civ. No. B-14-254, 2015 WL 648579, at *62 (S.D. Tex. Feb. 16, 2015). We discuss the APA question below. *See infra* notes 308-318 and accompanying text.

110. *See* Johnson, DACA and DAPA Memo, *supra* note 108, at 3. DACA initially made eligible only those childhood arrivals who were under the age of 31 at the time they applied for relief under DACA. *See* Napolitano, Prosecutorial Discretion Memo, *supra* note 103. This limit on one's age at the time of application was eliminated in the changes announced on November 20, 2014. *See* Johnson, DACA and DAPA Memo, *supra* note 108, at 3.

111. *See* Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al. 3-4 (Nov. 20, 2014) [hereinafter Johnson, Enforcement Priorities Memo], http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf [http://perma.cc/EQ57-XP42] (prioritizing for enforcement purposes, in tier one, those posing "threats to national security, border security, and public safety," in tier two "misdemeanants and new immigration violators," and in tier three all other recent immigration violators). As part of this enforcement reform, the Administration also announced the reformulation of the Secure Communities Program. Though DHS would continue to rely on fingerprint data collected from state and local arrests, it would change DHS's enforcement policy from requesting that state and local police detain noncitizens for removal to, instead, requesting that police simply notify DHS that the release of potentially removable noncitizens from local custody was pending. *See* Johnson, Secure Communities Memo, *supra* note 101, at 1-3.

All recent administrations have reflected some centralizing tendencies, but the combination of politics and current events has made centralization efforts particularly pronounced in the Obama years. Of course, the fact that the Obama relief initiatives arose in response to these intertwined institutional and political forces does not tell us that those initiatives are lawful. Nor are they lawful simply because they fit comfortably within the tradition of executive branch policymaking that we have brought to the fore in this Part and in our 2009 work. Indeed, the propriety of any one of the forms of executive action highlighted in this Part could be debated, and the mere historical rootedness of the particular exercise of a power is not sufficient to endow it with constitutional status.[112]

The emergence of the relief initiatives as administration policy does, however, highlight the dynamic evolution of the content and reach of executive power. In particular, the initiatives embody recent efforts by the President and political leadership to reorganize this power. Their importance stems from what they reveal to us about the Executive Branch's internal operations and those operations' relationship to core constitutional and legal values, and not just their substantive outcomes. In Parts II and III, we turn from this historical account to critique and justification, to explain how such internal reorganization can promote transparency and accountability and thus serve the objectives of the separation of powers, even as it might deviate from congressional design and advance the Executive's own policy agenda.

II. THE SUBSTANTIVE GROUNDS OF ENFORCEMENT DISCRETION

Everyone debating the Obama relief initiatives agrees on two basic points. First, all acknowledge that executive branch officials have some discretion to decide whether and when to initiate a prosecution in an individual case. This understanding represents the paradigm case of the Anglo-American concept of "prosecutorial discretion." Even those who insist most strongly on a constrained Executive accept this discretionary authority over charging decisions in both criminal and civil contexts.[113] Second, all participants agree

112. *See, e.g.*, Zachary Price, *Two Cheers for OLC's Opinion*, BALKINIZATION (Nov. 25, 2014, 1:30 PM), http://balkin.blogspot.com/2014/11/two-cheers-for-olcs-opinion.html [http://perma.cc/E7JV-EG53] (warning of the one-way ratchet of reliance on past executive branch practice to establish the legality of a present-day action and noting that "the constitutional architecture supports an important background norm that executive officials still must seek to effectuate statutory policies").

113. The existence of this authority does not mean, of course, that such discretion is never defeasible. A group of ICE agents challenged DACA on the ground that the INA stripped agency personnel of this discretion and now mandates the initiation of removal proceedings

that the President cannot decline to enforce altogether a law that is constitutional. Such an effort to "suspend" the law would amount to an abdication of his Article II obligation to "take Care that the Laws be faithfully executed."[114]

But how do we distinguish the constitutional exercise of prosecutorial discretion from an impermissible abdication of the President's duty to enforce the law? Putting aside purely formal arguments about the distinction between permissible "underenforcement"[115] and impermissible "suspension," which suffer from serious conceptual problems,[116] claims about how to draw this

against noncitizens who are inadmissible for having entered the United States without inspection. *See* Complaint, Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-CV-03247-O), 2012 WL 3629252 (arguing that Congress's use of the word "shall" in 8 U.S.C. § 1225(b)(2)(A) (2012), which states that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding," mandates the initiation of removal proceedings (emphasis omitted)). For a convincing demolition of this statutory claim about the INA, see David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE (2012), http://www.yalelawjournal.org/forum/a-defense-of-immigration-enforcement-discretion-the-legal-and-policy-flaws-in-kris-kobachs-latest-crusade [http://perma.cc/TJP6-2Y4F]. For a discussion of the resolution of this case, see *infra* note 120. For a discussion of the tools available to Congress, see *infra* notes 299-301 and accompanying text.

114. U.S. CONST. art. II, § 3. *But cf.* ERIC POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 113-53 (2011) (arguing that the political need to maintain credibility and respond to public opinion, not legal norms or constitutional rules, constrains the Executive).

115. Extensive literature explores the pervasiveness of and reasons for underenforcement, as well as its potential costs. *See* Jonathan M. Barnett, *The Rational Underenforcement of Vice Laws*, 54 RUTGERS L. REV. 423, 426-27 (2002) (arguing that nonenforcement is a rational law enforcement strategy to deter marginal offenders without expending enormous resources on pursuing those who would offend regardless of the law); Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1745-48 (2006) (criticizing underenforcement by arguing that it arises when the group in need of enforcement is politically powerless); Gerald L. Neuman, *Anomalous Zones*, 48 STAN. L. REV. 1197, 1201-06 (1996) (describing the reasons why zones arise in which law is not enforced as a matter of explicit policy); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 116-17 (2005) (linking underenforcement to the implementation of a larger administrative scheme and arguing that enforcement should be left to agencies rather than private causes of action to ensure that enforcement is governed by a unified strategy given that law cannot reasonably be enforced to its limits); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796-99 (2010) (identifying the phenomenon of deregulation through nonenforcement and arguing that it is undesirable because it lacks transparency and obstructs accountability).

116. A core conceptual challenge for formalistic approaches is the fact that enforcement decisions often require judgments about the appropriate relationships among myriad parts of a large statutory code. Immigration enforcement, for example, inevitably implicates tradeoffs across numerous INA provisions—between border and interior enforcement, between immigrants

distinction typically take one of two forms. The first searches for principles that limit the substantive criteria that can serve as a basis for prosecutorial discretion. The second focuses on the way the Executive institutionalizes the criteria—that is, on how the Executive structures its decision making to take account of substantive criteria it has defined as relevant.

Prior to President Obama's November 2014 announcement, few commentators had taken the first tack of focusing on whether the substantive grounds of relief in the President's potential programs were themselves unlawful.[117] But that changed when the Office of Legal Counsel (OLC) released a legal opinion to accompany the President's unveiling of DAPA. Before the President announced his new relief policies, the Secretary of DHS and the White House Counsel turned to OLC, proposing two deferred action programs and seeking advice as to whether they were lawful. OLC found one within the Executive's authority and the other not.[118] OLC's opinion honed in on the President's substantive priorities, asking whether the central criteria for relief—

who violate U.S. criminal laws and those who ignore provisions governing who may enter and work in the United States, between targeting immigrants themselves or third parties (like smugglers or employers) who affect the demand for migration, and so on. Whether one concludes that these choices lead to the unlawful suspension of "the law" depends on the level of generality at which one evaluates the Code. At a low level of generality—that is, with a focus on particular Code provisions—such tradeoffs can often resemble suspension, because *a part of the Code* (often a single provision) will end up being almost entirely unenforced. But if our frame of reference is the INA as a whole, these tradeoffs simply do not entail any failure to enforce the *Code as a whole*.

Recall, for example, our discussion in Part I of IRCA's employer sanctions regime. While we know that millions of unauthorized immigrants are employed by hundreds of thousands of employers, for years during the Bush Administration, DHS fined fewer than a hundred employers for violating IRCA. Whether one believes that those facts reflect a failure to enforce the law depends on the level of generality at which one defines "the law." And like these earlier IRCA enforcement decisions, the implementation of the Obama relief policies ultimately will mean that fewer enforcement resources will be directed to certain parts of the Code—the provisions making deportable those who entered without inspection or overstayed the terms of their lawful entry—while more enforcement resources will be directed at other elements of the Code, primarily those that make deportable noncitizens who have committed serious crimes or pose security risks.

117. In the wake of the President's announcement of DACA, a variety of commentators concluded his actions were unlawful, but they tended to focus their arguments on the institutional form of relief. Zachary Price provided the most detailed effort along these lines, arguing that "individualized" determinations are lawful but "categorical" ones are not. Price, *supra* note 14, at 675; *see also* Delahunty & Yoo, *supra* note 14, at 784-85 (acknowledging the President's authority to apply equitable concerns in individual cases but contending that such authority does not extend to general, categorical rules like DACA). We explain in Part III why the distinction between "categorical" and "case-by-case" enforcement discretion cannot bear the weight that Price's argument places on it.

118. For a discussion of the details, see *infra* notes 127-133, 150-157 and accompanying text.

being a parent of a U.S. citizen, for example—were lawful. The answer, according to OLC, could be found by asking whether providing relief to those singled out advanced "congressional priorities" embedded in the INA.

Though OLC developed its congressional priorities approach in response to a direct question about the lawfulness of DAPA, the opinion's analytic framework transcends the details of any one scheme of enforcement discretion. In our assessment of it, then, we aim simultaneously to address the particularities of DAPA (as well as DACA) in order to help resolve the debate currently raging about these specific programs, as well as to consider the viability of a congressional priorities framework for understanding any general limits on enforcement discretion, which can take numerous forms. In other words, even if DAPA were never implemented[119] and DACA were invalidated as the result of final federal court judgments[120]—outcomes we are skeptical will

119. At the time of this writing, DAPA remains enjoined. As we discuss in more detail in Part IV, a judge in the Southern District of Texas concluded that the Administration violated the Administrative Procedure Act by failing to subject DAPA—a legislative rule, in its view—to notice-and-comment rulemaking. In the spring and summer of 2015, the Fifth Circuit denied the United States's motion to stay the injunction and held oral arguments on the appeal of the preliminary injunction. In both settings, the Fifth Circuit telegraphed its extreme skepticism of the government's position, and it therefore seems likely that DAPA either will remain enjoined by the Fifth Circuit or be reviewed by the Supreme Court by 2016. *See infra* notes 310-312 and accompanying text. Even if the United States were to lose at each step of the way, it could cure the APA problem by initiating notice-and-comment rulemaking. Provided time remains in this Administration to go through these motions, DAPA is likely eventually to come into effect. To be sure, the analysis by the Texas district court and signals from the Fifth Circuit suggest underlying constitutional discomfort with DAPA. As we explain throughout this Article, we find the constitutional objections to DACA and DAPA to be both weak and ultimately inconsistent with the approach to enforcement discretion the Supreme Court has taken in cases such as *Arizona v. United States*.

120. Thus far, the United States has succeeded in defending DACA against attack, though neither the arguments animating those lawsuits nor the procedural developments in them is on all fours with the Texas litigation. In another lawsuit in the Fifth Circuit, a district judge in the Northern District of Texas found that ICE agents, but not the state of Mississippi, had standing to challenge DACA. *See* Crane v. Napolitano, 920 F. Supp. 2d 724, 736, 738, 746 (N.D. Tex. 2013) (holding that ICE agents could not claim a potential violation of their oaths of office as cognizable injury but could establish injury as the result of potential discipline they might face for not complying with DACA). The court ultimately dismissed the agents' lawsuit for lack of subject matter jurisdiction, however. *See* Crane v. Napolitano, No. 3:12-CV-03247-O, 2013 WL 8211660, at *2 (N.D. Tex. July 31, 2013) (concluding that the Civil Service Reform Act provides "comprehensive and exclusive procedures for settling work-related controversies between federal civil-service employees and the federal government"), *aff'd sub nom.* Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015). In a lawsuit brought by Sheriff Joe Arpaio in the D.C. Circuit, a district court has denied a motion for a preliminary injunction against DACA and dismissed the case for lack of Article III standing. *See* Arpaio v. Obama, 27 F. Supp. 3d 185 (D.D.C. 2014) (noting that Arpaio has no authority to enforce the immigration laws and therefore is not injured by their underenforcement and

come to pass—evaluating the congressional priorities approach would remain an important task.

Putting aside one puzzling aspect of OLC's congressional priorities approach—that it elevates an ordinary argument about agency compliance with statutory obligations into a constitutional argument about the President's Article II obligations—the basic analytic framework of the "congressional priorities" approach seems straightforward.[121] But its seemingly straightforward quality turns out to be an illusion. As we explain in this Part, tying executive discretion to congressional priorities cannot provide a satisfying limiting principle within immigration law because, for the vast majority of enforcement choices that must be made, there are no coherent congressional priorities to be extracted from the Code. Any inquiry into congressional priorities is thus likely to be futile, which is why the dueling accounts of those priorities supplied by OLC and its critics are both unpersuasive. Moreover, in addition to providing little interpretive guidance, the congressional priorities approach perpetuates a "faithful-agent" model of law enforcement that is neither descriptively accurate nor normatively attractive. Executive branch policymaking through enforcement actually advances certain goals of our scheme of separated powers. When it comes to the exercise of the enforcement power, therefore, we should embrace what we refer to as the two-principals model of decision making that has emerged in practice.

A. Congressional Priorities and Faithful Agents

Though we ultimately disagree with the OLC opinion's approach, the opinion reflects the best instincts of OLC: that significant and novel executive

concluding that his claim of injury stemming from the need to expend resources to address crime and other costs associated with DACA was speculative). The court also telegraphed its skepticism that Arpaio could succeed on the merits, observing that "the challenged deferred action programs continue a longstanding practice of enforcement discretion regarding the Nation's immigration laws" that has been "conferred by statute" and is therefore "consistent with, rather than contrary to, congressional policy." *Id.* at 209. The court also concluded that the policy preserved meaningful case-by-case review. *Id.* at 209-10. On appeal, the D.C. Circuit held that "Sheriff Arpaio has failed to allege an injury that is both fairly traceable to the deferred action policies and redressable by enjoining them, as our standing precedents require." Arpaio v. Obama, 797 F.3d 11, 14 (D.C. Cir. 2015).

121. In his work analyzing DACA, before the President's November 2014 announcement, Zachary Price offers a heuristic that resembles this OLC approach in the way that it ties the President's enforcement power to what Congress intends. He emphasizes that the Executive can engage in "priority setting" but not "policymaking." *See* Price, *supra* note 14, at 761. That said, the limiting principle he devises—the categorical versus individual distinction—does not attempt to excavate substantive priorities from the INA but instead devises a sort of structural device for evaluating enforcement discretion.

branch policies ought to be scrutinized and that such scrutiny is doubly important when the exercise of power is unlikely to be reviewed by courts and raises potential separation-of-powers concerns.[122] The independence of the Office's judgment is also reflected in an aspect of the opinion Administration detractors seem to overlook: its conclusion that one of the President's proposed initiatives was beyond his authority. Though OLC frequently advises the President that a proposed course of action would not be lawful,[123] such advice is rarely made public, making the release of the opinion itself a remarkable event. In taking on the task of crafting a principle to limit a highly malleable form of executive authority, OLC's actions highlight that law constrains the President's actions.

Two crucial legal conclusions structure the analysis in the OLC opinion. First, the opinion rejects the idea that "resource constraints" provide a meaningful principle for limiting enforcement discretion.[124] Many defenders of broad deportation relief had pressed that as a limiting principle. But OLC was right to reject it; as a limiting principle, it is virtually meaningless.[125] The

122. One of us (Cristina Rodríguez) was Deputy Assistant Attorney General in the Office of Legal Counsel from 2011-2013. The views expressed in this Article are the authors' alone and do not reflect the views of the Office or of the Department of Justice.

123. *See* Trevor M. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1718-19 (2011) (book review) (noting that thirty-two percent of OLC opinions between the beginning of the Carter Administration and the first year of the Obama Administration "went predominantly against the White House").

124. OLC grounds its discussion of the enforcement power and the President's duty under the Take Care Clause in principles articulated by the Supreme Court in *Heckler v. Chaney*, 470 U.S. 821 (1985), only one of which relates to agency judgments as to whether "agency resources are best spent on this violation or another" and "whether the agency has enough resources to undertake the action at all." OLC Memorandum Op., *supra* note 10, at 10 (citing *Heckler*, 470 U.S. at 831). In evaluating DAPA, in particular, OLC emphasizes that limited resources did not provide the only reason for DHS's actions. It noted, "DHS has explained that the program would also serve a particularized humanitarian interest in promoting family unity" and that this justification "appears consonant with congressional policy embodied in the INA." *Id.* at 26.

125. In the debate over the 2014 policies, defenders of the Administration position have repeatedly emphasized that the President does not have close to sufficient resources to remove all noncitizens who are removable, therefore making it necessary for him to prioritize those enforcement resources he does have. *See, e.g.*, Open Letter from Immigration Law Professors 6 (Nov. 25, 2014), http://pennstatelaw.psu.edu/sites/default/files/documents/pdfs/Immigrants/executive-action-law-prof-letter.pdf [http://perma.cc/N5QU-2GWG]. This argument is unexceptional. But prior to the OLC opinion, a number of supporters of the relief initiatives had argued further that resource constraints provided an appropriate measure and means of constraining executive discretion. The suggestion was that so long as the Executive Branch spent, in accordance with appropriations legislation, all the enforcement resources Congress had provided, the President had faithfully executed his duty to enforce the law. *See, e.g.*, *id.* (arguing that a

existence of resource constraints obviously provides a sufficient condition for the exercise of prosecutorial discretion. If the Executive lacks the resources to pursue every violator of the law, she must make choices about which ones not to pursue—that much is a truism. But resource constraints are not a necessary condition for the exercise of discretion: the paradigmatic historical justifications for prosecutorial discretion have little or nothing to do with resource constraints. And even were one to reject this history and conclude that resource limits should be considered necessary, the ubiquity of resource constraints would prevent this principle from providing any meaningful constraint on the exercise of executive authority. DHS has been showered with resources and operates with a budget larger than all other federal law enforcement agencies combined. Yet DHS could ignore broad swaths of the immigration code and still spend its appropriated dollars. After all, DHS currently spends its full appropriation every year and still manages to deport only a tiny fraction of the potentially removable noncitizens living in the United States.[126]

Instead of looking to financial constraints, OLC concluded that a limiting principle could be supplied by "congressional priorities" embedded in the

serious legal question would arise only if the Executive Branch "were to halt all immigration enforcement, or . . . refuse to substantially spend the resources appropriated by Congress" and noting that the Obama Administration has "fully utilized all the enforcement resources Congress has appropriated [and] enforced the immigration law at record levels through apprehensions, investigations, and detentions that have resulted in over two million removals"). Impoundment might violate Article II, and it would certainly violate statutory law, but nothing short of failure to spend appropriated resources would be unlawful. *Cf.* Legomsky, Written Testimony, *supra* note 17, at 10-11, 15 (listing express constraints imposed by Congress and constitutional rights limitations, as well as a general requirement of reasonableness, as limiting principles, but presenting resource constraints as the primary constitutional, structural limit on discretion, noting that "nothing in these new policies will prevent the President from continuing to enforce the immigration laws to the full extent that the resources Congress has given him will allow. As long as he does so, it is impossible to claim that his actions are tantamount to eliminating all limits.").

126. In 2013, for example, DHS removed almost 438,000 noncitizens. *See* John F. Simanski, *Annual Report: Immigration Enforcement Actions: 2013*, U.S. DEP'T HOMELAND SECURITY (Sept. 2014), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf [http://perma.cc/9A7Z-XT44]. The unauthorized population alone remains at approximately eleven million, and the number of removals includes many lawfully present noncitizens who otherwise violated a term of the immigration laws. The fact that the Obama Administration has deported more noncitizens each year than any prior presidential administration in American history does not change the reality that it can remove only a small subset of those who are in fact removable. For a discussion of the relative removal rates across administrations, see Marc R. Rosenblum & Doris Meissner, *The Deportation Dilemma: Reconciling Tough and Humane Enforcement*, MIGRATION POL'Y INST. (Apr. 2014), http://www.migrationpolicy.org/research/deportation-dilemma-reconciling-tough-humane-enforcement [http://perma.cc/FS26-2RLB].

Code: these priorities, it concluded, constrain the *substantive criteria* that can lawfully serve as the basis for deportation relief.[127] In its opinion, OLC determined that, where the decision to grant relief tracked priorities the Office unearthed from the statute, such as keeping intact the families of citizens and lawful permanent residents, relief fell within the permissible zone of discretion.[128] But where OLC believed that the relief could not be tightly linked to priorities embodied in existing statutory provisions, it concluded that the Executive was without legal authority to act.[129] The opinion surveys numerous executive branch uses of deferred action and emphasizes that Congress was aware of them, seeming to use past practice as a form of precedent. But the opinion then turns to determine whether the President's new proposals building on that history are, in fact, "consonant with, rather than contrary to,"[130] priorities derived from the statute itself.[131] OLC ultimately determined that the decision in DAPA to provide relief to the parents of U.S. citizens and green card holders would promote congressionally articulated priorities, but that a proposed program to provide relief for the parents of DACA recipients would not.

To our knowledge, the notion that the exercise of enforcement discretion is lawful only if consistent with congressional priorities had not yet emerged as a claim in the debate at the time OLC issued its opinion. At that moment, we had not yet seen defended elsewhere the idea that executive priority setting ought to be informed by the Executive's own analysis of the enforcement obligations (and forms of relief) Congress thought most important. At the same time, the approach feels familiar. It aligns analysis of presidential enforcement authority with the way courts (and offices such as OLC) decide whether administrative agencies have lawfully exercised their delegated authority. This focus on consistency with congressional priorities in the context of administrative rulemaking reflects the dominant approach to administrative law, in which

127. OLC Memorandum Op., *supra* note 10, at 24 ("[A]ny expansion of deferred action to new classes of aliens must be carefully scrutinized to ensure that it reflects consideration within the agency's expertise, and that it does not seek to effectively rewrite the laws to match the Executive's policy preferences, but rather operates in a manner consonant with congressional policy expressed in the statute.").

128. *Id.* at 31.

129. *Id.* at 32-33.

130. *Id.* at 6.

131. *Id.* at 13-17, 24-25 ("[T]he proposed deferred action program would resemble in material respects the kinds of deferred action programs Congress has implicitly approved in the past, which provides some indication that the proposal is consonant not only with the interests reflected in immigration law as a general matter, but also with congressional understandings about the permissible uses of deferred action.").

principal-agent models—both informal and formal—are used to conceptualize and evaluate the administrative state.[132] When we characterize Congress as the principal and the Executive as its agent, the obvious question becomes whether the agent is promoting his principal's goals or, instead, advancing his own. The turn to congressional priorities in the OLC Memorandum thus reflects a larger commitment to a delegation-centric model of congressional-executive relations—call it the faithful-agent model of prosecutorial discretion.

On the surface, the faithful-agent model might seem to have even stronger purchase in the enforcement context than in other administrative settings. In rulemaking, Congress has expressly delegated policymaking and thus interpretive authority to the Executive, but the duty to enforce is more akin to a straightforward obligation to follow the law on the books.[133] Congress passes laws, the Executive enforces them—or so the argument goes. Under this reasoning, the constitutional allocation of enforcement power to the Executive assumes that the President and the bureaucracy will enforce Congress's policies and priorities.

Of course, elucidating those priorities will likely involve a more freewheeling, inference-based inquiry than entailed by ordinary statutory interpretation, because Congress does not typically draft statutory enforcement priorities to accompany its substantive rules.[134] Priorities can be gleaned from any of a statute's provisions and not just the provisions being enforced or interpreted.[135] Any executive branch effort to limit its enforcement judgments

132. *See, e.g.*, PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY (2005); DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATED POWERS (1999); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243 (1987). For an overview of the historical development of these models in political contexts, see Sean Gailmard, *Accountability and Principal-Agent Models*, *in* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens et al. eds., 2014).

133. OLC's congressional priorities approach thus implicates debates about whether the administrative state merely implements or also interprets legislation. We do not purport to resolve or even address those debates here and observe only that the enforcement power at first glance is less consistent with a view that the Executive has broad interpretive authority than actions undertaken pursuant to express delegations.

134. In discrete instances, Congress has articulated general enforcement guidance, usually in appropriations legislation. For a discussion of the utility and force of such guidance, see *infra* notes 141-143 and accompanying text.

135. In its opinion, for example, OLC focuses not on the statutory provisions that would form the basis of removal for potential relief recipients under DAPA, i.e., the provisions that make unauthorized presence a ground of removal. Instead, it draws support for its conclusion that the INA embodies family unity from various provisions that grant relief from removal under specified circumstances that are unlikely to be applicable to those who would be eligible for DAPA. *See* OLC Memorandum Op., *supra* note 10, at 27-28. For a discussion of how this

based on its own understanding of the goals Congress sought to achieve with the statutory framework in question is thus likely to give the Executive Branch considerable interpretive authority.

But even with these caveats, it might remain appealing to ground enforcement judgments in an argument that they advance goals set by Congress. Under this view, enforcement judgments emanate from tough value choices made by Congress, not the President. The President simply extracts those judgments from the statute, using sophisticated legal analysis. Analytically, this approach preserves congressional supremacy in the lawmaking process. The strongest version of this model would treat the Executive as a functionary, though both OLC[136] and commentators[137] wedded to the principal-agent model recognize the reality that the Executive must exercise judgment when determining how to enforce the law. They simply seek to discipline that judgment in a way that ensures Congress, not the President, remains responsible for substantive policy.

B. The Limits of Congressional Intent

The appeal of the congressional priorities approach is understandable. But we do not believe it provides an effective principle for limiting executive branch enforcement judgments in immigration law and many other domains. The congressional priorities approach fails because those priorities are a mirage.

Little meaningful congressional guidance exists about how to appropriately structure the ex post screening rules for immigration law. As we explained in Part I, the modern structure of immigration law effectively delegates vast screening authority to the President. The interlocking statutory and political developments we describe have opened up a tremendous gap between law on the books and on the ground. In a world where nearly *half* of all noncitizens living in the United States are formally deportable, there can be no meaningful search for the congressionally preferred screening criteria.[138] The keys to the immigrant screening system effectively belong to the Executive, which has the

differs from purposive forms of statutory interpretation, see *infra* note 148 and accompanying text.

136. OLC Memorandum Op., *supra* note 10, at 5.

137. *See* Price, *supra* note 14, at 677, 680, 696-97 (arguing for a framework of legislative supremacy and executive judgment and acknowledging that faithful agency does not require "robotic" interpretation but rather judgment and priority setting, rather than policymaking).

138. *See supra* text accompanying notes 80-83.

authority (and some might even say obligation) to define screening criteria.[139] As we described earlier, administrations have wielded this authority to reshape the screening system over time, a practice the Obama Administration has continued.[140]

In theory, of course, Congress could constrain de facto delegation by complementing its substantive statutory enactments with detailed enforcement instructions or prohibitions. In practice, Congress has rarely done this—in immigration law or any other regulatory arena. Occasionally Congress blandly obligates DHS to do something like "prioritize the identification and removal of aliens convicted of a crime by the severity of that crime,"[141] or to fund a particular number of beds for immigrant detention (34,000, to be exact).[142] But loose language of prioritization does little to constrain the Executive's authority,[143] and even numerical prescriptions like the bed-space mandate only scratch the surface of the decisions the Executive must make when enforcing immigration law. Negative injunctions issued by Congress have the potential to be more powerful; prohibiting DHS from granting any immigrant deferred action, for example, would more seriously constrain the President's power to structure the immigrant screening system. But these sorts of prohibitions are also rare.

In this world, it will generally be futile to search for "congressional priorities" that legally constrain executive branch decisions about which immigrants, from within the vast pool of eleven million unlawfully here, may be deprioritized for deportation (not to mention congressional views as to *how*

139. For further discussion of this point, see *supra* Part I.C and *infra* notes 280-282 and accompanying text.

140. For examples of the guidance issued by various administrations to set these priorities, see *supra* note 111 and accompanying text. OLC acknowledges the need for administrations to prioritize, citing the observation in *Heckler v. Chaney* that decisions about whether to enforce the law require complex judgments that involve factors "peculiarly within [the agency's] expertise." OLC Memorandum Op., *supra* note 10, at 4 (citing Heckler v. Chaney, 470 U.S. 821, 831 (1985)). But in its search for a way to ensure that the Executive does not "rewrite" the law through enforcement, it requires that those judgments be "consonant with" congressional policy. *Id.* at 6.

141. *See* OLC Memorandum Op., *supra* note 10, at 10 (citing Department of Homeland Security Appropriations Act of 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251).

142. *See, e.g.*, Department of Homeland Security Appropriations Act of 2013, Pub. L. No. 113-6, div. D, tit. II, 127 Stat. 342, 347 (providing that "funding made available under this heading shall maintain a level of not less than 34,000 detention beds"); *see also* H.R. REP. NO. 112-492, at 56 (2012) (directing "ICE to intensify its enforcement efforts and fully utilize these resources" rather than rely on alternatives to detention).

143. For example, directing the Administration to prioritize the removal of persons who have committed serious offenses provides no guidance with respect to how to address the millions of other noncitizens who are removable.

such deprioritization ought to be structured). And given the absence of such priorities, efforts to invoke them ultimately only obscure the reality that executive branch officials are making important value judgments about our immigrant-screening system.

Our argument should not be confused with the claim that presidential immigration law grows out of inherent Article II authority and exists independently from Congress. To the contrary: the argument is perfectly consistent with the claim that the President has no inherent constitutional authority over immigration policy.[144] In such a world, the Executive makes enforcement judgments *within* the domain Congress has created. Congress's statutory grounds of removal, for example, specify necessary conditions for the exercise of the enforcement power against a noncitizen, and the President cannot act outside the domain defined by those conditions. Thus, if DHS decided to start deporting immigrants who had failed to pay child support—not a ground of deportability under the INA—that decision would be unlawful.

Nor is our argument that the very idea of "congressional priorities" is incoherent in principle, or that such priorities can never be identified in practice. Ordinary interpretation often entails the search for Congress's specific intent or overarching legislative "plan."[145] The idea of legislative priorities (or purposes, or intent) is, in our view, crucial to the construction of any persuasive interpretive theory (though the fact that it has been embraced by so many conservative legal scholars arguing against DAPA's lawfulness is perhaps ironic).[146] When a court confronts the question of whether an immigrant's

144. Some historical examples of the President exercising inherent authority to regulate immigration do exist. As noted in Part I, for example, the President claims authority to grant Deferred Enforced Departure from Article II and his power to conduct foreign relations. *See also* Cox & Rodríguez, *supra* note 7, at 485-92 (highlighting how President Truman appeared to claim inherent executive authority in the management of the Bracero guest worker program). The reach of this inherent Article II authority is beyond the scope of this Article, as we are more concerned with the role the President plays within the domains Congress constructs. Additionally, the inherent authority model has always been marginal in the immigration sphere and has receded over time.

145. *See* King v. Burwell, 135 S. Ct. 2480, 2496 (2015) ("A fair reading of legislation demands a fair understanding of the legislative plan. . . . If at all possible, we must interpret the Act in a way that is consistent with [that plan].").

146. This is not, of course, to minimize the well-understood difficulties associated with the concept of legislative intent. For a classic treatment of the problem of collective intent, see Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L. REV. L. & ECON. 239 (1992). For important work about the distinction between the enacting legislature and the current legislature, see William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 390-403 (1991); William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79

criminal conviction amounts to a ground of deportability under the Code, statutory interpretation arguments grounded in legislative intent will be perfectly plausible.[147]

But statutory interpretation questions of this sort typically have as their focus a discrete piece of statutory text. While interpreting that text might require placing it in the context of a larger code or in relation to other statutory provisions, the inquiry will typically be much more grounded in a discrete set of legislative materials than in inquiry into enforcement priorities.[148] Because, as we have noted, legislatures are not in the habit of writing enforcement instructions to accompany the substantive rules of a code, the congressional priorities approach will almost always be unmoored from any particular text and will require drawing inferences from a wide, amorphous range of statutory provisions and legislative materials. These materials are unlikely to contain much guidance. And the lack of guidance should come as no surprise, once we recognize that the pervasive failure of legislatures to write down enforcement instructions reflects the implicit delegation of those choices to the Executive.

That general challenge is only magnified in the specific context of modern American immigration law, where de facto delegation has given the Executive tremendous authority to manage the ex post screening rules by picking deportees from among a population of immigrants who are all obviously, and incontrovertibly, deportable. That is not to say, we reiterate, that the notion of congressional intent is conceptually incoherent. It is always possible to construct fanciful examples in which enforcement judgments would clearly contradict congressional purposes. Immigration law is no different in this respect. If the President announced that no enforcement resources would be directed toward immigrants with criminal convictions, and instead all resources would go toward deporting only long-term residents who were

CALIF. L. REV. 613 (1991); and William N. Eskridge, Jr., & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994).

147. Take, for example, the term of art "aggravated felony." Various consequences turn on whether a noncitizen has been convicted of a crime that falls into this category, but whether a federal or state offense constitutes an aggravated felony is far from straightforward. This has been the subject of numerous cases of statutory interpretation within the courts of appeals and at the Supreme Court. Resolving the interpretive questions at stake in those cases will for some interpreters involve inquiring into statutory purpose. For a discussion of the development of this statutory ground of removal, see LEGOMSKY & RODRÍGUEZ, *supra* note 83, at 598-99.

148. In this sense, the congressional priorities approach and our critique of it are also orthogonal to the analysis required of courts under the APA to determine whether agency action has been arbitrary or capricious, an abuse of discretion, or otherwise "not in accordance with law." *See* 5 U.S.C. § 706(2)(A) (2012) (directing courts to set aside agency action under certain circumstances).

married to Americans, we would not hesitate to conclude that such an enforcement decision is prohibited by the congressional priorities embedded in the Code, as well as appropriations law. But no President is likely to adopt such a policy. Thus, within extremely broad limits—limits that, we show below, easily sweep up programs like DACA and DAPA—the structure of modern immigration law simply leaves us with no discernable congressional enforcement priorities.

To see the failure of the congressional priorities approach in practice, we need look no further than OLC's efforts to extract such priorities from the INA in order to evaluate the two relief initiatives proposed by the Administration.[149] OLC ultimately determined that the INA's goal of promoting family unity justified DAPA, which provides relief to the parents of U.S. citizens and green card holders. It observed that the statute creates a path to lawful immigration status for immediate relatives of U.S. citizens without numerical limitation, and that "numerous provisions of the [INA] reflect a particular concern with uniting aliens with close relatives who have attained lawful immigration status in the United States."[150] But it rejected an initiative that would have provided relief from removal and work authorization for the unauthorized parents of the beneficiaries of the DACA program of 2012. The Office determined that such relief was beyond the President's authority because the INA did not reflect "comparable concern for uniting persons who lack lawful status (or prospective lawful status) in the United States with their families. Extending deferred action to the parents of DACA recipients would therefore expand family-based immigration relief in a manner that deviates in important respects from the

149. OLC in a sense recognizes this problem, noting: "These limits, however, are not clearly defined. The open-ended nature of the inquiry under the Take Care Clause—whether a particular exercise of discretion is 'faithful[]' to the law enacted by Congress—does not lend itself easily to the application of set formulas or bright-line rules." OLC Memorandum Op., *supra* note 10, at 5. But whereas we would abandon the effort to draw substantive limits, OLC does its best to find them.

150. *Id.* at 26. OLC also noted that, even though LPRs may not directly petition for the admission of their parents, the former could become citizens and then petition for family unity. *Id.* at 27. The opinion also cites the provision of the INA that authorizes the Attorney General to cancel the removal of certain aliens who have citizen or LPR relatives and to then adjust those aliens' status to permanent resident. *Id.* (citing 8 U.S.C. § 1229b(b)(1) (2012)). Importantly, OLC applied a sort of "lesser included" standard to evaluating the relationship of DAPA to the statute. It reasoned that, because the proposed deferred action program would provide temporary relief, it was "sharply limited in comparison to the benefits Congress has made available through statute" and therefore "would not operate to circumvent the limits Congress has placed on the availability of those benefits." *Id.*

immigration system Congress has enacted and the policies that system embodies."[151]

In the wake of the opinion's release, critics of DAPA disagreed strongly with OLC's view about how to cash out the congressional priorities embedded in the INA.[152] The Code does not promote family unity in some abstract and general way, they argued. Instead, the Code sometimes makes immigration benefits available for family members and at other times conspicuously declines to do so.[153] In other words, Congress has clearly and specifically defined the limited circumstances in which it values family unity, and the circumstances of DAPA recipients are not among them. For decades the INA has prohibited children born in the United States from immediately sponsoring their parents' entry into the United States. A U.S.-born child must turn twenty-one before she can do so—a restriction that prevents the Fourteenth Amendment's birthright citizenship rule from enabling unauthorized immigrants to acquire status quickly by having children in the United States.[154] But U.S.-born children are precisely the group who, under DAPA, serve as the basis of relief

151. *Id.* at 32. Unlike U.S. citizen children (and lawful permanent resident children who might eventually become citizens), the unauthorized youth shielded from removal by DACA cannot under existing law file petitions for their parents to be admitted as lawful permanent residents. *Id.*

152. *See, e.g.*, Margulies, *supra* note 14 (characterizing DAPA as belonging in the third category of Justice Jackson's famous framework for evaluating executive authority, or the lowest ebb of executive authority in light of Congress's regulation, and concluding that the policy's "unilateral grant of these immigration benefits defies Congress's will"); Price, *supra* note 112 ("[T]he constitutional architecture supports an important background norm that executive officials still must seek to effectuate statutory policies."); *see also* Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers*, 94 B.U. L. REV. 105, 111 (2014) (evaluating DACA and concluding that it is inconsistent with Congress's will in passing the INA, where Congress "expressly provided only limited avenues for the exercise of discretion and impliedly offered room for additional discretion only on a case-by-case basis").

153. *See, e.g.*, Martin, *supra* note 14 (arguing that OLC's invocation of cancellation was "remarkably misleading" because Congress tightened the standards for cancellation in 1996 and made it available as relief only in cases in which removal would impose "exceptional and extremely unusual hardship" and because Congress capped the annual number of cancellations at 4,000, making relief far from immediate).

154. *See id.* ("Long-standing congressional policy, clearly fixed in statute, disallows immediate relative petitions for parents until the child reaches age twenty-one. A test looking to consonance with congressional policy . . . has to be more candid about all the elements of that policy."); Michael W. McConnell, *Why Obama's Immigration Order Was Blocked*, WALL ST. J. (Feb. 17, 2015), http://www.wsj.com/articles/michael-mcconnell-why-obamas-immigration-order-was-blocked-1424219904 [http://perma.cc/KD5L-DN5N] (arguing that "DAPA dispensed with" the statutory requirements that "undocumented-immigrant parents of U.S. citizens . . . wait until the child turns 21, and then . . . leave the country for 10 years before applying for a change of immigration status on account of that child").

for their unauthorized parents. This shows, say Administration critics, that OLC got things exactly backwards.[155] To the extent the INA expresses priorities about when family unity should be the basis of immigration benefits, it has expressly rejected the priorities reflected in DAPA.

Similar arguments have also been made that DACA is inconsistent with the INA's priorities. DACA treats early childhood arrival in the United States as the touchstone criterion for relief from deportation. But the INA nowhere privileges young arrivals in its immigrant screening rules. Moreover, Congress has repeatedly rejected the so-called DREAM Act,[156] which would provide a path to legalization for many of the young migrants covered by DACA—further evidence, critics argue, that the Code cannot be read to reflect a congressional priority to provide protection to these young migrants.[157]

155. *See* Margulies, *supra* note 14 (arguing that the INA sends a "clear signal to foreign nationals: Entering the US without inspection and having kids is not a ticket to lawful residence or any of the benefits that lawful residence provides" and that "[t]he OLC memo misses this clear legislative signal").

156. *See* David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), http://www.nytimes.com/2010/12/19/us/politics/19immig.html [http://perma.cc/4894-S3N3]. The DREAM Act is a bill that has been introduced in Congress repeatedly that would give permanent resident status to unauthorized immigrants who were brought to the United States as children, completed two years of college or U.S. military service, and met other requirements. For an argument that DACA implements the DREAM Act through executive fiat, see Delahunty & Yoo, *supra* note 14, at 787-92.

157. Interestingly, the OLC opinion does not itself even make an argument that DACA is consistent with congressional priorities reflected in the INA. The opinion asked only that the Office formally evaluate the legality of DAPA and the proposed relief program for the parents of DACA recipients. In a footnote discussing the Office's earlier oral advice regarding DACA, however, the memorandum suggests that OLC might have had in mind a very different rationale for DACA itself. One possibility is that blamelessness—the fact that young migrants often bear no responsibility for their unauthorized status—implicates humanitarian and constitutional values that justify the exercise of discretion in DACA. Blamelessness connects to anti-inheritance principles reflected in the Fourteenth Amendment and other constitutional provisions. *See* Christopher L. Eisgruber, *Birthright Citizenship and the Constitution*, 72 N.Y.U. L. REV. 54, 76 (1997) (discussing the Constitution's rejection of titles of nobility); Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. PA. J. CONST. L. 1363, 1365 (2009) (articulating an anti-inheritance principle and arguing that the Citizenship Clause of the Fourteenth Amendment "represents our constitutional reset button" by placing "all people, regardless of ancestry, on equal terms at birth, with a legal status that cannot be denied them"). It also connects to conceptions of luck egalitarianism prominent in political philosophy. *See, e.g.*, Richard J. Arneson, *Luck Egalitarianism—a Primer*, *in* RESPONSIBILITY AND DISTRIBUTIVE JUSTICE 24 (Carl Knight & Zofia Stemplowska eds., 2011); Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 288 (1999) (criticizing luck egalitarian thought and arguing that the point of equality is to address oppression, not to "eliminate the impact of brute luck from human affairs"). Moreover, the idea of blamelessness played an important role in the famous immigration case *Plyler v. Doe*,

Who has the better argument? In our view, neither side persuades. OLC's critics are correct that there is no general policy in favor of family reunification that applies consistently throughout the Code. But critics are wrong too: the mere fact that U.S. citizen children cannot file green card petitions for their parents until age twenty-one does not tell us that the Code prohibits their parents from being provided with some lesser form of relief from deportation. DAPA simply defers a parent's deportation; it does not provide any lawful immigration status, let alone the right of permanent residency that comes with a green card. For the same reason, critics are mistaken in thinking that the Code's inclusion of specific, limited grounds for "relief" from removal—like those contained in the Code's "Cancellation of Removal" provision—undercuts DAPA's legality. The relief provided under the cancellation provision is, again, green card status, not deferred action. If all forms of relief from removal, including deferred action, really had to be limited to the enumerated grounds of "relief" in the Code, then nearly *every* grant of deferred action would be unlawful—not just the President's current policies—because DHS generally extends deferred action to noncitizens who are not eligible for more robust forms of relief like cancellation.[158]

If we attempt to abstract from any particular statutory provision to the claim that a web of provisions—really the whole Immigration Code read intratextually—dictates the result that either OLC or its critics are correct, we are left with an all-too-familiar level-of-generality game. At some high level of generality (i.e., does the INA prioritize families?) OLC's view looks more persuasive. At some lower level of generality (i.e., does the INA endorse deferred action for the out-of-status parents of U.S. citizens and lawful permanent residents?) it looks less persuasive. But we have no way to determine which level of generality to choose, given the way the INA evolved over time. The INA, initially adopted in 1952 and amended in significant fashion many times in the decades since, consists of a long series of legislative

457 U.S. 202 (1982), which struck down Texas laws restricting unauthorized children's access to the public schools. In concluding that the laws violated the Fourteenth Amendment, the Court emphasized the blamelessness of the unauthorized children for their immigration status. *Plyler*, 457 U.S. at 220-21; *cf.* Korematsu v. United States, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) ("Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable."). David Martin explains the legality of DACA in these terms, emphasizing that it "covers only a small percentage of removable aliens and . . . shields only those not culpable for the initial immigration law violation." Martin, *supra* note 14. Note that these justifications do not stem from congressional priorities.

158. OLC's rejection of deferred action for the parents of DACA recipients suffers from this same problem. *See, e.g.*, Steve Legomsky, *Why Can't Deferred Action Be Given to Parents of the Dreamers?*, BALKINIZATION (Nov. 25, 2014, 6:30 PM), http://balkin.blogspot.com/2014/11/why-cant-deferred-action-be-given-to.html [http://perma.cc/C272-23VF].

accretions. Each addition to the Code reflects a complicated mix of conflicting priorities either balanced against one another by a single Congress or across Congresses. The provisions for family-based immigration benefits have, for example, evolved in complex ways over more than a century.[159] There is little doubt that American immigration law makes family ties more important than do the immigration systems of many other nations.[160] But the devil is in the details: the general principle of family unity has been defined, qualified, and cabined in numerous ways, as have the general policy goals of augmenting the U.S. labor supply and providing protection for noncitizens fleeing disasters of various sorts, for that matter. A statute like the INA—one constructing a comprehensive regulatory scheme that has evolved in dynamic fashion over time and that embodies such a high level of complexity—will often not be amenable to many common intratextualist interpretive moves. The legislative "plan" of the INA is so full of internal contradictions and complexities as to be nearly impossible to characterize as pursuing concrete "priorities" at anything other than the highest level of generality.

This problem is not unique to immigration law. Today, it is common to many regulatory arenas, and looking for congressional priorities to constrain enforcement discretion will therefore pose a more difficult problem than those typically posed by statutory interpretation. When it comes to the INA, no individual relief provision points to Congress's intent to prohibit the adoption of a particular prioritization scheme for dealing with the eleven million removable noncitizens in the United States. Nor does the Code as a whole, read intratextually, do so. And at bottom the reason goes back to the general theory we laid out at the top of this Part: the rise of de facto delegation consolidated in the Executive the authority to make these sorts of judgments.

C. The Two-Principals Model of Immigration Policymaking

At a general level, debates over the scope of executive power traffic in two competing frames of reference. The congressional priorities approach embodies a faithful-agent model according to which the Executive, when fulfilling its responsibilities through rulemaking, administration, or enforcement, should always ask itself: "What would Congress do?" The President's obligation is to

159. For a representative example exploring what is to be gained from family immigration, see Kerry Abrams, *What Makes the Family Special?*, 80 U. CHI. L. REV. 7 (2013). For a collection of sources discussing the U.S. immigration system's prioritization, as well as denigration, of family ties, see LEGOMSKY & RODRÍGUEZ, *supra* note 83, at 269 n.10.

160. *See* Adam B. Cox & Eric A. Posner, *Delegation in Immigration Law*, 79 U. CHI. L. REV. 1285, 1319-26 (2012) (discussing U.S. immigration law's focus on family-based immigration and its connection to ideas about immigrant integration as well as racial and ethnic exclusivity).

reflect as nearly as possible the policy Congress would adopt, were Congress itself making the regulatory or enforcement decision. Under this framework, the Executive exercises no policymaking autonomy and refrains from making contested value judgments, even as it exercises judgment and sets priorities.[161]

When it comes to understanding the enforcement power, we believe this framework is mistaken as a descriptive matter and unappealing as a normative matter. Instead, we offer a contrasting account—a two-principals model[162]—according to which the President possesses his own policymaking power. This model appears most clearly in the foreign affairs context and in debates over the extent of inherent authority the President possesses as Commander-in-Chief or as a function of Article II. It also characterizes theories of administration and statutory interpretation that capture the power of the modern Executive to displace Congress as a policymaker.[163] One of our core contributions in this Article is to elucidate how a version of the two-principals model also characterizes the enforcement domain, not as a matter of inherent presidential authority, but as a function of the imperatives of the President's obligations under the Take Care Clause, which emanate from but are not wholly controlled by Congress.

In this Part, we begin by reinforcing this two-principals claim descriptively. We then move to establish why the Executive serves rather than undermines certain core separation-of-powers values when acting as a kind of second principal in the exercise of the enforcement power. But first, we should say a few words about what we mean by two principals. We do not mean to suggest that the President and Congress are substitutes. Instead, we envision the Executive as a principal because, using the tools conferred by both the Constitution and the historical development of a particular regulatory arena, the President acts as a policymaking counterpart to Congress. He does so by playing a major and independent role in constructing the domain of enforcement over time, defining whom and under what circumstances the law will regulate. Moreover, to say that the Executive is a co-principal does not mean that the President himself is authorized or obligated to act as a pure unitary principal of the sort sometimes imagined in the separation-of-powers scholarship. Enforcement power can be lodged in a variety of institutional locations within the Executive Branch. Part III explores this explicitly, disaggregating the Executive and considering the possibility that the policymaking potential of the enforcement power may necessitate, or at least

161. *See* Price, *supra* note 14, at 677.

162. We thank Daryl Levinson for this formulation of our argument.

163. *See infra* notes 226-229 and accompanying text (discussing scholarly debates over presidential administration).

justify, some degree of high-level political control of or supervision over priority setting.[164] In the remainder of this Part, however, we bracket this institutional complexity and think about executive power in general terms.

1. *Executive Construction of Enforcement Domains*

The faithful-agent model cannot be squared with the reality of prosecutorial discretion in immigration and many other regulatory arenas. It is a descriptive impossibility. Outside the immigration context, for example, it would be strange to argue that the myriad discretionary decisions made by federal prosecutors and other law enforcement officials are (or should be) motivated only by a sense of the value judgments Congress made when enacting the criminal law. To the contrary, when a prosecutor makes a plea deal, she is much more likely to describe the choices embodied in the plea in terms of an all-things-considered pragmatic calculation that is guided by oversight within her office and, ultimately, by what justice requires. Her time would not be spent scouring the criminal code to unearth some latent congressional priorities that somehow compelled the particular plea deal.[165] Prosecutorial discretion has long entailed executive branch officials' legal authority (and responsibility) to make difficult value judgments about the exercise of the state's coercive authority.[166]

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164. For further discussion of who should be understood as the principal within the Executive Branch, see *infra* notes 262-264 and accompanying text.

165. In his rejection of the independent counsel statute as a gross intrusion into the President's power to control prosecutors within the Executive Branch, Justice Scalia offers a vivid picture of the sort of judgments prosecutors routinely make—a picture that does not square with a congressional priorities model. He writes:

> Almost all investigative and prosecutorial decisions—including the ultimate decision whether, after a technical violation of the law has been found, prosecution is warranted—involve the balancing of innumerable legal and practical considerations. Indeed, even political considerations (in the nonpartisan sense) must be considered, as exemplified by the recent decision of an independent counsel to subpoena the former Ambassador of Canada, producing considerable tension in our relations with that country. Another preeminently political decision is whether getting a conviction in a particular case is worth the disclosure of national security information that would be necessary. . . . In sum, the balancing of various legal, practical, and political considerations, none of which is absolute, is the very essence of prosecutorial discretion.

Morrison v. Olson, 487 U.S. 654, 707-08 (1988) (Scalia, J., dissenting).

166. Some critics of the President's relief initiatives believe that decisions by line-level prosecutors are an inapposite comparison. Zachary Price, for example, argues that those decisions are different in kind because they are made on an individualized basis, while the decision to establish DACA or DAPA involves a "categorical" judgment by high-level agency

This dynamic of prosecutorial policymaking is perhaps even more vivid when we move from the retail level of the line prosecutor to the level of the agency head or the President himself. As we documented in detail in Part I, a simple principal-agent model does not accurately capture the history of immigration law and enforcement. While the nature and scope of executive power in immigration law has evolved over time in response to events and structural phenomena, as it has in other regulatory domains, an especially notable fact of immigration history is that the President has regularly acted as an independent policymaker, pursuing agendas that his corresponding Congresses may or may not have shared. In the first century of immigration law, Presidents used quintessentially executive powers—namely the negotiation of treaties—to advance their agendas, and they were able to do so because Congress had yet to occupy the field of immigration regulation with an elaborate code.[167] But even in the twentieth-century context of domesticated executive power, amidst the rise of immigration delegation, the President has played the independent policymaking role to at least as robust an effect, both in exercising delegated authorities and in large part through the exercise of the enforcement power in the context of de facto delegation.

Our account of IRCA, in Part I, presents a good example: the substantive legal regime that determines whether and how to regulate employers and their unauthorized workers has evolved over the last three decades through the application of the Executive's enforcement judgments. IRCA as a regulatory system in 2015 looks quite distinct from IRCA as a statute enacted in 1986. The combination of partisan politics and the institutional dynamics of enforcement itself (the assessment of its costs and the efficacy of different methods of enforcement, for example) have reconstructed the regulatory domain Congress created with its initial statutory enactment.

But as the evolution of IRCA highlights, the modern immigration system should not be understood to embody a simple static and uncontested shift of authority to the Executive. Nor is this joint federal lawmaking necessarily collaborative or harmonious. Rather, it consists of the branches responding to one another's regulatory choices. Presidential immigration law has precipitated a variety of responses from Congress, which has both ratified and resisted the

officials (or even by the President himself). *See* Price, *supra* note 14, at 674; *see also* Price, *supra* note 112. For reasons we explore in Part III, we do not believe this distinction between individual and categorical judgments can be sustained. And for reasons we explore in this Part, we believe there to be value in executive branch policymaking through enforcement.

167. *See* Cox & Rodríguez, *supra* note 7, at 469-71.

Executive's use of his authority.[168] On occasion Congress has responded with actual lawmaking, as in the case of refugee policy.[169] In other moments, Congress has wielded the power of the purse, using appropriations measures to shape executive branch conduct.[170]

In response to DAPA, in particular, House Republicans have sought to tie funding for the Department of Homeland Security to riders that would block implementation of the Obama relief initiatives; this is but the latest example of this phenomenon.[171] That they have not succeeded could either demonstrate the limited utility of appropriations threats, or that these Republicans were simply grandstanding, exerting a less formal form of control through politics. The congressional-executive dynamic often does not rise to the level of lawmaking. Congress's response to the President's use of his de facto delegated power frequently takes the form of political posturing, whether during election campaigns or in hearings called to bring attention to opposition among members of Congress.[172] But rather than think of these responses as reflecting

168. *See id*. at 502-05 (discussing congressional resistance to Presidents' uses of parole power); *id.* at 507-08 (discussing Congress's addition to the INA enabling adjustment of the status of Haitian and Cuban entrants in the aftermath of large-scale parole by President Carter).

169. *See id.* at 507-08. While the efforts to constrain the use of parole power might be the one (partial) exception, even these instances of responsive immigration legislation by Congress have not amounted to the sorts of congressionally imposed constraints sometimes seen in other regulatory arenas, where Congress responds to executive branch enforcement decisions by enacting statutory prohibitions, instructions, or deadlines.

170. *See supra* note 142 and accompanying text (discussing the detention bed mandate). In addition, the ever-increasing appropriation of funds for DHS generally reflects congressional efforts to shape enforcement. *See* Meissner et al., *supra* note 63, at 2, 9 (documenting two decades of "sizeable, sustained budget requests and appropriations made by the Executive Branch and Congress . . . under the leadership of both parties" and emphasizing that the U.S. government spends more on federal immigration enforcement than all other federal law enforcement agencies combined).

171. *See, e.g.*, Ashley Parker, *House and Senate Prepare Measures To Keep Homeland Security Funded*, N.Y. TIMES (Feb. 26, 2015), http://www.nytimes.com/2015/02/27/us/house-and-senate-near-differing-plans-to-avoid-homeland-security-shutdown.html [http://perma.cc/K8RS-BNTS].

172. *See, e.g.*, *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the H. Comm. on the Judiciary*, 114th Cong. 1-3 (2015) (statement of Rep. Bob Goodlatte, Chairman, H. Comm. on the Judiciary) (introducing a hearing featuring testimony opposed to the President's executive actions and accusing the President of "one of the biggest constitutional power grabs ever" and "rewriting the laws when [he] can't convince Congress to change them"). At the same time, congressional complaints about the President's policymaking through enforcement have transcended partisan dynamics—though the charge of fecklessness may be less frequently lobbed at Republican Presidents (despite their examples of underenforcement) and more frequently aimed at Democrats (despite their zealous enforcement). Tellingly, however, Congress has never responded by acknowledging, much less addressing, the underlying "causes" of de facto delegation.

the petulance or dissatisfaction of a principal whose agent has gone astray, we should understand them as embodying the rivalry of two principals and the friction that can result when the center of policymaking gravity moves from one to the other.

This two principals understanding of executive power differs in important respects from other influential accounts of interbranch relations. As noted in Part I, we disclaim the position that the legality of the President's actions turns on whether precise historical precedents or analogs exist. In that sense, our argument diverges from and is more radical than the view, present in some scholarship as well as executive branch practice, that congressional acquiescence over time to a particular executive branch practice is what makes it lawful.[173] Instead, on our account, the President effectively acts as a principal within a regulatory space that has been constructed over time, even if Congress has not acquiesced. In immigration law, that space is breathtakingly broad in part because of the rise of de facto delegation. And within that space, the President shapes immigration law by continually revising and restructuring enforcement authority.[174]At the same time, our account is more restrained than the one contained in the historical gloss literature. That literature concludes that practices to which Congress has acquiesced at Time One become immune

173. The argument that historical executive branch practices qualify as constitutional precedents often entails the claim that those practices reflect a legal convention that should be accorded constitutional status. The "historical gloss" literature is founded on the idea that discrete exercises of presidential power, acquiesced in over time by Congress, become constitutional precedents that support the continued legality of that exercise of presidential power—even in the face of new resistance from Congress. *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2013) (exploring the significance of congressional acquiescence and arguing that it is necessary for a practice to achieve constitutional status but also exploring the limits and dangers of identifying or claiming acquiescence). For a discussion of the difficulties of using historical practice in this way, see Alison L. LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75 (2013), which criticizes Bradley and Morrison, in particular, for failing to account for the role of courts as "gloss producers."

174. Our model also differs from the claim made in scholarly and popular accounts that robust and independent presidential action can be justified during times of polarization, when Congress fails to fulfill its own constitutional responsibilities or obstructs policymaking. *See* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 7-11 (2014); Cass R. Sunstein, Robert Walmsley Univ. Professor, Harvard Univ., Keynote Address at the University of Chicago Legal Forum: Partyism (Nov. 7, 2014), http://ssrn.com/abstract=2536084 [http://perma.cc/U9PT-THYT] (arguing that in the face of partyism—or deep prejudice against members of the opposing party—vast delegations and a receptivity to the *Chevron* principle offer good ways to ensure ongoing problem solving by government). While we would agree that a two-principals model could be especially useful in such circumstances, we also believe the model's value transcends polarized contexts, for reasons we explore *infra* Part II.C.2. In addition, defining what constitutes obstruction seems to us a fraught enterprise.

from congressional override—that is, constitutionally entrenched—at Time Two. In contrast, in our account, Congress can defeat presidential power at Time Two, producing a more fluid politics of congressional-executive relations over time.

This defeasibility does not mean Congress is, ultimately, the only "true" principal, or that our account can be reduced to the claim that presidential immigration law is nothing more than the product of agency "slack."[175] The idea that mere agency slack is all that is at stake is misleading for the same reason that the faithful-agent framework (from which the idea of slack is drawn) leads us astray. Conceptualizing the tremendous divergence between congressional statutes and executive branch outcomes that we document in Part I as the product of slack suggests that we should find ways to control that divergence. Slack is undesirable—something one always wishes to squeeze out of the principal-agent relationship, something that we are saddled with only because principals are incapable of perfectly monitoring their agents. The history of immigration law we tell, however, suggests that presidential policymaking is too pervasive and autonomous to fit this model. And as we explain in Part II.C.2 below, there is value in that relationship that would be quashed by an insistence that the goal of administrative law and design should be to tighten up slack. It is true that, as a matter of formal game theory, the President can be labeled principal only if his authority is indefeasibly by Congress. But we think that model obscures the interbranch dynamics that have existed in practice, and we believe our conceptions of those dynamics must take account of that practice.

2. *Against Faithful Agents*

If we have succeeded in our descriptive account of two principals, at least within the domain of immigration enforcement, the question then becomes what to think as a normative matter about the system we now have.[176] Our goal

175. Thank you to Dan Ho for pushing us to clarify this point.

176. As should be clear from everything we have said thus far, we do not believe this normative question can be collapsed into a formalistic inquiry into whether the President's exercise of the enforcement power ceases to be "executive" and becomes "legislative." To be sure, there is a long intellectual tradition, dating at least to Montesquieu and Locke, advancing the idea that certain forms of power belong to certain types of government actors. For a leading but somewhat forlorn defense of this view, see Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 438, 442, 467 (2013), which claims, "Even if the principle is dying a sclerotic death, even if it misconceives the character of modern political institutions, still it points to something that was once deemed valuable—namely, *articulated government through successive phases of governance each of which maintains its own integrity* . . . ." Modern administrative law has largely moved us past this formalistic idea of dividing power

is not to erect a theory of separated powers from the ground up, or to identify an "optimal" separation of powers. It can be hard to avoid abstract generalities when attempting to articulate the reasons for horizontal divisions of power. The Supreme Court's regular references to the prevention of tyranny or the protection of individual rights as the purposes of the separation of powers may ring true as far as they go,[177] but they are little more than platitudes when a genuine competition for power is at stake, in part because those power struggles do not themselves involve a clear battle between tyranny and freedom. We are deeply skeptical that a true first-principles inquiry can succeed, and a central conceit of our work is that any theory of power allocation must emerge from institutional and historical context.[178] That is not to say that we don't think current arrangements can be improved—a task we take on in Part IV. But if we reason from abstractions rather than from practice, we will lose sight of a number of benefits that flow from the two-principals model of

according to its type. *See, e.g.*, M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Laws*, 150 U. PA. L. REV. 603, 605-06 (2001) (turning attention away from constitutional separation of powers and toward consideration of how governmental power is shared by a "large and diverse set of government decision-makers"); *cf.* Memorandum from Walter Dellinger, Office of Legal Counsel, to the Gen. Counsels of the Fed. Gov't (May 7, 1996) (discussing cases such as Bowsher v. Synar, 478 U.S. 714 (1986), that identify congressional aggrandizement, or congressional efforts to formally exert executive powers), *reprinted in* 63 LAW & CONTEMP. PROBS. 514 (2000).

177. The "purpose" question is quite under-theorized in Supreme Court precedents. Much as it does in the federalism context, the Court gestures toward abstract values such as protecting liberty and preventing the rise of tyranny before it elaborates the particular power arrangements it believes the Constitution has erected to advance those values. However, the connection between the constitutional allocations and the values is typically assumed rather than analyzed. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2608-09 (2011); Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252, 273-74 (1991); Mistretta v. United States, 488 U.S. 361, 380-81 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers . . . that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty. Madison, in writing about the principle of separated powers, said: 'No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.'" (citations omitted) (quoting THE FEDERALIST NO. 47, at 324 (James Madison) (J. Cooke ed., 1961))); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (stating that the goal of separation of powers is to "diffuse[] power the better to secure liberty").

178. In rejecting the idea that there is some single, platonic separation-of-powers principle, we share much in common with John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011), which argues that there is no freestanding principle of the separation of powers. Of course, we differ a good deal as to the reasons for concluding that no such single principle exists, as well as on the implications that flow from its absence.

immigration lawmaking that has emerged over time. Given the system we've inherited, it will be useful to understand its upsides.

In so doing, we focus on a second-order set of tradeoffs that the separation of powers entails: the classic struggle between the exercise of power to accomplish the ends of government and the overarching need to ensure that power is constrained, or exercised in a nonarbitrary fashion.[179] A central feature of this inquiry, for our purposes, is a debate about how best to ensure that the Executive acts in an accountable fashion, and then whether that accountability should be to apolitical norms of reasoned decision making or to popular and political conceptions of accountability.[180] In this sense, the inquiry sounds as much in administrative law as it does in constitutional law. In the balance of this Part, we explain why the two-principals model as applied to the enforcement power resonates with aspirations for constrained and accountable governmental power across the branches. We reserve for Part III a full discussion of the accountability tradeoffs embodied in the Obama relief initiatives. A key insight of our account of immigration enforcement is that independent priority setting by the Executive can, within the scheme of separated powers, actually facilitate the constrained use of power. Much separation-of-powers scholarship concerns itself with the rise of the imperial presidency, which prompts views that range from cheerful acceptance to

179. For a discussion of this dichotomy between power and constraint, see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015). As Michaels describes the literature and the theory, he argues that the concept of checking powers is not just about constraining abuse; it is also about legitimating the exercise of power. *See id.* at 523. The Supreme Court's separation-of-powers jurisprudence is full of language linking both separation of powers and federalism to the related goal of diffusing power or preventing its concentration. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., 135 S. Ct. 1225, 1244-45 (2015) (Thomas, J., concurring) (depicting the Framers as "concerned not just with the starting allocation" of power but also with power's ability to concentrate over time); *Youngstown*, 343 U.S. at 593-94 (Frankfurter, J., concurring) (describing the potential for "[t]he accretion of dangerous power" if separation of powers is not vigilantly guarded); *see also* Printz v. United States, 521 U.S. 898, 918-19 (1997) (stating that the Constitution established "dual sovereignty" in the national and state governments); Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (stating that the separation of powers was created with the purpose of "prevent[ing] the accumulation of excessive power in any one branch" and analogizing it to federalism).

180. *See* Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1891-97 (2015) (distinguishing between political or electoral accountability and legal accountability, or the concept that "all exercises of governmental power be subject to constitutional limits that the political branches lack power to alter through ordinary legislation"); Michaels, *supra* note 179, at 540-57 (exploring the civil service as a counterweight to the political leadership of agencies and arguing that the former provides a form of constraint that helps ensure independent and apolitical decision making).

alarmism,[181] though whether to cheer or warn often depends on the sources of power the Executive purports to be using.[182] A crucial dynamic missing from this account, which revolves around the assumption that the Executive is the branch in need of constraint, emerges from our observation of how de facto delegation has operated in immigration law. Executive action and priority setting in the exercise of the enforcement power can serve to constrain power in a world of overbroad legislation. For example, the enforcement priorities articulated across administrations to emphasize the removal of security and safety risks constitute executive efforts to construct a more rational screening system within the overinclusive sweep of today's immigration code.[183]

Moreover, the act of actually enforcing the law—of confronting its real-world effects—can help point to limits or unintended consequences of the law as drafted.[184] Enforcement brings to life the consequences of legislation—one

181. *Compare* POSNER & VERMEULE, *supra* note 114 (arguing that in the modern administrative state, the Executive governs subject to weak or nonexistent legal constraints), *with* BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 6 (2010) (emphasizing the danger of a "runaway presidency").

182. *Compare* Delahunty & Yoo, *supra* note 14, at 784-85 (arguing that the President violated his responsibility under the Take Care Clause by initiating DACA), *with* JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 106-09, 184-90 (2005) (locating robust presidential foreign affairs and war powers in Article II of the Constitution that overcome congressional efforts to limit them). *See generally* Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops* (Univ. of Chi. Pub. Law & Legal Theory, Working Paper No. 501, 2015), http://ssrn.com/abstract=2553285 [http://perma.cc/U5JV-PHY4] (defining "flip-flops" as decisions by lawmakers, politicians, and others to change their approaches to federalism, the filibuster, recess appointments, executive privilege, and other structural arrangements to serve their ideological goals and attributing flip-flops to "merits bias" or a psychological phenomenon according to which short-term political commitments make the necessity of certain institutional arrangements seem self-evident).

183. This is not to say that the immigration enforcement bureaucracy has not been zealous in its mission. Immigrants' rights advocates would charge the Obama Administration, in particular, with overenforcement. But this charge often obscures the complexities of institutional context. The prioritization memos issued by various administrations may not have had as significant an impact as their political authors might have liked. As we explore in Part III, the Obama relief policies are themselves a recalibration of enforcement policy to capture that fact. Within the Executive Branch, the push and pull between political appointees and the civil service ensures that the exercise of the enforcement power will itself consist of mixed goals and imperfect results.

184. Another example of this dynamic can be found in the resistance by former executive branch officials from the first Bush and Clinton Administrations to the mandatory detention provision Congress added to the Code in 1996 for noncitizens in removal proceedings on the basis of having committed an aggravated felony or violation of certain other grounds of removal. When the American Civil Liberties Union took a due process challenge to this provision all the way to the Supreme Court in 2003, numerous former INS officials filed an amicus brief emphasizing how the provision constrained executive discretion to determine

concrete manifestation of the informational advantages of the presidency. We should want the Executive Branch to have the power to grapple with those consequences based on judgments forged through its own experience. Indeed, these informational benefits can often only be acquired in a dynamic context, in which executive branch officials have authority to make decisions *subsequent* to congressional policymaking. For the Executive to respond to the lived experience of the law by shifting priorities can help hold the legislature accountable, but also advance a policy debate by pointing a regulatory regime in better directions.

These epistemic benefits of executive action also bring with them increased policy responsiveness. While responsiveness is no unalloyed virtue, executive-branch initiative taking can perform a valuable constitutional function in immigration policy, particularly within a system that governs a polity marked by deep ideological differences and in a domain where a significant legislative reform occurs, at best, once a generation.[185] One way executive-driven priority setting has fostered responsiveness is by offering a counterpoint to the interest groups that dominated Congress, with the White House serving as an alternative site for organizing and advocacy for the immigrants' rights social movement. Whatever we think about the merits of their various positions, multiplying outlets for interest-group competition, and expression of popular preferences through policy, can promote the responsiveness of government.

To the extent that the concern about executive policymaking through enforcement stems from the desire for accountability, we do not think the Executive suffers from a democracy deficit as compared to Congress in any meaningful sense. [186] The mechanisms of democratic influence and accountability may differ from those that operate on the legislature, but they exist not only in the President's election mandate, but also in the

whether a noncitizen in removal proceedings could be released on bond in harmful and counterproductive ways. *See* Brief for T. Alexander Aleinikoff et al. as Amici Curiae Supporting Respondent at 4-14, Demore v. Kim, 538 U.S. 510 (2003) (No. 01-1491).

185. David Pozen calls for treating certain "remedial" measures taken by the Executive Branch as forms of norm-based self-help that advance separation-of-powers goals, rather than as self-aggrandizing, and he emphasizes the value of self-help during times of "agonistic" and "dysfunctional" government. *See* Pozen, *supra* note 174, at 7-11. For reasons explained *infra* notes 189-190 and accompanying text, we do not regard the two-principal dynamic as depending on polarized or dysfunctional government. Rather, we see it as vital under ordinary circumstances, too, when legislation is either difficult to achieve or when Congress has chosen inaction for other reasons.

186. *See infra* notes 226-229 and accompanying text (discussing the literature concerning presidential administration and the value and function of presidential control over agency policy, including by emphasizing the relative accountability of the President). *See generally* Andrias, *supra* note 52, at 1090-94 (highlighting the accountability of the President in defending his and his political appointees' control over enforcement judgments).

corresponding organization of interest groups that pressure the White House and the agencies, and in the modern media's insistence that the President explain and justify his actions and take his policy initiatives "on the road."[187] In fact, the Obama relief initiatives and the reformulation of Secure Communities offer prime examples of the Executive's responsiveness to popular dissent from administration enforcement policies and the underlying statutory framework that sets the stage for them. Relatedly, formal and informal interactions with Congress will themselves constrain the Executive. In the war-powers context, scholars have drawn attention to such potential. Stephen Griffin, for example, writes of a "cycle of accountability" that consists of interbranch interaction over time through which "mutual testing and deliberation results," such that the branches learn from their mistakes.[188]

187. The concept of "accountability" merits some unpacking, because it can come in the form of being answerable to the political process, or from the numerous internal constraints that operate within the Executive Branch and through the application of judicial review over agency action. For a nuanced discussion of forms of accountability, see Metzger, *supra* note 180, at 1886-97. Given the numerous internal constraints on the Executive Branch that exist, including competition among agencies in shared regulatory space, centralized White House review of agency action, the presence of lawyers across the branch assigned the function of ensuring executive action comports with the law, and institutions such as the Inspectors General, we reject the Posner and Vermeule formulation of the Executive as "unbound." *See* POSNER & VERMEULE, *supra* note 114 (describing the Executive's power as largely unconstrained by legal mechanisms); *see also* JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENT AFTER 9/11, at 83-160 (2012) (discussing the interagency process, the Inspectors General, and the role of lawyers as forms of constraint). The ICE Agent's Union, and the lawsuit it has brought challenging DACA, represents one potential example of internal constraint, as do the different and generally enforcement-oriented preferences of the bureaucracy. *See* Rodríguez, *supra* note 95, at 2110 (discussing the role of institutional culture within agencies as part of a coherent picture of "federal" priorities and preferences). Whether there should be more and better internal constraints may be worth debating, and scholars such as Neal Katyal and Gillian Metzger have initiated important inquiries along these lines, but we would be wrong to think of the Executive as a necessarily and truly dangerous branch. *See, e.g.*, Neal Kumar Katyal, *Toward Internal Separation of Powers*, 116 YALE L.J. POCKET PART 106, 106-10 (2006) (arguing for the implementation of a separation-of-powers principle within the Executive Branch, given the scope of the President's power); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 425 (2009) (calling for paying close attention to internal administrative design and analyzing which structures serve as the most effective checks on executive power).

188. STEPHEN M. GRIFFIN, LONG WARS AND THE CONSTITUTION 5 (2013). Importantly, Griffin argues that this cycle has not operated properly since 1945 and that scholars focused on whether Congress has authorized military action miss the deeper problem of the absence of codeliberation on the use of force. *Id.* at 8-9. The factors that account for this decline in deliberation are likely complex, but whereas the President has occupied the domain of foreign affairs, Congress remains his rival and counterpoint in the domestic setting.

It may be that robust policymaking through enforcement creates disincentives for Congress to act. But while we could certainly characterize recent immigration history as embodying a failure of congressional will, we doubt that the causes of legislative stasis include executive initiative taking. Whatever the reasons for congressional inaction—whether they be dysfunction, paralysis, or simply the choice to not act—the President's decision to offer an affirmative, substantive vision can expand the policymaking domain in constructive and idea-generating ways. In this sense, the Executive acts as an engine in the policymaking process. This agenda-setting function may be particularly vital during times of polarization that produce legislative stasis,[189] such as the one we seem to be living through, but this function of executive policymaking is by no means limited to moments like ours.[190] Presidential immigration law can help mitigate one of the ordinary costs of our separation-of-powers regime—the reluctance or inability of government as a whole to act—thus furthering the interest of a healthy tradeoff between power and constraint.

Again, action in and of itself is not necessarily good. And whether executive action of the sort initiated by President Obama in his relief policies will actually prompt further policy deliberation is an empirical question. Executive action often amounts to a second-best alternative to legislation. Nowhere is that more true than in the immigration enforcement context, where prioritization cannot provide legal immigration status to those who receive deferred action under Obama's relief initiatives.[191] Thus, we should remain concerned with the possibility that executive policymaking will disable or displace Congress in some way—a point we take up in more detail in Part IV. But having a rival or complementary policymaker in the Executive can be good for the democratic and problem-solving features of government.

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Our dynamic understanding of the relationship between Congress and the Executive, and our conception of the domain of regulation as one that evolves over time through the exercise of the enforcement power, reflect what we believe to be an important moment in the intellectual history of separation-of-

189. For a similar argument in the federalism context, see Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 16-18 (2007).

190. In this sense, our claims about the value of two principals differ from some recent accounts of the separation of powers and politics. *See* Pozen, *supra* note 174; Sunstein, *supra* note 174.

191. *See infra* p. 215.

powers scholarship—both at the descriptive and the normative levels. The constitutional framework sets up institutional rivalries as forms of constraint on government power. But these constraints do not come exclusively from the formal powers the Constitution assigns each branch and the "checks" each one possesses over the other.[192] Our immigration history shows how constraints can also arise from the push and pull of politics and institutional design.[193] Unique to our account is the way in which we illuminate, through history, how constraints on government can arise when each branch acts as an institutional source of policymaking in the same domain.

This idea that the roles and powers of the political branches are defined through a complex historical process that cannot be easily captured through either formal models or deductive, judicial-style reasoning is far from limited to the immigration arena.[194] In fact, it appears even in settings where the

192. For a classic statement of three different forms of separation of powers that commentators often conflate, see Waldron, *supra* note 176, at 438-42, which distinguishes among separation of powers, checks and balances, and dispersal of power generally and argues that separation of powers is, above all, a matter of "articulated governance."

193. In Part III, we elaborate on this last point in particular and highlight how dynamics internal to the Executive Branch can serve as sources of constraint. This institutionally grounded conception of separation of powers serves as a counterpoint to an ascendant line of thinking that rejects the Madisonian theory of separation of powers and emphasizes instead that, to the extent constraints exist on the branches, they come from the "separation of parties," or divided government. *See* POSNER & VERMEULE, *supra* note 114, at 4 (rejecting altogether the notion that a legal concept of separation of powers does any work and arguing that constraints on the Executive come in the form of popular politics); Bradley & Morrison, *supra* note 173, at 438-47 (arguing that the Madisonian theory of checks and balances on which theories of congressional acquiescence to executive branch practice are based no longer accurately describes the relationship between the branches or captures the realities (and difficulties) of legislation); Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2330-47 (2006) (arguing that during times of cohesive and polarized politics, competition between the branches will vary widely and may disappear altogether if the branches are controlled by officials from the same party). These theories quite successfully dismantle the most abstract and starry-eyed versions of the Madisonian vision. But because their foil is a theory, they operate at a level of institutional abstraction that prevents them from appreciating some of the ways in which institutional constraints within government play a large role in the wielding of the enforcement power—dynamics our immigration history helps to bring to light. For an account of internal and external constraints on the Executive Branch that captures some of these institutional realities in the war powers and national security contexts, see generally GOLDSMITH, *supra* note 187.

194. Our thinking along these lines is ultimately part of a moment in the separation-of-powers scholarship that seeks to understand the nature of power by appreciating how it plays out in practice. Trevor Morrison and Curtis Bradley, for example, call for attention to the role that history plays in the construction of executive power and argue that historical practice can render a particular arrangement constitutional in status. *See* Bradley & Morrison, *supra* note 173; Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 45-52, 70-76 (2013)

Constitution clearly allocates overlapping power to Congress and the President, as in the war-powers context.[195] As we have emphasized, whether this sort of relationship between the branches proves productive really depends on context. Moreover, policymaking through enforcement judgments presents concerns that policymaking through rulemaking does not: the source of delegated authority is less clear, and it can be difficult to externally police the executive decision-making process—concerns we flagged back in 2009. In Part III, we take up this dilemma and explore how the Obama relief policies simultaneously harness the benefits of policymaking through enforcement, enhance accountability, and promote constrained government by making enforcement judgments more transparent. Even within our vision of executive policymaking through enforcement, we do believe there should be a limiting principle on executive action, in service of the basic value of constraining government power. We turn now to a more fruitful source of such a principle.

(arguing that the scope of the presidential removal power should be seen as a political question, in part because of the political-science scholarship suggesting that the removal power does not serve as a constraint on the bureaucracy, which renders judicial intervention in agency design counterproductive); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1620-31, 1683-86 (2014) (arguing that the branches negotiate their institutional interests with one another and that courts are not well placed to monitor these "intermural deals," which instead should be policed for bad outcomes by elected officials); Pozen, *supra* note 174, at 10 (criticizing the separation-of-powers scholarship that turns away from "legal modes of reasoning" and arguing that unwritten, quasi-legal norms shape and constrain interactions across the U.S. government, producing both "retaliation" as well as cooperation). Though we differ in our conclusions about the nature of executive power and the proper role of Congress and the courts in constraining it, all of these works share an understanding of interbranch relationships as constructed over time.

195. In an important recent work on presidential war powers, for example, Mariah Zeisberg develops a "relational" model of separation of powers and rejects the idea that the branches must adhere to "determinate textual meaning." MARIAH ZEISBERG, WAR POWERS: THE POLITICS OF CONSTITUTIONAL AUTHORITY 7-9, 18-19 (2013). She argues instead that we can evaluate the branches' work based on "how well they bring their special institutional capacities to bear on the problem of interpreting the Constitution's substantive standards about war." *Id.* at 18-19. She sees interbranch conflict as a potentially productive source of both deliberation over constitutional meaning and accountability for ultimate policies. *Id.* at 30-31. The focus on deliberation and accountability has much in common with Griffin's approach discussed *supra* note 188 and accompanying text. *See also* Stephen M. Griffin, *Zeisberg's Relational Conception of War Authority: Convergence and Divergence in Achieving a New Understanding of War Powers*, 95 B.U. L. REV. 1235, 1238 (2015) (noting the shared emphasis on "the nature and value of interbranch deliberation").

III. THE INSTITUTIONALIZATION OF ENFORCEMENT DISCRETION

The faithful-agent model of congressional-executive relations we reject in Part II focuses on the *substantive* relationship between the choices or values reflected in the INA and those reflected in the President's enforcement of the statute. This approach, we have argued, leads us astray. But that does not mean we think all bets are off. In this Part, we turn from substance to process and argue that the inquiry into the legality of President Obama's relief programs and other similar exercises of the enforcement power should revolve around whether the Executive should be constitutionally prohibited from *institutionalizing* prosecutorial discretion in certain ways.[196] On this account, the concern is not *who* gets protected from deportation, but *how* they come to be protected.

Numerous critics of the Obama relief initiatives have focused on these process concerns and declared his actions unconstitutional because of the way they institutionalize the Executive's discretion. One prominent critique holds that the initiatives are unlawful because they provide "categorical" forms of relief, rather than resting on the exercise of "individualized" discretion.[197] A second claim emphasizes that the way the relief initiatives institutionalize discretion threatens to undermine the "rule of law," by which critics mean legal compliance.

This Part explains why these claims are misguided as a matter of both law and theory. As a theoretical matter, these claims about President Obama's relief initiatives are actually just retail-level examples of more general debates that have long raged in legal theory and administrative-law scholarship. We will show that these critiques all boil down to claims about one or more of three choices: the choices between (1) rules versus standards, (2) centralized versus decentralized control over prosecutorial discretion, and (3) secret versus public norms regarding the exercise of that discretion. The Obama relief initiatives' central "innovation" is to bind the exercise of prosecutorial discretion to more rule-like criteria, to centralize the supervision of discretion to a greater extent than is typical in enforcement contexts, and to make the exercise of discretion predictable and transparent. In other words, DACA and DAPA choose rules over standards, centralization over decentralization, and transparency over secrecy.

196. Whereas in this Part we focus on why the Obama Administration relief initiatives serve rather than undermine structural separation-of-powers values, in Part IV we consider what forms of institutionalizing discretion might present constitutional concerns, and we enumerate some of the external sources of constraint that exist.

197. *See, e.g.*, Price, *supra* note 14, at 674-75.

These choices ultimately advance the core rule-of-law values of consistency, transparency, and accountability: they ensure that similar cases are more likely to be treated alike, that the exercise of discretion is more predictable, and that enforcement outcomes align more closely with the policy preferences of the agency's political leadership and the President himself.[198] This does not mean, of course, that the choices embodied in DACA and DAPA are legally required, or even that they would in all contexts be legally permissible. At a high level of generality and abstracted from the details of the Obama relief initiatives, these choices are contestable. In many situations, good reasons exist to prefer standards to rules, decentralization to centralization, and secrecy to transparency; these choices involve tradeoffs between values at the very core of the American legal tradition. But for this very reason, it is impossible to make much progress in evaluating how those tradeoffs cash out without careful attention to institutional context. And once we understand the institutional realities against which the Obama Administration developed its relief initiatives, the choices embodied in DACA and DAPA become easy to defend.

Importantly, we ground our defense of the institutional choices reflected in the Obama relief initiatives by accepting the importance of identifying limiting principles on the enforcement power—principles that arise from constitutional structure, not just extralegal sources.[199] But we acknowledge that these limits must, given the structure of the modern administrative state, inevitably derive

198. Anil Kalhan similarly argues that DAPA helps the DHS ensure that "its personnel heed important rule-of-law values such as consistency, transparency, accountability, and nonarbitrariness." Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 85 (2015). Though a deep analysis of what is meant by rule-of-law values is beyond the scope of this Article, we believe consistency rather than uniformity captures what we can realistically expect from complex enforcement efforts. For a discussion of the difference between uniformity and consistency, see Cristina M. Rodríguez, *Uniformity and Integrity in Immigration Law: Lessons from the Decisions of Justice (and Judge) Sotomayor*, 123 YALE L.J. F. 499 (2014), http://www.yalelawjournal.org/forum/uniformity-and-integrity-in-immigration-law [http://perma.cc/7NFN-U7CF]. In addition, we emphasize perceptions of fairness by the regulated public, rather than nonarbitrariness, because we are reluctant to describe the differentiated results of a decentralized, diffused decision-making process as necessarily arbitrary.

199. In view of the futility of substantive limits, another approach to understanding the enforcement power could be to reject the idea that any constitutional limits exist or can be reliably determined. We might adopt the perspective of Eric Posner and Adrian Vermeule and accept that the only real limits on executive power come from politics and public opinion. *See* POSNER & VERMEULE, *supra* note 114. As we suggest throughout this Article, we reject their descriptive account that legal rules and practices fail to constrain the modern Executive. And we share at least one assumption with the critics of the Obama relief initiatives—that the exercise of executive power ought to be disciplined as the result of legal and constitutional considerations.

from the contextual application of the broader objectives we identify in this Part and Part II. Critics have been blind to both that institutional context and to the realities of administrative governance. Their view that the institutional choices embodied in DACA and DAPA are unconstitutional (rather than just undesirable) embodies a radical theory that the Constitution sharply restricts the ways in which the Executive may organize itself.

A. Rules and Standards

The Obama Administration's relief initiatives institutionalize discretion in an innovative way—just not in the way critics charge.[200] According to critics, DACA and DAPA are unconstitutional because they exercise discretion on a "categorical" rather than an "individualized" basis. The individualized exercise of discretion comports with the canonical form of prosecutorial authority, the argument goes. But the categorical exercise of discretion amounts to an unconstitutional act of executive "lawmaking."[201]

It might be tempting to dismiss this claim by pointing to the conceptual flaw in this dichotomy. Every exercise of prosecutorial discretion, including those authorized by the Obama relief initiatives, is "individualized" in the sense that individual persons seek or will be granted relief as individuals.[202] Given

200. Some scholars have attempted to characterize DACA and DAPA as a run-of-the-mill action by the President, consistent with past practices. *See* Gilbert, *supra* note 18. As we explained in Part I, while we think the initiatives are consistent with the history of executive branch policymaking through the exercise of the enforcement power, many of the precedents typically cited for this claim were not of the same scale as DACA or DAPA, and those that were can be characterized as providing only transitional relief. We believe what the Administration has done is novel and simultaneously an improvement on the status quo and imperfect (for reasons we explain *infra* Part IV) but not constitutionally defective.

201. *See, e.g.*, Price, *supra* note 14. In describing the appropriate use of the enforcement power, Price emphasizes that the Executive may engage in priority setting within the parameters of statutory policy but that it may not engage in policymaking. *Id.* at 677, 749 ("[E]xecutive officials should understand their task as a matter of priority setting within the parameters of statutory policy . . . ."). Our claim throughout this Article has been that the structure of immigration law transforms priority setting into policymaking, but that the raison d'être of the administrative state belies the idea that executive policymaking through enforcement (or rulemaking) is constitutionally worrisome.

202. Leading defenders of the Administration's policy have emphasized that the memoranda detailing the policy and providing instructions to line-level adjudicators emphasize that they retain discretion to deny deferred action even to those who meet the eligibility criteria. *See* Legomsky, Written Testimony, *supra* note 17, at 71 (noting that the memoranda governing both DACA and DAPA "are filled with clear, careful, explicit, repeated commands to officers to make individualized, case-by-case discretionary judgments"). Even if it were not the case that adjudicators retained discretion beyond application of the eligibility criteria, the

this, it is unclear what it even means to say that DACA and DAPA do not involve "individualized" determinations regarding the exercise of prosecutorial discretion. The fact that large numbers of noncitizens who meet the announced eligibility criteria will come forward to apply does not mean that each application will not be adjudicated on an individual basis. This sort of confused talk about individualized decision making is part of what plagued debates about profiling for years, and the history of that debate shows that there is little profit in trying to make this analytic distinction do much work as a matter of law or theory.[203]

But while the focus on "categorical" decision making is confused, we can recharacterize this argument to capture what seems to be at the heart of critics' concern. The core of their objection appears to be that the Obama relief initiatives have substituted rules for standards in the exercise of prosecutorial discretion. As a descriptive matter, this claim is essentially accurate. The initiatives innovate because they move from a system of suggestive enforcement guidelines to a much more rule-bound enforcement system. Previously, grants of "deferred action" were made on an ad hoc basis, guided by loose priorities laid out in a series of agency memos on the exercise of prosecutorial discretion. These memos specified dozens of factors relevant to relief determinations (many of which embodied vague standards), and said little about the appropriate relationship between the factors.

DACA and DAPA reshaped this decision-making process to make it much more rule-bound. (They also formalized the application process, a point we will take up in a moment.) First, DACA and DAPA reduced considerably the number of criteria relevant to eligibility for relief; rather than dozens of factors being relevant, the initiatives selected just a handful. Second, the initiatives replaced loose criteria with more objective ones. Under DAPA, for example, the two most important criteria the applicant must establish are that she has resided in the United States for at least five years, and that she has a child who is a U.S. citizen or green card holder.[204] Third, DACA and DAPA clearly specify the logical relationship among the listed criteria. Each criterion is a necessary condition, meaning that an immigrant must show that she satisfies all of the enumerated criteria in order to be eligible for the exercise of discretionary relief.

adjudications still would be individualized. The distinction between individual and categorical judgments ultimately amounts to a question of framing.

203. *See* FREDERICK SCHAUER, PROFILING, PROBABILITIES, AND STEREOTYPES (2006) (explaining the conceptual impossibility of "individualized" decision making, if an individualized decision is defined as one that does not permit the decision maker to make any group generalizations).

204. *See* Johnson, DACA and DAPA Memo, *supra* note 108, at 4.

Defenders of the relief initiatives have tried to resist the claim that DACA and DAPA have a rule-like structure. The Department of Justice has taken great pains to emphasize—both in the OLC opinion and in the Texas litigation over DAPA—that the relief programs authorize agency personnel to exercise discretion to deny relief to otherwise-eligible noncitizens.[205] But the preservation of formal discretion does not mean that DACA and DAPA are not more rule-like than the regime they would replace. The relevant question is whether, as a *causal matter* rather than as a formal one, discretion plays as large a role in deferred-action determinations under the new initiatives as under the old regime. The answer to that question is unequivocal: while discretion previously pervaded every aspect of each decision, it plays a very limited role under the new initiatives. Government-provided data for DACA show that almost no eligible applicants have been denied relief as a matter of discretion. From DACA's inception until the end of 2014, USCIS approved 638,897 applications and denied 38,597.[206] Most denied applications were rejected "based on a determination that the requestor failed to meet certain threshold criteria."[207] In other words, a full ninety-four percent of adjudications have resulted in grants.[208] And of the six percent that were rejections, most were based on the failure to satisfy DACA's eligibility criteria, not on the exercise of discretion to deny relief to an otherwise-eligible applicant.[209] Thus, the

205. *See* Defendant's Emergency Expedited Motion to Stay the Court's February 16, 2015 Order Pending Appeal and Supporting Memorandum at 10, Texas v. United States, No. 1:14-CV-254, renumbered No. B-14-254 (S.D. Tex. Feb. 23, 2015); OLC Memorandum Op., *supra* note 10, at 8-9. In describing DACA and DAPA as preferring rules over standards, we do not take a position on the question of whether DAPA constitutes a legislative rule for the purposes of the APA and as understood within the administrative law doctrine. We engage with that issue more fully in Part IV. Here, we make a legal-theory point by using "rules" as compared to "standards" to describe the structure of decision making. The desire to defend against the APA claims in the Texas lawsuit has detracted from candid discussion of what the Administration sought to accomplish with DACA and DAPA as a matter of executive branch organization.

206. *See* Declaration of Donald W. Neufeld ¶ 23, at 10, *Texas*, slip op. USCIS accepted 727,164 applications by this date, and 49,670 remained pending. *See id.*

207. *Id.*

208. *See id.*

209. *See id.* To be sure, these correlational statistics cannot, on their own, provide conclusive proof of causation. Because DACA applicants are self-selected, it is theoretically possible that the formal preservation of discretion plays a much larger role than these data suggest. If many potential applicants would be denied relief as a matter of discretion, and if these potential applicants can accurately predict the discretionary denial and therefore decline to apply whenever they anticipate that they will lose at the discretionary stage, then we would observe few discretionary denials, even though the presence of discretionary authority played a large role in the program. But while such a scenario is observationally equivalent to what we see in the grant-rate data, it is *not* equivalently plausible.

program appears to have operated, as intended, to ensure that certain types of immigration-law violators—those who satisfied the rule-like eligibility criteria—succeeded in their applications and therefore became protected from deportation.

These outcomes do not mean that the discretion left to USCIS officials is not in some sense "real." Out of the hundreds of thousands of DACA applications, there do appear to have been a small number in which adjudicators have denied relief to applicants who otherwise satisfied the eligibility criteria.[210] Thus, our claim is not that the formal preservation of discretion is somehow a sham. The formal discretion left to adjudicators may have been intended to preserve some of the case-by-case flexibility for truly exceptional cases; or perhaps it was mainly intended to insulate the new policies from certain kinds of (misguided) legal challenges.[211] But even if discretion remains relevant in rare cases, it is hard to resist the conclusion that the more rule-like components of the decision will be dispositive of ultimate relief decisions in the vast majority of cases.[212] This reality is, in fact, precisely

210. There is some dispute in the Texas litigation about exactly how many applications may have been denied as a matter of discretion. The district court concluded that "[n]o DACA application that has met the criteria has been denied based on an exercise of individualized discretion." *Texas*, slip op. at 109. This conclusion does not appear to be consistent with a declaration submitted on behalf of the United States as part of the litigation, which documents at least two instances in which DACA applicants who satisfied the threshold eligibility criteria were denied relief as a matter of discretion. *See* Neufeld, *supra* note 206, ¶ 18, at 8. As that declaration notes, however, "Until very recently, USCIS lacked any ability to automatically track and sort the reasons for DACA denials . . . ." *Id.* ¶ 24, at 10-11. For that reason, it appears to be impossible to know whether additional discretionary denials occurred beyond the two examples noted in the declaration.

211. *See infra* text accompanying notes 309-318 (discussing, and rejecting, the view that a more rule-bound regime of prosecutorial discretion might run afoul of the APA's "legislative rule" jurisprudence).

212. In many decision-making structures that mix rules and standards—including DACA and DAPA—the relative importance of different criteria cannot be determined as a matter of pure logical deduction. For example, it would have been fully consistent with the formal decision-making rules for DACA adjudicators to have denied relief, as a matter of discretion, to half of all otherwise-eligible applicants. And certainly other immigration relief programs, such as cancellation of removal (which also mixes rules and discretion), have much higher rates of discretionary denial.

It is interesting to note, however, that a pretty regular pattern does seem to emerge in legal decision-making contexts that combine a complex set of eligibility criteria with a back-end grant of discretionary authority: the rule-like stage seems to reduce the role discretion plays. *See, e.g.*, Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493 (2008) (testing empirically the constraining power of rules in one example of these sorts of mixed decision-making structures). Asylum determinations are a good illustration of this phenomenon. Adjudicators must determine whether an applicant meets the legal definition of refugee or

why the Administration replaced a wholly discretionary regime subject to suggestive guidance and ad hoc supervision with a rule-like application process in which discretion is limited to a backstopping role. As a practical matter, the structure of DACA and DAPA significantly constrains, if not functionally eliminates, the discretion of those adjudicating relief applications.

Critics are thus correct that the Obama initiatives replaced the old regime of discretion with a new regime bound by rules. Contrary to the critics, however, we do not believe this renders the programs unconstitutional. For these critics, the articulation of objective criteria and the overwhelming grant rates for DACA applicants who met the criteria render the program an unconstitutional act of executive "lawmaking."[213] Under this view, the distinction between rules and standards maps onto the constitutional division between "legislative" authority under Article I and "executive" authority under Article II; vague standards are less "legislative" than clear rules, and vice versa. But even for those who subscribe to formalistic accounts of the constitutional separation of powers, under which each branch exercises power of a particular type (and we are not among them), this argument makes little sense. Taken seriously, it would lead to the conclusion that Congress improperly exercises Article II "executive" authority when it enacts vague standards into law. The Sherman Antitrust Act would be unconstitutional, along with myriad other laws.[214] Such an argument would require a robust reinvigoration of the nondelegation doctrine. It also would require courts to conclude that administrative agencies improperly usurp Article I "legislative" authority

otherwise falls within any legal bars to asylum. But even if an applicant satisfies the criteria for asylum, an adjudicator still retains the discretion to deny an application for equitable reasons. In practice, the existence of the eligibility criteria has disciplined the inquiry and narrowed the authority of adjudicators; only a small percentage of asylum applicants who satisfy the eligibility criteria are denied asylum as a matter of discretion. *See, e.g.*, Gulla v. Gonzales, 498 F.3d 911, 916 (9th Cir. 2007) ("It is rare to find a case where an IJ finds a petitioner statutorily eligible for asylum and credible, yet exercises his discretion to deny relief."); 3 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 34.02(12)(d) (2011). And while there is some possibility that discretionary denials are suppressed because asylum law's malleable eligibility criteria make it easy for adjudicators to conduct legal analysis that comports with their preferred outcome, thereby obviating the need to deny applications on discretionary grounds, the DACA and DAPA criteria are not nearly so malleable.

213. *See, e.g.*, Price, *supra* note 14, at 759-61. As noted above, this claim is sometimes cast as a formalist argument about the separation of powers: the idea is that the distinction between rules and standards maps onto the constitutional division between "legislative" authority under Article I and "executive" authority under Article II. *See supra* notes 176-178 and accompanying text.

214. Magill, *supra* note 176, at 621.

whenever they issue regulations that embody bright-line rules. So much for the modern administrative state.

More generally, American law rarely constitutionalizes the choice between rules and standards in public administration. Courts have in some cases constitutionally *required* reliance on rules—generally in cases where courts perceive a significant risk that discretionary decision making will serve as cover for discriminatory decision making. This idea runs through a number of First Amendment doctrines and helps explain the Warren Court's criminal procedure revolution.[215] In other circumstances, courts have constitutionally *prohibited* reliance on rules, generally where courts have concluded that adjudicatory discretion (and often a particular adjudicatory forum) must be preserved in order to secure the liberty or property interests of individuals protected by the Due Process Clause. The prohibition on categorical rules for pretrial detention in the criminal context offers a prominent example.[216] But these instances are clear exceptions to the general agnosticism of constitutional law on this question.

Even if the choice whether to structure decision making rigidly or flexibly rarely raises constitutional questions, it does implicate a question at the heart of twentieth-century administrative law and bureaucratic design: what is the best way to mete out mass justice, including in contexts like the one at issue here, in which millions of cases demand the attention of the Executive?[217] Attempts to answer that question generally must grapple with the foundational tradeoff between rules and standards: rules promote equal treatment across cases, but they necessarily define "like cases" in a more reductionist way than standards. Broad standards and "individualized discretion" can foster more fine-grained judgments about when justice or other equitable factors support relief.[218] But they necessarily achieve nuance at the expense of equal treatment across cases—

215. *See* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 809-12 (7th ed. 2013).

216. *See* United States v. Salerno, 481 U.S. 739 (1987). *But see* Demore v. Kim, 538 U.S. 510 (2003) (accepting the constitutionality of such categorical rules in at least some immigration detention contexts).

217. For an important early effort to work through this question, see generally JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1985).

218. On the tradeoffs between rules and standards, see, for example, FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991); Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983); and Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974).

especially in a world where the same decision maker cannot decide all cases and power is diffused across a bureaucracy.[219]

There is no single answer to how best to strike these tradeoffs. In the context of mass administrative justice, however, the choice of whether to adopt rules or open-ended discretion is closely linked to the question of whether to centralize authority within the bureaucracy and exert significant supervisory authority over line-level executive officials. Within the Executive Branch, rules facilitate oversight and make it easier for high-level executive branch officials, many of whom are politically accountable, to prevent low-level agents from imposing their own views about when and how the law should be enforced.[220] But rather than eliminating discretion from the system, as critics charge, constraining low-level decision makers with rules simply relocates discretion to a point higher up in the bureaucracy. It is in this sense that discretion most truly remains within the system under the President's relief initiatives. That discretion simply belongs primarily to the Secretary of Homeland Security, Jeh Johnson, the officer to whom the INA formally delegates discretionary enforcement authority.[221] He retains the power to alter the criteria for relief in any way he sees fit, or even to cancel the relief programs.[222] And once we

219. Another conventional tradeoff between rules and standards is that rules are often more costly to specify ex ante and less costly to apply ex post. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 562-63 (1992). This tradeoff is also important to understanding why DACA and DAPA were likely structured the way they were, because they place the costly process of ex ante specification in the hands of high-level political officials rather than line-level bureaucrats.

220. *Cf.* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1078 (2011) (noting the coordination costs of the diffusion of authority within the bureaucracy but suggesting the countervailing value of promoting independence by empowering the civil service).

221. *See* Immigration and Nationality Act § 103, 6 U.S.C. § 202 (2012) ("The Secretary, acting through the Under Secretary for Border and Transportation Security, shall be responsible for the following: . . . (5) Establishing national immigration enforcement policies and priorities."); 8 U.S.C. § 1103(a)(1) (2012) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . . ."). There is some irony in the fact that critics are arguing that enforcement discretion cannot constitutionally be exercised by the statutory delegatee but instead must be exercised by a set of subordinate officials. We explore the radical nature of this claim about the structure of the administrative state below.

222. Though the President announced the DAPA initiative, Secretary Johnson issued the memoranda governing the program. *See supra* notes 108, 111 and accompanying text. The White House clearly was involved in the formulation of DAPA, as evidenced by the fact that the OLC opinion analyzing the program's legality was addressed both to the Secretary and to the White House Counsel. *See* OLC Memorandum Op., *supra* note 10, at 1. Though we speak in terms of the President's authority, therefore, the enforcement judgments we describe throughout the Article are clearly the product of collaboration within the Executive

acknowledge that the formal discretion left to line-level adjudicators to deny relief is of little practical importance, this transfer of discretion becomes all the more pronounced. We doubt Secretary Johnson (of his own volition or at the President's direction) will exercise his discretion to alter or terminate the program. But this doubt does not mean that Secretary Johnson actually lacks discretion; it simply means that we are confident about how he will exercise it.[223]

B. Supervision (Not Separation) of Powers

The argument that "categorical rules" violate some requirement of "individualized discretion" really amounts to an argument that the supervision and centralization of discretion in immigration law are prohibited. The prohibition on centralization could be cast as a statutory directive, as a constitutional requirement, or as an imperative of good institutional design. So far as we are aware, no one has advanced the statutory argument—that Congress embedded in the immigration code a requirement that enforcement discretion be located exclusively in the hands of line-level enforcement personnel. This argument's absence is unsurprising, given that nearly all the statutory developments of the last several decades point in the other direction, promoting consolidation rather than diffusion within the Executive Branch of authority to make discretionary decisions about who should be deported.[224]

Branch, with the Secretary of Homeland Security and the leadership of DHS playing the key role in mediating presidential preferences and the management of the bureaucracy.

223. This confidence that Secretary Johnson will not reverse course leads some to believe that the relief is thereby more *durable* than ordinary decisions to defer prosecutions—a view that leads some to (wrongly) characterize the relief as a grant of "legal status." *See infra* notes 274-275 and accompanying text.

224. One particularly salient set of examples is the 1996 amendments to the INA that eliminated the authority that immigration judges had to grant relief from deportation. As we explained in 2009, these changes took place against a status quo in which the enforcement arm of the INS (now DHS) had considerable discretion about whom to place in proceedings in the first place. Rather than squeezing out discretion, the 1996 amendments simply consolidated discretion in the hands of enforcement officials by removing it from the hands of the somewhat-more-independent immigration judges. *See* Cox & Rodríguez, *supra* note 7, at 517-19. A similar story can be told about the slow death of a procedure, known as judicial recommendation against deportation (JRAD), which permitted an Article III judge to grant relief from deportation in the course of adjudicating a federal criminal case. *See* Padilla v. Kentucky, 559 U.S. 356, 361-64 (2010). Congress eliminated JRAD authority in 1990 and then further eliminated the Attorney General's discretionary authority to grant relief from deportation in 1996. *Id.* The elimination of JRAD took discretionary authority that was dispersed out to the federal judiciary and consolidated it in the hands of executive branch officials responsible for policing and prosecuting immigration violations.

Accordingly, we focus in this Part on the institutional and constitutional versions of the anticentralization claim. As a matter of institutional design, we show that the efforts in DACA and DAPA to centralize decision making have been significant administrative improvements on the practices of diffused prosecutorial discretion that preceded them. Second, we show that the notion that either the separation of powers generally, or the Take Care Clause in particular, constitutionalizes decentralization within the Executive Branch in the way imagined by critics of the relief programs is wildly implausible.[225]

1. Institutional Design

The long-term trend in American bureaucracy has been toward centralization—elevating decisions within agencies themselves, as well as above agencies into the Executive Office of the President. Political scientists and legal scholars from Terry Moe to Justice Elena Kagan have documented this trend,[226] and both unitary theorists on the right and advocates of presidential administration on the left have defended it.[227] Even recent developments in the

225. Some constitutional constraints surely exist on the organization and staffing of the bureaucracy, though none of the constraints clearly required by the Constitution, as described by judicial doctrine, apply to the sorts of choices we identify here. *See* Magill & Vermeule, *supra* note 220, at 1038-41 (discussing constitutional rules that constrain agency structure, such as the Constitution's Appointments Clause and the law governing removal, as well as the demands of procedural due process that require hearings or individualized processes in certain circumstances).

226. *See generally* WILLIAM G. HOWELL, POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION (2003); ARTHUR M. SCHLESINGER JR., THE IMPERIAL PRESIDENCY (1973); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Terry Moe, *The Politicized Presidency*, *in* THE NEW DIRECTION IN AMERICAN POLITICS 235 (John E. Chubb & Paul E. Peterson eds., 1985); Terry M. Moe & William G. Howell, *Unilateral Action and Presidential Power: A Theory*, 29 PRESIDENTIAL STUD. Q. 850 (1999). It is important to note that centralization within an agency and centralization within the institution of the presidency are conceptually distinct phenomena, though they are causally related. With respect to the President's relief initiatives, both sorts of centralization are at work. Most of our discussion in this Part focuses on the way that those initiatives centralize discretionary decision making within the immigration bureaucracy. It is clear from the rollout of the initiatives, however, that the White House was intimately involved in overseeing the development of the initiatives.

227. *See, e.g.*, Andrias, *supra* note 52; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Steven Croley, *White House Review of Agency Rulemaking: An Empirical Investigation*, 70 U. CHI. L. REV. 821 (2003); Kagan, *supra* note 226.

Supreme Court's administrative law canon have promoted and (implicitly) defended administrative centralization.[228]

Considered abstractly, of course, it would be difficult to identify a single, optimal level of centralization that applies across the bureaucracy to all (or even many) agencies and regulatory contexts. It is unsurprising, therefore, that a number of administrative law scholars have resisted Kagan's normative gloss on the centralization Moe describes.[229] In the critics' telling, centralization can diminish transparency, obscure lines of accountability, undermine expert decision making, and politicize agency action.

But our argument that the Obama relief initiatives promote the more disciplined and accountable use of executive power does not depend on taking a side in this general debate. If the last two decades of scholarship prove anything, it is that the appropriate level of centralization cannot be determined in the abstract; whether and how to centralize depend on how the relevant institutions operate in practice. Those who have argued that Obama's relief programs are unconstitutional have mostly elided this institutional detail. But it is precisely this detail in the immigration setting that offers us a unique policy experiment with which we can actually assess the centralizing tradeoffs made by Obama's relief initiatives. If we evaluate the initiatives in terms of what they replaced, we see how they promise to significantly improve the ex post screening system by regularizing it through the supervision of line officials.

Prior to DACA and DAPA, the Administration launched a prosecutorial discretion initiative that sought to preserve and guide line-level enforcement authority. The Obama Administration announced this initiative in June 2011 with the release of the so-called Morton Memos—directives that laid out the criteria the political leadership of Immigration and Customs Enforcement (ICE) and DHS wanted to govern the exercise of prosecutorial discretion by

228. *See* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201; Magill & Vermeule, *supra* note 220, at 1061-72. Recently, Gillian Metzger has reminded us that centralization and supervision are not just often desirable—sometimes these forms of oversight can be constitutionally mandatory. *See* Metzger, *supra* note 180, at 1903 (arguing that the Constitution imposes such a duty to ensure that the exercise of executive power is according to law, rather than arbitrary, as well as a duty to ensure that the Executive is politically accountable). The possibility that supervision can be constitutionally mandatory is commonplace in federal courts doctrine and scholarship, but it has far too often been overlooked in writing about administrative law.

229. *See* Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 59-62 (2006); Nina A. Mendelson, *Disclosing "Political" Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1130 (2010).

ICE employees.[230] The memos defined "prosecutorial discretion" broadly to encompass nearly every sort of enforcement decision made by ICE agents, including, crucially, the decision to initiate removal proceedings and the decision to grant deferred action.[231] As we noted in Part I, the memos were far from the first such documents; officials in both the Bush and Clinton Administrations issued guidance documents listing criteria intended to inform myriad discretionary enforcement judgments.[232] Yet both the content of the Morton Memos and the timing of their release, coinciding as they did with broader agency efforts designed to bring consistency to the system of screening noncitizens for deportability, led many advocates to see the memos as heralding a new era in which immigration discretion would be wielded on a more widespread and consistent basis.[233] This assumption may have been overly optimistic. The memos only articulated priorities; they did not indicate an intention *not* to remove low-priority targets, nor did they identify the means by which the priorities would inform the actual judgments of the line agents scattered across the country. By touting the memos, however, the Administration made a kind of political promise to shift the brunt of the enforcement system away from status violators and toward more serious offenders.

Many of the Morton Memos' factors for exercising prosecutorial discretion (and granting deferred action) bear a marked similarity to the deferred action criteria eventually embodied in the Obama relief initiatives. The factors included an immigrant's length of residence in the United States, as well as educational history, family ties, and criminal record (or lack thereof)—factors closely related to the eligibility criteria for both DACA and DAPA.[234] Having been a child when one migrated to the United States—the keystone criterion

230. *See* Morton, Exercising Prosecutorial Discretion, *supra* note 96.

231. *Id.* at 2–3.

232. *See supra* note 96 and accompanying text.

233. *See, e.g.*, Julia Preston, *U.S. Pledges To Raise Deportation Threshold*, N.Y. TIMES, June 17, 2011, http://www.nytimes.com/2011/06/18/us/18immig.html [http://perma.cc/42WW-Y2LT]. This view was held not only by media organizations and immigrants' rights advocates, but also by advocates of stricter immigration controls. *See The Morton Memos: Giving Illegal Aliens Administrative Amnesty*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/morton-memos [http://perma.cc/6X8D-E7HZ].

234. *See* Morton, Exercising Prosecutorial Discretion, *supra* note 96, at 4 (referencing "the person's length of presence in the United States"; "the person's pursuit of education in the United States, with particular consideration given to those who have graduated from a U.S. high school or have successfully pursued or are pursuing a college or advanced degrees at a legitimate institution of higher education in the United States"; "whether the person has a U.S. citizen or permanent resident spouse, child, or parent"; and "the person's criminal history, including arrests, prior convictions, or outstanding arrest warrants").

under DACA—was also deemed important under the Morton Memos.[235] Although the factors in the Morton Memos were less precise and more numerous, and although the logical relationship among them was not well defined, their resemblance to the DACA and DAPA priorities is unmistakable.[236]

Despite this resemblance, however, the Morton Memos did not have the immediate and obvious effects of DACA (and presumably of DAPA, once implemented), and perhaps for precisely that reason, they provoked much less public controversy than either of the Obama relief initiatives.[237] In the months following the memos' June 2011 release, there were few observable changes in the exercise of immigration prosecutorial discretion. According to widespread accounts, ICE continued to place immigrants who should have been among the lowest enforcement priorities in removal proceedings, routinely ignoring individual requests for deferred action.[238] Moreover, a large-scale review of

235. While the Morton Memos took pains to note that their list of factors was not exhaustive, they simultaneously emphasized that "there are certain classes of individuals that warrant particular care," including "minors" and "individuals present in the United States since childhood." *Id.* at 5; *see also id.* at 4 (highlighting "the circumstances of the person's arrival in the United States and the manner of his or her entry, particularly if the alien came to the United States as a young child").

236. This highlights another puzzling aspect of the arguments from congressional intent we criticized in Part II: the Morton Memos could have been subjected to pretty much the same wooden congressional-priorities critique that has been leveled against DACA and DAPA. Many of the Morton Memos' criteria are not clearly supported by the text of the INA, and some of them are in tension with discrete provisions of the Code. Yet many who criticize some or all of the President's proposals for relief express no doubts about the legality of the sorts of prioritization policies represented by the Morton Memos. *See, e.g.*, OLC Memorandum Op., *supra* note 10, at 7-11 (explaining how the prioritization policy announced by DHS (now known as the "Johnson Memo") fits comfortably within the President's enforcement discretion). Even the Texas district court that recently enjoined both DACA and DAPA took pains to emphasize its view that the agency has unreviewable discretion to prioritize its enforcement efforts and resources, essentially accepting the prioritization scheme set out in the memos Secretary Johnson issued to replace the Morton Memos. *See* Texas v. United States, No. 1:14-CV-254, renumbered No. B-14-254, slip op. at 68-70 (S.D. Tex. Jan. 30, 2015).

237. In a notable exception, a group of ICE officers in the Houston field office contested the new prosecutorial discretion policy, arguing that it created a "secretive review process." The national ICE union eventually passed a no-confidence motion citing ICE Director John Morton and Assistant Director Phyllis Coven. *See* Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666, 677-78 (2014). Some members of Congress also, predictably, criticized the memos, *see* Rosenblum, *supra* note 3, at 5 n.13, though the concerns did not get widespread traction.

238. *See, e.g.*, Bill Ong Hing, *The Failure of Prosecutorial Discretion and the Deportation of Oscar Martinez*, 15 SCHOLAR 437 (2013); Julia Preston, *Deportations Under New U.S. Policy Are*

over 300,000 ongoing removal cases, implemented in conjunction with the memos' release in order to identify those cases in which prosecutorial discretion was warranted, resulted in a very small number of case closures.[239] And while the fraction of criminal deportees did go up somewhat through this period, that trend appears to be largely the product of changes to other enforcement initiatives, not the Morton Memos themselves.

Additional evidence of the Morton Memos' ineffectiveness can be seen in the operation of Secure Communities, another signature Obama enforcement initiative. That program, launched in the fall of 2008 by the Bush DHS, turned every local criminal arrest in the country into a point of immigration

Inconsistent, N.Y. TIMES, Nov. 12, 2011, http://www.nytimes.com/2011/11/13/us/politics/president-obamas-policy-on-deportation-is-unevenly-applied.html [http://perma.cc/EE24-VQNJ]; *Holding DHS Accountable on Prosecutorial Discretion*, AM. IMMIGR. LAW. ASS'N & AM. IMMIGR. COUNCIL (Nov. 2011), http://www.aila.org/content/default.aspx?docid=37615 [http://perma.cc/2EWM-G9Y7].

239. *See ICE Prosecutorial Discretion Initiative: Latest Figures*, TRANSACTIONAL REC. ACCESS CLEARINGHOUSE 1 (Apr. 19, 2012), http://trac.syr.edu/immigration/reports/278 [http://perma.cc/CYR2-AMS6] (stating that less than one percent of pending cases were closed by the end of September 2011); Julia Preston, *Deportations Continue Despite U.S. Review of Backlog*, N.Y. TIMES, June 6, 2012, http://www.nytimes.com/2012/06/07/us/politics/deportations-continue-despite-us-review-of-backlog.html [http://perma.cc/XU74-ZZT3] (stating that fewer than two percent were closed by June 6, 2012). The low rate of closure was exacerbated by delays in background checks, as well as by the fact that a fair number of respondents declined offers of administrative closure, presumably because they had pending claims for more permanent forms of relief. *See* Immigration Policy Ctr., *Prosecutorial Discretion: A Statistical Analysis*, AM. IMMIGR. COUNCIL (June 11, 2012), http://www.immigrationpolicy.org/just-facts/prosecutorial-discretion-statistical-analysis [http://perma.cc/XT9F-TSP5]. Even adjusting for these facts, the rates of eligibility remain remarkably low and declined as the program proceeded. *See* Ben Winograd, *ICE Numbers on Prosecutorial Discretion Keep Sliding Downward*, IMMIGR. IMPACT (July 30, 2012), http://immigrationimpact.com/2012/07/30/ice-numbers-on-prosecutorial-discretion-sliding-downward [http://perma.cc/7FCT-JMAB]. In a speech at the University of Georgia, former DHS Secretary Napolitano discussed the impetus for DACA and cited, among other factors, the difficulty of moving the bureaucracy in the direction the Administration desired through mechanisms such as the comprehensive review for administrative closure. *See* Janet Napolitano, President, Univ. of Cal., John A. Sibley Lecture at the University of Georgia School of Law: Anatomy of a Legal Decision 9 (Oct. 27, 2014), http://law.uga.edu/sites/default/files/President%20Napolitano%20Sibley%20Lecture%20UGA%20School%20of%20Law%2010.27.14.pdf [http://perma.cc/3X4M-2YR3] ("Bureaucratic momentum was not [on our side]. DHS was a new entity—a vast department that brought together many distinct agencies in the aftermath of 9-11. Our earlier call for a review of the backlogged cases in removal proceedings through the lens of our stated priorities helped a bit. But in the end, it did not have the desired impact. The Dreamers remained in limbo, ensnared within the sputtering debate over immigration reform.").

screening.[240] Universal screening at the point of arrest provides a tremendous amount of information to the federal government—information that can be used (and that the government has argued was designed to be used) to make decisions about removal both more consistent and more responsive to federal priorities. Under the program, federal officials, not local police, decided whether to place an immigrant identified through arrest data in removal proceedings.[241]

If the Morton Memos had actually significantly impacted the decisions made by agency personnel about whether to place a particular immigrant in removal proceedings, one would have expected to see that impact reflected in the pool of immigrants arrested by ICE under Secure Communities; those memos applied directly to arrest decisions made by ICE agents under Secure Communities. Yet no effect was apparent in the wake of the Morton Memos' release. Figure 1 shows the composition of that pool over time, broken down by the criminal history of those apprehended and placed in deportation proceedings following notification to DHS as part of Secure Communities.[242] Two aspects of the Figure stand out. First, a large percentage of people placed in proceedings under the program had no criminal history at all: nearly a third had no criminal conviction, despite the fact that the program was publicly touted as a means of targeting "criminal aliens."[243] Second, the composition of the arrestee pool did not change at all after the Morton Memos were released. The arrest decisions of line-level ICE agents under Secure Communities looks much the same before and after June 2011.[244] While the memos formally singled out noncitizens without prior convictions as lower priorities for

240. For an overview of the program, see Cox & Miles, *supra* note 97, at 93-98. The program involved data sharing between the FBI and DHS. *Id.* at 94. State and local police departments routinely route fingerprint data collected during arrests to the FBI. *Id.* Under Secure Communities, that data was forwarded to DHS and compared to a large database containing information on essentially every noncitizen encountered by the agency. *Id.* If the database returned a hit, ICE then determined whether the arrestee was potentially removable and, if so, whether to issue a request that police detain the person until ICE assumed custody. *Id.* at 95.

241. *See id.* at 131-35; *see also* Cox & Posner, *supra* note 160, at 1344-46 (explaining the advantages for the federal government over section 287 agreements).

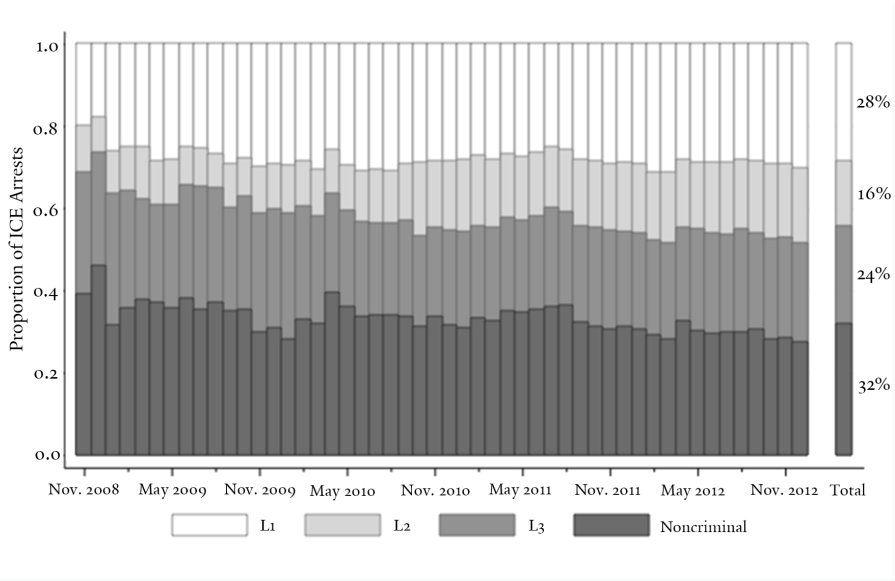
242. Thomas J. Miles & Adam B. Cox, *Does Immigration Enforcement Reduce Crime? Evidence from "Secure Communities,"* 57 J.L. & ECON. 937, 956 fig.4 (2014).

243. *See* Johnson, Secure Communities Memo, *supra* note 101, at 1 ("The goal of Secure Communities was to more effectively identify and facilitate the removal of criminal aliens . . . .").

244. To be clear, there are some longer-term enforcement trends that bridge the release of the Morton Memos. The fraction of deportees with a criminal record had been rising since 2008, and this trend continued after the memos' release.

removal, the reality on the ground was that they were just as likely to be arrested by ICE after the memos' announcement.[245]

Figure 1.
CRIMINAL HISTORY OF NONCITIZENS ARRESTED BY ICE UNDER SECURE COMMUNITIES[246]



These data highlight the limitations of the Morton Memos' approach to producing meaningful changes in the exercise of immigration discretion.[247] In

245. It is certainly possible that, after a number of years, the Morton Memos would have been institutionalized in supervisory or disciplinary strategies so that they might ultimately have had *some* effects on enforcement. But as we explain below, we are very skeptical that any such strategies could have precipitated a shift that comes close to matching the effects of DACA and what would likely result from the implementation of DAPA—the *guarantee* that millions of unauthorized immigrants would be immune from removal for defined periods of time with the likelihood of indefinite continuation into the future.

246. L1 refers to noncitizens convicted of aggravated felonies, such as murder or rape, or two or more felonies. L2 refers to noncitizens convicted of any felony that is not an aggravated felony or three or more misdemeanors. L3 refers to noncitizens convicted of one or two misdemeanors. Noncriminal refers to noncitizens who have no criminal conviction but have civil violations of immigration law, such as overstaying a visa.

247. Another, perhaps more cynical, view of the Morton Memos is that they were motivated largely by politics, or the desire to curry favor with immigrant advocacy and Latino communities, rather than by a genuine desire to change the types of unauthorized migrants being deported from the United States. On this view, it should also be no surprise that the

retrospect, this limitation of a guidance-document-oriented approach should not be surprising. The memos embody an effort to shift the culture of enforcement at the agency through an articulation by leadership of best practices. But even if agency leadership sought to monitor compliance with the memos' priorities through vigilant supervision buttressed by the disciplining of officials who consistently failed to respect the memos' priorities, observable changes in enforcement practices would have taken considerable time to emerge. And, producing dramatic results of the sort achieved by DACA would have been elusive. The Morton Memos would have had to change the behavior of large numbers of ICE agents—the line-level enforcement personnel principally responsible for making decisions about whether to place an immigrant in removal proceedings.[248]

Many agents were extremely resistant to the memos' central goal, some quite vocally.[249] They work within a law enforcement agency that has an enforcement-oriented and results-driven institutional culture, not unlike the culture of the FBI and the DEA. It should not be surprising to find resistance within the ranks to the premise of the Morton Memos. Men and women who see their jobs as punishing lawbreakers could have felt as if they were being directed to ignore the transgressions of immigration violators.[250] This

Morton Memos had little effect. Regardless of their true aim (or whether it is even possible to characterize them as having a single aim), opponents of the Administration's deportation policies were able to use the Morton Memos' "failure" as a focal point for messaging and organizing that helped create the political conditions that gave rise to DACA in 2012. *See supra* text accompanying notes 101-102.

248. This question of whether and how to control line-level prosecutors, and even the U.S. Attorneys themselves, has been a perennial one in analyses of federal criminal law. *See, e.g.*, Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1469-70 (2008) (analyzing a discretion memorandum issued by Attorney General John Ashcroft and concluding that it established no enforcement mechanism and left space for flexible application in its language, and that the lack of sufficient numbers of attorneys in Main Justice in the District of Columbia to monitor the thousands of local line attorneys in field offices thwarted the memorandum's centralizing goal); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1562-63 (1981) (arguing that guidelines to prosecutors need to be "specific enough to provide genuine guidance when applied to a particular set of facts").

249. *See, e.g.*, Press Release, ICE Union, ICE Agent's Union Speaks Out on Director's "Discretionary Memo"; Calls on the Public To Take Action (June 23, 2011), http://iceunion.org/download/286-287-press-release-pd-memo.pdf [http://perma.cc/6JNA-ZRCY].

250. This enforcement culture is, in part, the product of the culture within the INS, the legacy agency that was abolished in the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. And the law enforcement orientation within the INS was one reason advocates had long argued that the enforcement and services functions of the agency should be separated. The 2002 Act did so, locating enforcement functions within ICE and CBP while services functions were located within USCIS. *See* ALEINIKOFF ET AL., IMMIGRATION AND

discontent ultimately bubbled up through the employees' union,[251] and once DACA was announced, some members of the union filed suit against the Secretary of DHS, arguing that the policies required them to violate their legal duties to enforce immigration law.[252]

But even if the inability of the Morton Memos to significantly (and quickly) reshape the exercise of prosecutorial discretion comes as no surprise, it was quite consequential. The limitations of the approach bolstered forces—both inside and outside the agency—that sought to draw critical attention to the Administration's deportation policies generally. Many advocates initially regarded the memos as a strong *promise* of protection, and their disappointment with enforcement practices in the wake of the memos helped create the political conditions that ultimately persuaded the Administration of the need to centralize enforcement judgments in order to better insure protection of status violators.[253] One way of understanding the Obama relief initiatives, then, is as a determination that the Administration could no longer wait for the indirect guidance of the memos to take root and shift the culture of the agency. Political leadership thus turned to a more decisive and reliable approach to insulate mere status offenders from law enforcement.

For critics of the Obama relief initiative, this influence of politics on the formulation and timing of DACA underscores the argument that the President engaged in impermissible policymaking. We contend, however, that the interweaving of political and institutional incentives for administrative reorganization is to be expected generally and can often be constructive. The move to a more rule-bound and centralized regime provided the rule-of-law benefits associated with promoting consistency in official decision making,

CITIZENSHIP: PROCESS AND POLICY 242-48 (7th ed. 2013) (providing an overview of the functions of each DHS component).

251. *See* Zatz & Rodriguez, *supra* note 237, at 678.

252. *See* Crane v. Napolitano, No. 3:12-cv-03247-O, 2013 WL 8211660 (N.D. Tex. July 31, 2013) (dismissal for lack of subject matter jurisdiction), *aff'd sub nom.* Crane v. Johnson, 783 F.3d 244 (5th Cir. 2015). Though the suit specifically attacked the shape of DACA, the suit embodied an approach to enforcement discretion distinct from the one the Administration sought to advance even before DACA, thus undermining DHS leadership's attempts to channel that discretion through informal, standards-based guidelines.

253. *See* Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014, 5:00 PM), http://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html [http://perma.cc/X925-LLHF]; *see also* Zatz & Rodriguez, *supra* note 237, at 679-81 (citing interviews with advocates who expressed concerns that the Morton Memos could not change institutional culture, that their implementation was slow and uneven, and that making the case for an exercise of discretion was particularly difficult for immigrants placed in mandatory detention).

amplifying political control and, most importantly, instituting accountability over the enforcement power.

On top of that, we are aware of no evidence that the pre-DACA regime of prosecutorial discretion guided by informal memoranda was serving the salutary function typically associated with discretion—promoting fine-grained judgments involving individual equities about when the initiation of removal proceedings was warranted. In the case of the Obama initiatives, then, the benefits of centralization and the rule-like inquiry it entailed came without the costs typically associated with a move away from discretion. The fact that the same initiatives advanced the political goals of the Administration, or may have been timed in response to political pressures, or the fact that the Administration could have been more patient with the Morton Memos' approach, are not reasons to declare them suspicious, much less unconstitutional. Instead, the evolution of the Morton Memos into the Obama relief initiatives underscores our claims in Part II about the potential value of a two-principals model of enforcement.

The trajectory of the Morton Memos also explains what we believe to be the most salient features of Obama's relief initiatives for the purposes of evaluating their legality. DACA made two interrelated institutional changes to the prior regime of discretion. In addition to the turn to rules that we discussed in the previous Part—a move that facilitated oversight of the bureaucracy and constrained lower-level decision makers—DACA changed the decision makers themselves. Not only did the Obama initiative locate the bulk of discretion in the hands of DHS leadership, it took the process of individual adjudication out of the hands of line-level ICE agents and the enforcement arm of the immigration bureaucracy and handed it over to personnel in USCIS, the arm of DHS responsible for conferring immigration benefits.[254]

This shift to USCIS might seem to have further fractured enforcement responsibilities across the bureaucracy, since ICE remains responsible for enforcement generally. In fact, however, it had the effect of further centralizing discretion. USCIS decided that all DACA applications would be processed in one of four major service centers, rather than dispersing them to eighty-seven field offices around the nation.[255] Moreover, the agency required that nearly every discretionary denial recommended by a service center be reviewed by decision makers at USCIS headquarters in northern Virginia.[256]

Even more important, the shift from ICE to USCIS amounted to DHS leadership, presumably in consultation with the White House, selecting the

254. *See* Napolitano, Prosecutorial Discretion Memo, *supra* note 103.

255. *See* Declaration of Donald W. Neufeld, *supra* note 206, at 5-9.

256. *See id.*

agency component more likely to share the views of the President and agency leadership and therefore more amenable to oversight in its administration of the program.[257] As the benefits-granting component of DHS, USCIS is more likely than ICE to be institutionally predisposed to viewing immigrants as claimants with potential entitlements; ICE is more likely to see them as lawbreakers. This change in decision makers, combined with the adoption of rules, thus facilitated the centralization of prosecutorial discretion decisions within DHS, making it possible to overcome the Department's seeming inability to supervise the exercise of discretion under the Morton Memos regime.

Seen through this lens, the President's relief initiatives form part of a broader trend in recent years toward the centralization and reorganization of immigration enforcement authority. We documented some of this movement in *The President and Immigration Law*, which showed how a series of statutory changes shifted discretionary authority that had previously been held by individual immigration judges within the Department of Justice to DHS.[258] Other data points in this trend include the rollout of Secure Communities, along with the scaling back of section 287(g) agreements that sometimes gave considerable discretionary immigration authority to local officials.[259] To be sure, the pattern of centralization has been complicated. It would be a mistake to suggest that significant authority over the shape of immigration law no longer exists outside executive leadership, or that such diffusion of authority could ever be extinguished, since immigration enforcement depends on public and private institutions beyond the federal bureaucracy.[260] Nonetheless, these

257. This story highlights the role of an agency's institutional culture in limiting the ability of high-level executive branch officials to quickly redirect the institution's priorities. At the same time, it shows the ways in which bureaucratic redundancy can diffuse the constraints that institutional culture might place on the pace of policy change. Because there were two agencies within DHS with the legal authority to make decisions on deferred action, the leadership within the Department could select the agency with an institutional culture more in line with the goals of the administrative initiative. *See* Jason Marisam, *The President's Agency Selection Powers*, 65 ADMIN. L. REV. 821 (2013); *cf.* Magill & Vermeule, *supra* note 220, at 1040 (arguing that where top officials have a closer relationship to the President, they are more likely to override others within the agency, suggesting that assignation of responsibility based on proximity of views to the President and political leadership can enable greater control of the bureaucracy by those delegated the power at issue).

258. *See* Cox & Rodríguez, *supra* note 7, at 517-19.

259. *See* Cox & Posner, *supra* note 160, at 1344-48; Rodríguez, *supra* note 99 (manuscript at 9-10).

260. *See generally* Cox & Posner, *supra* note 160 (describing the myriad ways in which federal immigration law expressly incorporates local conditions and judgments); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008) (describing how state and local police and other bureaucracies play vital direct and

recent developments show that DACA and DAPA, far from being anomalous, reflect the latest significant moves in the ongoing reorganization and centralization of the immigration bureaucracy.

This series of recent institutional changes has helped constrain and control the use of the enforcement power in an immigration regime that today gives the Executive capacious authority. The Obama relief initiatives promise to do the same, if and when the Administration can fully implement them. The tradeoffs between rules and standards and centralization and diffusion may be intractable in the abstract, but in this context they point clearly in one direction.

2. *Constitutionalized Decentralization*

Our account of the institutional dynamics leading up to the Obama relief initiatives also has the benefit of highlighting a strange idea implicit in the conception of the separation of powers advanced by the President's critics. On the one hand, these critics complain about the failure of the Executive Branch to serve as Congress's faithful agent. They worry about the lack of sufficiently strong checks on principal-agent problems that arise *across* the branches. But they would address this problem by constitutionally prohibiting the President from attempting to ameliorate principal-agent problems *within* the Executive Branch, arguing that the President cannot take a centralizing step to ensure that the priorities reflected in immigration enforcement match his agenda, instead of being the product of tens of thousands of line-level agents within the immigration bureaucracy.[261]

Perhaps critics who make this claim believe that bureaucratic insulation from either politically appointed agency heads, or from the Executive Office of the President itself, actually furthers congressional control. The perennial argument in administrative law in favor of empowering the civil service sometimes takes this form, emphasizing that these employees are less likely than a political appointee or the President himself to ignore the wishes of Congress, or to be motivated by aggrandizement of the President and his

indirect roles in controlling immigration movement and facilitating immigrant integration); Rodríguez, *supra* note 95 (discussing the influence of local bureaucracies on federal decision making).

261. For various critiques of DACA and DAPA that can be understood in these terms, see sources cited *supra* note 14.

political party.[262] This idea also sometimes animates arguments for independent agencies.[263]

To the extent the arguments in favor of insulating low-level bureaucrats intend to promote Congress's substantive enforcement priorities, we are deeply skeptical of their purchase in this context. As we explained in Part II, the work of the Congresses that enacted the various provisions that have constructed the Executive's domain over immigration enforcement do not embody any coherent enforcement priorities. Insulating low-level bureaucrats from the President in this setting, therefore, will not facilitate their compliance with congressional priorities. It will simply enable them to freely pursue their own agendas.

More importantly, when theorists argue that insulating bureaucrats from the President may empower Congress, they do so primarily to defend the claim that the Constitution *permits* Congress to legislate such insulation by adopting new organizational structures for administrative entities, such as staggered-term commissions, or restrictions on the President's removal power.[264] Here, in sharp contrast, the constitutional critique of the President's relief initiatives amounts to a claim that the Constitution *requires* this sort of insulation—even if neither Congress nor the President prefers it. This claim amounts to radical constitutional theory. On this account, the Constitution imposes stringent dictates on the internal organization of the Executive Branch, precluding even the modest effort to discipline the exercise of prosecutorial discretion within an agency by subjecting its exercise to somewhat more rule-like criteria. Even if one thought that the idea of empowering low-level bureaucrats to resist supervision might be attractive in certain situations, constitutionalizing those views in a way that prohibits other organizational judgments by either Congress or the President would be a mistake.

In light of the foregoing analysis, the scope of our two-principals account in Part II comes into further relief. Our concept of the Executive as a second principal necessarily entails permitting politically accountable leadership to exert supervisory authority over line-level agents. But our account certainly does not require disabling line-level officials. After all, the informational advantages the Executive possesses—the learning that comes through

262. *See generally* Jonathan R. Macey, *Organizational Design and Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93 (1992); McCubbins et al., *supra* note 132.

263. *See generally* Jacob E. Gersen, *Designing Agencies*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333, 333-57 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010).

264. Such arguments are necessary because others, in particular those who subscribe to certain theories of the "unitary executive," believe that this sort of congressional interference is unconstitutional. The President, these scholars argue, is constitutionally entitled to supervise decision making within the Executive Branch. *See* sources cited *supra* note 227.

enforcement and that should inform ongoing policymaking—enter the system first and foremost through the work of line-level agents and bureaucrats and their operations in the regulatory field. The Executive's capacity to act as a second principal depends on diffusion in this sense—on the actual officials who produce regulatory reality and see the operation of the law in practice. But what the Obama relief initiatives seek to do is to channel and control the information flow from the field to the center, and our claim in this Part has been that such control should not be constitutionally prohibited (indeed, it might sometimes be constitutionally required). As in the criminal justice system, each individual immigration prosecutor or law enforcement official possesses small-scale policymaking power. When structured with the sorts of rule-of-law values we explore in this Part, the power that this gives to the Executive as a whole should be understood as both legitimate and productive.

C. Transparency and the Rule of Law

As we noted at the outset of this Part, the Obama relief policies implicate a third tradeoff—between transparency and secrecy. One might worry that increased transparency pits two laudable rule-of-law values against each other. On the one hand, through their transparency about how enforcement judgments will be exercised, the initiatives secure greater consistency and predictability in the exercise of discretion, reducing the extent to which decisions about who will be deported appear arbitrary or random.[265] Curbing inconsistency and arbitrariness in the exercise of government power is commonly defended as a boon for the rule of law.[266] But clarity can come at a cost. Critics of the Obama initiatives worry that the very predictability of enforcement—or, more precisely, the predictability of who will be protected from enforcement—will undercut compliance with the INA and reduce the deterrent effect of the law, thereby threatening the rule of law.[267]

265. *See* HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 192 (2014); Cox & Rodríguez, *supra* note 7, at 536; Cristina M. Rodríguez, *Constraint Through Delegation: The Case of Executive Control over Immigration Policy*, 59 DUKE L.J. 1787, 1800-01 (2010); Shoba Sivaprasad Wadhia, *Sharing Secrets: Examining Deferred Action and Transparency in Immigration Law*, 10 U.N.H. L. REV. 1, 57 (2012).

266. *See* H.L.A. HART, THE CONCEPT OF LAW 155 (1961); Corey Brettschneider, *A Substantive Conception of the Rule of Law: Nonarbitrary Treatment and the Limits of Procedure*, *in* GETTING TO THE RULE OF LAW 52 (James E. Fleming ed., 2011); David A. Strauss, *Must Like Cases Be Treated Alike?* (Chi. Pub. Law & Legal Theory, Working Paper No. 24, 2002), http://www.law.uchicago.edu/files/files/24.strauss.like-cases.pdf [http://perma.cc/DPW3-VZA5].

267. *See* Martin, *supra* note 14; Price, *supra* note 14, at 755 n.360, 761 ("[K]eeping their priorities secret may preserve the deterrent effect of the statute on a public ignorant of actual executive enforcement practices.").

On this account, any effort to rationalize the exercise of prosecutorial discretion will necessitate a tragic choice between rule-of-law values: the value of making enforcement predictable on the one hand, and the value of legal compliance on the other.[268] This claim applies far more broadly than to the President's immigration actions: it amounts to an argument that *no* enforcement regime can simultaneously maximize both fairness and legal compliance. For the President's relief initiatives in particular, the argument suggests that critics would favor more emphasis on legal compliance, while supporters would be happy to trade reduced compliance for increased fairness.

This account poses an interesting dilemma, but we believe the choice to be illusory, not tragic, in our particular immigration setting. To make this case, we first show that this "tragic choice" logic rests on fuzzy thinking about deterrence. Second, and more important and controversial, we explain why concern about legal compliance rests on an incomplete understanding of modern American immigration law.

1. The Logic of Deterrence

There is an entirely mundane reason to doubt that DACA or DAPA will undermine the deterrent value of the law: both of the President's initiatives apply retrospectively. They grant relief only to past immigration violators, not to future ones. Because eligibility for DACA or DAPA requires at least five years' continuous residence in the country, the immigration violations of most eligible immigrants will have occurred more than five years ago, years before the President announced the policies. In fact, given estimates that the majority of the unauthorized population has been living in the United States for at least ten years,[269] DAPA relief may well end up helping mostly those whose immigration violations are more than a decade old.

The relief initiatives' retrospectivity makes the programs very different from conventional policies of prosecutorial discretion, which should reduce concern about their impact on law's deterrent value. Most prosecutorial discretion policies set out criteria that guide decisions about which *future*

268. The only way to avoid such a conflict would be to devise rule-like schemes that constrain enforcement discretion, but to somehow keep them from the public. Maintaining a gap between the system's operation and the public's beliefs about how it operates strikes us as extremely difficult. Even if it were possible, it is important to note that enforcement would then only be rational, not predictable. Thus the decisions of enforcement officials might still appear arbitrary to the public.

269. *See* Randy Capps & Marc R. Rosenblum, *Executive Action for Unauthorized Immigrants*, MIGRATION POL'Y INST. 3-4 (Sept. 2014), http://www.migrationpolicy.org/sites/default/files/publications/Executive-Action-Brief.pdf [http://perma.cc/GBA5-2ZRX].

offenders will be prosecuted for certain legal violations. The Department of Justice's recent guidance about low-level marijuana offenses provides a run-of-the-mill example. The policy tells legal subjects—you and me—that a U.S. Attorney's office is extremely unlikely to prosecute us for possessing a few marijuana cigarettes. This announcement might well affect our decisions about whether to abide by the federal prohibition on marijuana possession laid out in 21 U.S.C. § 841. Indeed, the Department of Justice almost certainly wanted to shape people's decision making in this way, freeing states like Colorado and Washington to experiment with regimes that opted to decriminalize marijuana, regulating its distribution and use through noncriminal means.[270]

DAPA and DACA, by contrast, should not produce such a behavioral response. They are best conceptualized as exogenous legal shocks that will affect the size of the existing pool of unauthorized migrants without altering the legal regime that applies to future immigration violators (or to those who do not receive relief under the program). This feature enables the policies to drive a wedge between the values of deterrence and predictability; DHS can make enforcement more predictable without undermining future legal compliance. In fact, these programs might even improve future compliance with immigration law. With fewer resources devoted to identifying and deporting those who receive relief, DHS can redirect enforcement resources to increase the likelihood that future immigration law violators will be caught (thus increasing deterrence). DHS directives released alongside the relief policies in November 2014 reveal this strategy: DHS will devote more resources to the border, as well as to identifying those who become deportable by virtue of convictions for certain crimes.[271]

Critics who claim that DACA and DAPA will undermine the rule of law might resist this account of legal compliance in two ways. First, they might reject the notion that the programs grant relief for past immigration violations, arguing instead that immigration violations, by their very nature, constitute ongoing offenses. Every day an unauthorized migrant spends in the country amounts to a legal violation, and only by leaving the country can she put an end to her lawbreaking. Thus, the argument goes, even if DACA and DAPA do not affect the behavior of other migrants, they undermine legal compliance by the very migrants granted relief under the programs. Absent the programs,

270. *But cf.* Price, *supra* note 14, at 758 (arguing that DOJ's marijuana policy is permissible because it only announces a policy rather than guaranteeing immunity).

271. *See* Johnson, Enforcement Priorities Memo, *supra* note 111; Johnson, Secure Communities Memo, *supra* note 101; Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to U.S. Customs & Border Prot., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_southern_border_campaign_plan_0.pdf [http://perma.cc/5LDJ-UN8N].

some number of these migrants might self-deport to bring themselves into compliance with the law, but in the presence of the program no one granted relief will do so.

For a number of reasons, we reject this conceptualization of immigration violations. We need not delve into the complexity of what it means for conduct to constitute an ongoing legal violation, because the argument contains a more basic flaw: by focusing on the individuals eligible for relief, it ignores the effect the relief programs are likely to have on legal compliance more generally. DAPA might make compliance via self-deportation less likely for those eligible for relief, but it enhances the likelihood of compliance by those not eligible for relief by raising the risk that the latter will be deported. In other words, even on an account that treats immigration status violations as ongoing violations, neither DACA nor DAPA undermines the overall level of deterrence;[272] they simply shift the brunt of deterrence from one population to another.[273]

Second, critics might challenge the sharp analytic distinction we have made between retrospective and prospective relief. The distinction depends on the credibility of the government's commitment not to extend relief in the future to those who violate immigration law after DACA or DAPA's announcement. Commitment presents a perennial problem for amnesties and other forms of relief for past legal violations. If people begin to believe that similar relief will be granted again in the future, they might break the law in anticipation of a future grant of amnesty. If DACA grants relief to some immigrants who arrived as children, perhaps more children will attempt to enter the country in hopes of some future DACA-like program. Some commentators made precisely this claim last summer, when apprehensions of unaccompanied minors at the Texas border suddenly skyrocketed. And similar claims have been made about past immigration relief programs, most notably the legalization program that was a part of the 1986 Immigration Reform and Control Act (IRCA), which granted green cards to nearly 2.7 million unauthorized immigrants, more than half of the then-existing unauthorized population.[274]

272. Of course, the story may be more complicated, given the wealth of evidence that people do not respond to risk in the way predicted by expected utility theory. *See, e.g.*, DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Daniel Kahneman & Amos Tversky, *Prospect Theory: An Analysis of Decision Under Risk*, 47 ECONOMETRICA 263 (1979). But this evidence simply gives us more reason to doubt the simple story of legal compliance told by critics of the President's relief programs.

273. For immigrants' rights advocates, of course, this shift may still be troubling. Beyond the boundaries of DACA and DAPA lie many sympathetic cases of unauthorized noncitizens with deep ties to the United States who have long-ago, minor criminal convictions, or who have not been present for the requisite time to qualify for the relief initiatives.

274. *See* Nancy Rytina, *IRCA Legalization Effects: Lawful Permanent Residence and Naturalization Through 2001*, U.S. IMMIGR. & NATURALIZATION SERV. (Oct. 25, 2002), http://

Evidence from IRCA's legalization gives us reason to doubt strong claims that immigrants will make different migration decisions simply because of a slight increase in the highly uncertain prospect of some unspecified relief years down the road. Economists studying IRCA's effect on unauthorized migration found no evidence of an increase in the flow of migrants hoping for a future program.[275] Moreover, in the present political environment, it seems equally possible that DACA and DAPA will serve as anchors that lower, rather than raise, the probability of more expansive relief down the road. Prior to these programs, a legislative legalization program formed a central component of the immigration reform bills passed by the Senate in 2006 and 2013.[276] Most commentators think a legislative amnesty will eventually come to pass, in part because of the sheer magnitude of the unauthorized population. The open questions include when that legislative relief will ultimately come, and how far it will extend. It may be that the Obama relief initiatives will shape future legalization by limiting any program to those who have benefited from DACA and DAPA. But we think any such predictions would be foolish. What effect, if any, DACA and DAPA will have on future reform turns on political dynamics so complex that even those who are central players in the drama, right down to the congressional leadership and President Obama himself, seem to have little idea how it will play out. Given this extreme uncertainty, we think it implausible that DACA or DAPA's influence on the prospect of relief for future immigration violators will meaningfully affect the migration decisions of prospective migrants contemplating coming to America, either by encouraging or discouraging them.

2. *Underenforcement and Ex Post Screening*

The retrospective nature of DACA and DAPA make them special from the perspective of deterrence. But even if the compliance critique fails at the retail level, the turn to transparent, predictable, and rule-bound enforcement strategies could still raise compliance concerns, thus implicating the tragic choice between rule-of-law values. For this reason, it is important to explain why the choice between transparency and compliance is illusory in light of the structure of modern American immigration law—a structure other regulatory

www.dhs.gov/xlibrary/assets/statistics/publications/irca0114int.pdf [http://perma.cc/92X2-R7ZV].

275. Pia M. Orrenius & Madeline Zavodny, *Do Amnesty Programs Reduce Undocumented Immigration? Evidence from IRCA*, 40 DEMOGRAPHY 437, 437-38 (2003).

276. *See* Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (as passed by Senate, June 27, 2013); Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (as passed by Senate, May 25, 2006).

contexts may share and that in the immigration setting transcends the Obama relief initiatives.

The argument against transparency in the exercise of prosecutorial discretion conflates two very different types of enforcement settings. In one, the legal system makes clear that the desired level of some conduct is zero. In such a setting, there ideally would be perfect compliance with the legal prohibition. But compliance might fall short of that, and the government may lack the resources to punish every single violator. In that context, secrecy about enforcement strategy can be valuable, and transparency can threaten legal compliance. The threat to compliance will be most palpable when an offense can be committed in multiple ways, or in multiple places. In such situations, publicizing what law enforcement officials will be looking for, or where they will be looking, can make it easier for would-be violators to avoid having their legal violations detected. Secrecy about law enforcement tactics, even to the extent of randomizing those tactics, can often increase compliance, both by raising the risk of detection and by creating more uncertainty about the level of risk.[277] For these reasons, the IRS works hard to keep its audit algorithms secret, state highway patrols do not disclose the locations of speed traps, Customs and Border Patrol frequently moves the roving checkpoints it uses along the southern border, and the CIA and other intelligence agencies resist disclosure of their surveillance tactics.[278]

277. Risk can rise, rather than simply be redistributed across potential offenders, because strategic evasion is eliminated. *See* James Andreoni et al., *Tax Compliance*, 36 J. ECON. LITERATURE 818 (1998). *See generally* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (laying the foundation for strategic, rational action accounts of lawbreaking). For an overview of the large game-theoretic literature on these questions, see DECISION AND GAME THEORY FOR SECURITY (Radha Poovendran & Walid Saad eds., 2014).

278. This idea relates to a view in legal theory, dating back at least to Jeremy Bentham, that "[a] law confining itself to the creation of an offense, and a law commanding a punishment to be administered in case of the commission of such an offense, are two distinct laws." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 331 (Dover Classics 2007) (1789). On this view, legal obligations can motivate behavior even in the absence of a sanction, and hence it is possible to speak of a legal obligation and a legal remedy as "two distinct laws." Some deny this view, of course: rational choice theorists of a certain sort, for example, deny that obligations ever create an independent reason for action. But for those who do not deny this possibility, there can sometimes be value in keeping certain aspects of the official remedial regime hidden from public view—to the extent possible—to prevent gaps in the remedial regime from undermining the influence of some statutory rule on behavior. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984); *see also* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999) (developing a taxonomy of rights and remedies). Crucially, however, this idea turns on the notion that the "true" legal norm is not itself instantiated by the remedial regime.

But for reasons we already have explained in our development of the concept of de facto delegation, this account does not describe the immigration enforcement setting. In the world of de facto delegation, where exceptionally broad grounds of deportability and long-standing acceptance of high levels of unauthorized immigration have made half of all noncitizens living in the United States formally deportable,[279] a perfect world is not a world of perfect enforcement.[280] This is so not simply because the government has limited resources—the claim around which most defenses of the President's actions have turned.[281] Nor is it true only because the social costs of deporting all unauthorized migrants would be enormous (though they would be). Rather, it is because immigration law's formal prohibitions do not accurately reflect the structure of the immigrant screening system. The INA does not establish fully the contours of culpability under immigration law. Instead, our system of de facto delegation requires the Executive to assume responsibility for sorting "deserving" violators out from non-deserving ones—for making the sorts of policy judgments we defend in Part II.[282] The screening decisions of executive branch officials who decide which formally deportable noncitizens deserve deportation thus shape the true limits of the law.

In our view, the screening the law requires will be most fair if the Executive conducts screening universally and makes its rules transparent. Universality makes it possible to treat like cases alike, and transparency provides notice to immigrants about the actual structure of the screening system (as opposed to the formal structure of that system). We need not worry that transparency will undermine compliance with the formal screening rules of the INA, because the rules are not meant to be followed to the letter.[283] Instead, public behavior

279. *See* Grieco et al., *supra* note 82.

280. To be clear, our claim is not that an ideal world would still contain some illegal immigration. Instead, our claim is that, given the way the law is written and how it has intersected with social realities over time, we should not understand the existing immigration regime as one that demands full compliance and therefore enforcement efforts that seek to achieve full compliance.

281. *See, e.g.*, sources cited *supra* note 125.

282. *See* Cox, *supra* note 36.

283. As we explained in Part II, in making this claim about de facto delegation, we do not mean to suggest that Congress specifically intended to overdraw the law and assign the President the authority to screen. Instead, it is an observation about the evolution and expansion of a legal regime to cover such a broad swath of conduct that the Executive becomes obligated to do so. It is a claim about the social meaning and ex post acceptance of a system as it has evolved and been constructed by Congress and the Executive in tandem. As we also explained in Part II, the Supreme Court in *Arizona v. United States*, 132 S. Ct. 2492 (2012), openly acknowledged this conception of executive power by highlighting the central role that executive branch discretion plays in defining the actual content of immigration law. *See*

would track the screening system established by executive discretion, instead of the (overbroad) criteria articulated in the statute itself. The Obama relief initiatives aid this objective through transparency.

Other areas of the law share this structure whereby the legally desirable level of an action is not zero, and according to which overbroad laws have the effect of empowering public officials to screen for culpable violators from among a larger pool of formal violators.[284] Consider criminal law. Bill Stuntz has argued that it has just such a structure: legislators draw substantive rules of criminal liability to sweep in far more persons than are deserving of punishment, effectively delegating power to prosecutors and police to sift through the universe of violators, screening for those who are worthy of punishment.[285] In such a system, a rationalized, predictable, and transparent system of prosecutorial discretion promotes the equal treatment of similarly situated defendants without undermining compliance with the "true" criminal law norms that the system seeks to enforce. If we think that low-level marijuana possession by a person with no other criminal record should not be punished, then we should hope that judgment applies to all cases, not to a random subset of violators. And we would not worry that publicizing the policy would undermine legal compliance, because the very point of the exercise of discretion would be to communicate that possession under those circumstances does not deserve punishment.

We recognize, of course, that critics of the Obama relief initiatives, in Congress and in the commentariat, might dispute our account of the modern structure of immigration law—we view this claim as our most controversial and contestable one. The self-deportation strategy advanced by opponents of illegal immigration reflects a total compliance worldview leavened by the reality of limited enforcement resources. Measures that induce self-deportation

Cox, *supra* note 36, at 48-55 (discussing enforcement redundancy in the context of *Arizona*); Rodríguez, *supra* note 157 (discussing the ambiguous social meaning of unauthorized status and exploring the concept of sociological as opposed to legal membership); *supra* text accompanying notes 88-90.

284. The case that the formal rules embodied in the immigration code sweep in far more people than deserve deportation can be made in two ways: as an interpretive claim about the structure of modern immigration law, or as a purely normative claim. Our claim here is primarily interpretive, building on our historical account of the development of immigration law and the de facto delegation of screening authority to the Executive—a delegation which presumes that not all those in formal violation of the law should be deported. This is the sort of claim endorsed by the Supreme Court in *Arizona*. But our account also undoubtedly has important normative implications—about the questions of institutional design we are focused on in this Article, as well as about broader issues we have touched on in earlier work and continue to develop.

285. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506-09 (2001).

become necessary in a world of limited resources precisely in order to achieve the total compliance goals of the system. But the core of our argument here is that these critics operate with the wrong understanding of the nature of underenforcement in immigration law—one that ignores the actual history and practice of immigration law and puts them on the wrong side of the Supreme Court in *Arizona*. Supporters of DACA and DAPA have reinforced this confusion about underenforcement's significance; their persistent focus on resource constraints as both a necessary (and sufficient?) condition for the exercise of broad deportation discretion promotes the misconception that, in the absence of resource constraints, the Executive's duty would be to enforce against all violators (save perhaps for the occasional exercise of humanitarian discretion). Budget constraints are ubiquitous. But the structural delegation of screening authority present in immigration law—and some other areas like criminal law—is not.

D. Benefits Versus Penalties

In choosing rules over standards, centralization over diffusion, and transparency over secrecy, the Obama relief initiatives highlight some key debates over how best to organize the modern bureaucracy. In their particular context, these choices not only make acceptable structural tradeoffs, they actually promote rule-of -law values and accountable and constrained executive power. Far from striking a blow on behalf of the imperial presidency, the relief initiatives represent responsible uses of the enforcement power, even as they advance the President's political agenda. Any unseemliness of the latter does not detract from the value of the former.

Of course, in offering this conceptual alternative to the faithful-agent framework we reject in Part II, the question becomes what sorts of efforts to structure the enforcement power *would* give rise to constitutional concerns. Can we imagine any limits on the way in which the Executive institutionalizes its discretion or makes the inevitable tradeoffs among rule-of-law values? We turn to these most difficult questions in Part IV below.

But before developing our account of limiting principles, we pause to address one last, frequently heard claim about the way in which DACA and DAPA institutionalize relief loosely related to our arguments in this Part. The claim is as follows: by choosing rule-like criteria for relief, by centralizing control over the application of those criteria, and by establishing a transparent application process, the Obama Administration has conferred on DACA and DAPA recipients a promise of nonenforcement that differs in kind from a mere guideline that de-prioritizes removal on the basis of certain characteristics. This claim—that there is an important substantive difference between the *form of relief* provided by these programs and ordinary prosecutorial discretion—rests

at the heart of the Texas district court's decision to enjoin DAPA and the expansion of DACA. In the words of the district court, the programs provide the benefit of "three years of immunity from [the] law."[286] At another point the decision describes the benefit as the conferral of "legal presence status."[287] In other words, the relief initiatives confer new legal benefits on recipients rather than simply declining to prosecute them.[288] Providing these legal benefits, in the critics' view, departs from any coherent understanding of prosecutorial discretion and exceeds the authority of executive branch officials.[289]

This argument appears to turn on the legal consequences for immigrants (or other regulatory subjects) of institutionalizing enforcement discretion in particular ways. Its subtext might also be that the relief policies' beneficiaries do not deserve an open and notorious relief from prosecution, even if they might escape prosecution as the result of case-by-case choices. To the extent this argument depends on the claim that DAPA and DACA recipients receive a legally binding promise that they will not be deported for three years,[290] the argument is mistaken. The Administration has made no such promise.[291] As a

286. Texas v. United States, No. B-14-254, 2015 WL 648579, at *44 (S.D. Tex. Feb. 16, 2015) (memorandum opinion and order granting preliminary injunction).

287. *Id.* at *2; *see also* McConnell, *supra* note 154 (arguing that the President has attempted to create "a new legal status for aliens unlawfully present under the terms of the Immigration Act" and emphasizing that the President's actions are not a "routine application of 'prosecutorial discretion'" but rather the conferral of benefits such as "work permits and welfare without statutory authority and notice-and-comment rule-making").

288. While we focus here on the purported benefit of legal status, critics also claim that the work permits that accompany a grant of relief amount to an unauthorized legal benefit. The difficulty with this argument is that federal regulations, adopted more than two decades ago through notice-and-comment rulemaking, authorized the Attorney General (now the Secretary of DHS) to grant work permits to noncitizens who receive deferred action. *See* 8 C.F.R. § 274.12 (2015). Bizarrely, this regulation is never cited by the Texas district court. For a thorough explanation of this issue, see Legomsky, Written Testimony, *supra* note 17, at 16-18; OLC Memorandum Op., *supra* note 10, at 21-22.

289. Exactly how the "benefits" conferral exceeded the authority of those officials is unclear in the district court opinion. The court *held* only that the APA prohibited the provision of these benefits in the absence of notice-and-comment rulemaking. *See Texas*, 2015 WL 648579, at *56. But the court's *reasoning* appears to entail the much more consequential conclusion that the President violated Article II by conferring such benefits on immigrants under the guise of exercising prosecutorial discretion. *See id.* at *49 ("The DHS' job is to enforce the laws Congress passes and the President signs (or at least does not veto). It has broad discretion to utilize when it is enforcing a law. Nevertheless, no statute gives the DHS the discretion it is trying to exercise here.").

290. Price describes this as a prospective license to violate the law. *See* Price, *supra* note 14, at 704.

291. As an aside, it is also far from clear that the Constitution prohibits such promises. If Article II were understood to do so, it would require that we treat the ubiquitous practice of granting immunity to criminal defendants as either unconstitutional or unenforceable.

formal matter, the promise entailed by the relief initiatives is no more a legal entitlement than the promise that would have accompanied an "individualized" grant of deferred action in the years prior to DACA. While grants of deferred action have in the past often been made for multi-year terms, and sometimes for indefinite periods, these grants have never been understood as legal entitlements. As with any other instance of prosecutorial discretion, executive branch officials remain free to reverse course and charge a person previously granted deferred action. Of course, in practice, such reversals were rare historically, and we agree that Jeh Johnson almost certainly will not reverse course next month and order ICE agents to initiate removal proceedings against those who have been granted relief under DACA. As a matter of law, however, this reality does not convert a permissible nonenforcement decision into an impermissible grant of a legal benefit. If it did, grants of prosecutorial discretion by criminal prosecutors would be widely unlawful, as it is often clear in the case of such grants that criminal justice officials have no intention of pursuing changes in the future for the conduct at issue.

We could try to rescue the "benefits" critique by recasting it in a functional rather than formal light (though critics themselves have cast it in a formalist way). We could say that the core of the benefits claim is not that the deferred action granted amounts to a legal entitlement, but instead that, as a practical matter, DACA and DAPA provide relief that will be more *durable* than ordinary decisions to defer or forgo enforcement. This durability, critics might argue, applies not only within the current Administration, but also beyond it, as it would be very costly politically for a new President, regardless of party, to begin removing in significant numbers the beneficiaries of DACA and DAPA who will have developed strong reliance interests. On this account, the practical entrenchment likely to arise from the President's actions separates constitutional exercises of prosecutorial discretion from unconstitutional ones.

These programs may in fact be durable, but that would not distinguish DACA and DAPA from earlier exercises of immigration enforcement discretion. Whereas President Obama's initiatives promise only three years of relief, noncitizens granted deferred action in the past have in many cases been granted indefinite relief—relief that, in practice, often lasted for periods of more than three years and sometimes spanned more than one administration.[292] And, as a theoretical matter, it seems equally plausible that the institutionalization of relief in high-level agency decisions will ultimately

292. *See, e.g.*, SHOBA S. WADHIA, BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 59-63 (2015) (describing the use of open-ended grants of deferred action, some of which lasted for up to eight years, for U visa applicants). *See generally* MANUEL & GARCIA, *supra* note 29, at 17 (describing deferred action grants outside of DACA as "open-ended").

undermine the durability of relief over time. A single decision of a future administration could reverse the nonenforcement decisions with respect to millions of noncitizens.[293] Nothing of this sort would have been possible under the regime that preceded DACA and DAPA. The literature analyzing centralization appreciates this possibility, emphasizing the fact that agencies become more responsive and policies less entrenched—not the other way around—as decision making becomes centralized in high-level officials who are less subject to the slow-to-change culture of an institution.[294]

As a descriptive matter, therefore, we are skeptical of the claim that DACA and DAPA entrench nonenforcement promises to a greater degree than other forms of enforcement discretion. More importantly, we see no reason why the practical durability of the policy should be constitutionally relevant: there is no plausible constitutional theory of which we are aware under which a promise not to prosecute becomes unconstitutional whenever that promise might be politically durable.

IV. WHITHER LIMITING PRINCIPLES?

As we showed in Part II, principles to limit the exercise of enforcement discretion based on *substantive* factors grounded in congressional priorities will be elusive across many statutory schemes, especially as those schemes become more reticulated over time. This reality underscores that the "parade of horribles" invoked by many critics of the Obama relief initiatives is not so much a series of hypotheticals about a dystopian post-DACA future as a simple description of the actual history of many regulatory arenas. Ronald Reagan dramatically scaled back environmental and antitrust enforcement. George W. Bush transformed the enforcement culture of the Environmental Protection Agency, altering threshold regulatory requirements for new source review under the Clean Air Act and abandoning investigations that had been commenced under the pre-existing legal regime.[295] His Administration also

293. *See, e.g.*, Marty Lederman, *Judge Hanen's—and Michael McConnell's—Mistakes About "Affirmative Action" in DAPA*, BALKINIZATION (Feb. 25, 2015, 2:46 PM), http://balkin.blogspot.com/2015/02/judge-hanens-and-michael-mcconnells.html [http://perma.cc/4332-JGKL]; Eric Posner, *Faithfully Executed*, SLATE (Feb. 19, 2015. 3:23 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/02/obama_s_dapa_immigration_program_is_legal_judge_hanen_s_injunction_will.html [http://perma.cc/7RTM-NVVH].

294. *See, e.g.*, Kagan, *supra* note 226; Mathew Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53 (2008).

295. *See* Deacon, *supra* note 115, at 811-16; Thomas O. McGarity, *When Strong Enforcement Works Better than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative*, 72 MD.

nearly shuttered the Department of Justice office that pursues structural reform of police misconduct,[296] and the Voting Section of his Civil Rights Division did not file a single lawsuit alleging discrimination against minority voters for several consecutive years.[297] Indeed, Eric Holder came into office as Attorney General promising to restore the stature and power of the Division. The first chair of the Securities and Exchange Commission appointed by President Obama immediately ended a Bush Administration pilot program that required enforcement staff to seek permission from the Commission before negotiating a civil monetary penalty against a public company—a policy that had delayed the enforcement process.[298]

These shifts in enforcement policy, while perhaps dramatic, simply reflect the consequences of politics and presidential elections. Though it might be magnanimous and perhaps even judicious for the President to tread lightly when making enforcement judgments, in order to set good precedents for his or her successors who will have distinct ideological preferences, it may also be foolishly high-minded. Exercising the enforcement power necessitates making value judgments, particularly in circumstances where the laws being enforced either reflect a variety of compromises made by the enacting Congress or leave the Executive Branch with wide-ranging discretion in implementation. And as we explained in Part II, there are reasons to value rather than lament the scope

L. REV. 1204, 1257 (2013). In the first three years of the Bush Administration, the Department of Justice launched only three investigations against energy companies—down ninety percent from the last three years of the Clinton Administration. McGarity, *supra* at 1257.

296. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-75, U.S. DEPARTMENT OF JUSTICE: INFORMATION ON EMPLOYMENT LITIGATION, HOUSING AND CIVIL ENFORCEMENT, VOTING AND SPECIAL LITIGATION SECTIONS' ENFORCEMENT EFFORTS FROM FISCAL YEARS 2001 THROUGH 2007, at 22 (2009) (documenting that from 2001-2007, the Bush Administration initiated only three lawsuits against law enforcement agencies, all of which involved allegations of excessive force).

297. *See generally* OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUST., A REVIEW OF THE OPERATIONS OF THE VOTING SECTION OF THE CIVIL RIGHTS DIVISION 113 (2013) ("Our examination of the mix and volume of enforcement cases brought over the past ten years by the Voting Section revealed some changes in enforcement priorities over time, corresponding to changes in leadership."); Joseph D. Rich et al., *The Voting Section*, *in* THE EROSION OF RIGHTS: DECLINING CIVIL RIGHTS ENFORCEMENT UNDER THE BUSH ADMINISTRATION 32, 41 (William L. Taylor et al. eds., 2007).

298. *The SEC in Transition: A Mid-Year Review of SEC Enforcement in 2009*, GIBSON DUNN (2009), http://www.gibsondunn.com/publications/pages/SECinTransition-MidYearReview-SECEnforcement.aspx [http://perma.cc/UZ8R-AWJH]. Chair Mary Shapiro also approved a new procedure for rapidly approving formal orders of investigations and issued 188 formal orders from February to May 2009 and 167 injunctions against defendants from January to June 2009, as compared to 74 orders and 114 injunctions during the same periods in 2008. *Id.*

of judgment the enforcement power entails—reasons that parallel common defenses of Congress's delegation of vast rulemaking and, therefore, policymaking power.

Yet the inevitability and desirability of presidential priority setting does not mean that the President can exercise the enforcement power without constraint. In the absence of express and specific statutory direction as to how to prioritize enforcement, we would still want the Executive to abide by constitutional norms that expect the exercise of coercive power to be well supervised and accountable. But these norms will be difficult to translate into limiting principles based on substantive priorities. Instead, we should devise limiting principles that operate as forms of constraint on the way the Executive institutionalizes enforcement priorities. Understanding the choices at stake in the institutionalization of prosecutorial discretion, as we have presented them, can help us begin to identify when the form discretion takes might raise red flags as a matter of constitutional law or culture.

To say that such limiting principles can be identified is not to say that they will always be judicially manageable. Some might be easily embodied in doctrine, but others will be difficult to formulate into clear legal rules. For constitutional scholars who believe the very definition of a "limiting principle" is that it must be amenable to enforcement by an Article III judge, our view will be unsatisfying. But we believe that tangling up debates about the existence of limiting principles with longstanding disagreements about the extent to which constitutional norms must be judicially enforceable stymies genuine inquiry into how best to conform the enforcement power to conceptions of constrained and accountable government.

In what follows, we begin by identifying the sorts of limiting principles that might apply to the exercise of the enforcement power. But the inquiry into constraint need not end there. Even if broad use of the enforcement power according to executive judgment will almost always be constitutional, and even if it will be difficult to conclude that any given institutionalization of discretion crosses a constitutional line, we can still evaluate on the merits the Executive's decisions regarding how to structure its power, as well as any arrangement the political branches might have reached through the political process. In other words, it would be a mistake to limit the analysis of the enforcement power to the constitutional register. We therefore close by considering what might be deficient with the Obama relief initiatives and the state of affairs that produced them, as a matter of more general legal and political theory.

A. Current Constraining Principles

Constraints on the President's authority to determine how to institutionalize discretion within the Executive Branch could arise from a

number of sources, many of which have nothing to do with constitutional limiting principles. First, as we discussed in Parts II and III, Congress possesses a variety of tools to constrain discretion, though some will be easier to employ than others. Congress certainly could place constraints on the substance of discretionary choices. As we noted in Part II when describing how enforcement judgments help construct the regulatory domain, statutes themselves place limits on the bases of enforcement. The President could not, for example, declare as a ground of removal an offense Congress has not listed in the Code. Congress also could draft statutory prohibitions against certain exercises of discretion,[299] or use its appropriations power to shape enforcement choices, though we have discussed the limits of the latter[300] and are skeptical that the former approach would be a good one to adopt with frequency, given the affirmative value of executive policymaking through enforcement articulated in Part II.

Congress could also use institutional design and oversight in tandem to constrain discretion. It could limit the President's capacity to supervise officials' discretionary judgments; for example, Congress could require that particular low-level adjudicators, such as administrative law judges, make certain decisions without interference from agency leadership. The development of statutory protections for civil service employees reflects this sort of judgment and promotes the professionalization of government employment by insulating employees from the pressure of patronage politics.[301] Congress might also seek to diffuse power to make agencies more responsive to individual members of Congress and oversight committees through day-to-day, informal interactions. Strategies of this sort might be difficult to launch, given the fraught legislative process. But Congress could, at the very least, use hearings and appeals to the press to advance its point of view

299. We acknowledge the existence of a debate concerning whether Congress can direct the President's prosecutorial judgments. *See, e.g.*, *In re* Aiken County, 725 F.3d 255, 266 n.11 (D.C. Cir. 2013) ("[T]he President may decline to follow a law that purports to *require* the Executive Branch to prosecute certain offenses or offenders. Such a law would interfere with the President's Article II prosecutorial discretion."). But while it seems clear that a congressional instruction to prosecute particular individuals would raise serious constitutional concerns, we would not read Article II as containing inherent authority to exercise discretion such that Congress could not extinguish that discretion—a power we think is included in its very power to legislate.

300. *See supra* notes 142-143 and accompanying text.

301. Jon Michaels, in fact, analogizes the civil service to the constraints imposed on government power by the judiciary in the Madisonian separation-of-powers framework and argues that modern trends toward privatization pose a worrying threat to this essential source of constraint of power. *See* Michaels, *supra* note 179, at 540-47.

in a way that might create political pressure on the Executive to change its behavior.[302]

But our primary interest here is not in the myriad political and institutional forces that constrain the President as a matter of fact. We focus instead on the ways in which the Constitution itself will sometimes directly constrain how executive officials institutionalize enforcement discretion.[303] Constraints can crop up along any of the three dimensions we identified in Part III. Take the choice between rules, standards, and unfettered discretion. Sometimes the Constitution requires government-by-rules; other times it prohibits their use. First Amendment doctrine, for example, sometimes requires that executive branch officials make decisions pursuant to rules clearly specified ex ante, in order to constrain discretionary judgments about decisions to issue permits and the like—judgments that present a high risk of impermissible discrimination.[304] In contrast, the Due Process Clause sometimes prohibits the use of highly structured decision-making rules, requiring that an adjudicator

302. *See* Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765, 768-69, 793 (1983) (showing how members of Congress used hearings and the threat of sanctions in the late 1970s to induce changes in FTC policy); *see also* Kagan, *supra* note 226, at 2348-49 (arguing that presidential involvement in bureaucratic decision making stimulates congressional oversight); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789-93 (1999) (arguing that congressional oversight hearings are particularly effective in cases of prosecutorial discretion, where the Executive would otherwise operate in secrecy).

303. One type of constraint on which we do not focus, but which is obviously very important, is constraint imposed by rights-regarding constitutional provisions like the First or Fourteenth Amendments. Even in a world where congressional priorities do not limit the substantive criteria on which the Executive bases enforcement, the Constitution does prohibit the use of some criteria. So, for example, the President could no more restrict grants of deferred action on the basis of race than could a federal prosecutor use race as a factor in charging decisions. *See* Legomsky, Written Testimony, *supra* note 17, at 15 ("[P]articular priorities can't . . . otherwise violate equal protection of other individual constitutional rights."). The Executive, of course, routinely makes discretionary judgments in the immigration arena based on nationality. Grants of temporary protected status and deferred enforced departure, for example, are made for groups of noncitizens based on their nationality, to provide protection for persons from countries beset by environmental disasters or civil strife or where the President's foreign policy would be undermined by their return. *See supra* notes 22, 29 and accompanying text (discussing TPS and DED). In the main, this line does not present a constitutional concern, even though correlations between race and nationality abound. But were the President to draw nationality classifications in a manner that suggested an underlying race-based motivation, we believe it would be appropriate for critics and even courts to decry the President's actions using the language of constitutionality.

304. *See* STONE ET AL., *supra* note 215.

retain discretion to take account of any evidence or arguments offered by an individual claimant.[305]

It could also be the case that particular choices between rules and standards result in impermissible tradeoffs among rule-of-law values. These limits will be hard to characterize as hard-and-fast constitutional requirements and may be more appropriately characterized as features of a theory of constitutionalism. But some criticisms aimed at particular institutional design choices might sound in constitutional concerns, even though a court would be unlikely to strike them down. If, for example, the President's initiative permitted any non-citizen to apply for relief but then left the judgment entirely to the whims of adjudicators, the loss of supervision resulting from this standards-based approach might, depending on the practice of the adjudicators, amount to a loss that cannot be offset by the benefits of individualized, fine-grained decision making. We could describe this tradeoff as a constitutionally irresponsible choice, even if it would be difficult to describe it as unconstitutional such that a court could strike it down.

We could similarly analyze the choice to centralize or diffuse power. Centralization designed to facilitate preferential treatment of the President's cronies could present a constitutionally problematic form of institutionalization. A centralization initiative designed to serve partisan goals might ordinarily be unexceptional, but it could present a source of constitutional concern in a context in which custom demands independence. The centralized and politicized hiring of immigration judges in the Ashcroft Department of Justice, for instance, contravened civil service regulations and customs surrounding the hiring of officials otherwise removable by the Attorney General.[306]

The tradeoff between transparency and secrecy could also be governed by principles or presumptions that would constrain presidential choices about how to institutionalize discretion. If the structure and integrity of a given enforcement domain depend on self-compliance by regulated parties, then the costs of transparency regarding enforcement priorities might be so high as to be deemed impermissible. In the tax arena, for example, the enforcement machinery depends heavily on the in terrorem effect of legal regulation; the system's goal is maximal compliance with the law, and so it is crucial for the IRS to keep its enforcement priorities hidden from view, in order to maintain public incentives for widespread compliance. If the IRS were to announce that

305. *See* Demore v. Kim, 538 U.S. 510 (2003); United States v. Salerno, 481 U.S. 739 (1987).

306. By contrast, Gillian Metzger, for example, argues that the failure to supervise the exercise of discretion can in some circumstances amount to unconstitutional abdication of presidential responsibilities. *See* Metzger, *supra* note 180, at 1874-86.

a portion of the Code simply would not be enforced because of the Service's scarce resources, legal compliance would be undermined for little benefit and for arguably questionable reasons (perhaps to curry favor with a tax-skeptical public).[307] In such a circumstance, the charge of "abdication" would have bite, because enforcement policy would reflect less an attempt to better structure the location of discretion than an effort to undermine the law itself.

Again, it bears emphasizing that these limits we imagine may not be judicially enforceable, and we have not conceptualized them as doctrinal principles. Defining and then mobilizing limits as doctrinal rules would require that we formulate a comprehensive theory of executive power that would inevitably be unmoored from constitutional text and have an ambiguous relationship to constitutional practice. As we emphasized throughout Part III, we are reluctant to constitutionalize the internal structures of the Executive Branch, given the complex tradeoffs among rule-of-law values that must be made when an administration seeks to organize and wield its power.

The difficulty of devising rules of constraint from a set of general principles does help explain the appeal of OLC's substantive approach, or of the prophylactic, bright-line framings of critics who have tried to draw the conceptual distinctions we reject between individual and categorical judgments, or between non-prosecution and the granting of benefits. But as we hope we have shown in Parts II and III, the lawyerly appeal of these frameworks cannot save them as descriptive or normative accounts of the scope of executive authority. The theoretical framework we have offered as an alternative may not result in clear lines around the enforcement power, but it does provide a vocabulary well suited to legal conversations about constitutional norms with which we (scholars, lawmakers, internal executive watchdogs) can assess the merits of executive branch practice.

B. Future Discipline

The fact that the President acted lawfully and reasonably when announcing DACA and DAPA does not mean that our current institutional arrangements are ideal. The two-principals model of immigration policymaking is the one we have inherited, and we showed in Part II that important benefits flow from this model. But we do not maintain that the current regulatory structure is optimal, and current interbranch dynamics do present downsides. We therefore close by

307. As we explain in Part III, hypotheticals like this one presume that tax law aims for perfect compliance with the Tax Code.

considering various ways of improving the constitutional and theoretical grounding of the President's enforcement power over immigration law.[308]

1. Meta: The Process of Institutionalization

Let's start with the development of the Obama relief initiatives themselves. As we have argued, they represent transparency-enhancing and regularizing improvements on the status quo that preceded them—a world in which the Morton Memos and other guidance documents provided far too little information about how the Executive actually exercised its significant screening authority, and far too little supervision of line-level officials. Yet while the Obama initiatives themselves are transparent, the process that produced them was opaque. Mobilized interest groups may well have informed the ultimate shape of the initiatives, but there were no formal avenues for public input into the policymaking process. The policies were drafted and vetted only within the Executive Branch and its self-defined spheres of influence.

One means of addressing this flaw might be through the Administrative Procedure Act (APA). The notion that DACA and DAPA count as legislative rules subject to the APA's notice-and-comment requirement, rather than as general statements of policy, led the district court in Texas to declare that the Administration had violated the APA.[309] That decision remains pending before the Fifth Circuit as we write, though the court of appeals appears poised to affirm the district court, teeing up the APA issue, if not the underlying constitutional question, for the Supreme Court.[310] In denying the

308. In some sense, this inquiry resembles the debate in the foreign affairs domain over whether and how Congress should authorize the President to use force against a national security threat. Even if the President's authority is not in dispute (and it often is), reasons that reflect constitutional values still exist for him to seek authorization from Congress, and genuine debate can be had over how best to unleash but yet constrain the President's authority to use force. *See, e.g.*, Robert Chesney et al., *A Statutory Framework for Next-Generation Terrorist Threats*, HOOVER INST. (2013), http://media.hoover.org/sites/default/files/documents/Statutory-Framework-for-Next-Generation-Terrorist-Threats.pdf [http://perma.cc/F8MG-PE6M]; Ryan Goodman, *Obama's Forever War Starts Now*, FOREIGN POL'Y (Feb. 12, 2015), http://foreignpolicy.com/2015/02/12/obamas-forever-war-starts-now-aumf-isis-islamic-state [http://perma.cc/6KKG-PUFN].

309. For an elaboration of this holding, see *supra* notes 109, 119 and accompanying text. For skepticism by others of the district court's conclusion, see, for example, Cass R. Sunstein, *Texas Misjudges Obama on Immigration*, BLOOMBERG VIEW (Feb. 17, 2015, 12:56 PM), http://www.bloombergview.com/articles/2015-02-17/what-the-judge-got-wrong-about-obama-s-immigration-plan [http://perma.cc/M8E7-BBSR].

310. If the Fifth Circuit were to uphold the district court's injunction of the Obama relief initiatives, we believe there would be a strong case for Supreme Court review, given the fact that the court of appeals would have enjoined the nationwide implementation of an

government's request for a stay of the district court's injunction,[311] and during oral arguments on the merits,[312] two different Fifth Circuit panels (with overlapping membership) appeared skeptical of the federal government's case (though one judge subjected Texas's claims to withering criticism, as well).

As a matter of existing administrative law doctrine, we are skeptical of this outcome (though, to be frank, the case law attempting to sort legislative from nonlegislative rules is a mess).[313] But as a matter of principle, the claim that the

important federal program based on legal conclusions in a doctrinally muddy area. Though not creating an actual circuit split, the courts of appeals cases rejecting challenges to DACA on standing and jurisdictional grounds might also inform the Court's consideration of whether the sorts of issues implicated in DAPA require Court attention. For a discussion of those cases, see *supra* notes 119-120 and accompanying text. In a case challenging the State of Arizona's refusal to issue drivers' licenses to DACA recipients, the Ninth Circuit recently requested briefing on the constitutionality of DACA, since the State defends its policy in part on the claim that DACA was unlawful. This litigation therefore might also generate disagreement in the courts of appeals. *See* Order, Ariz. Dream Act Coal. v. Brewer, No. 15-15307 (9th Cir. July 17, 2015).

311. *See* Texas v. United States, 787 F.3d 733 (5th Cir. 2015). In denying the government's request for a stay of the district court's injunction pending appeal, the Fifth Circuit concluded that the United States had not shown that it was likely to succeed on the merits of its claims, including that Texas lacked standing, *id.* at 747-54, that the INA, and the fact that the policy constituted the exercise of prosecutorial discretion, precluded judicial review, *id.* at 757-61, and that DAPA did not constitute a legislative rule requiring notice-and-comment, *id.* at 762-67. The court found that the government had not made a strong showing that the district court erred in concluding that DAPA did not leave agency officials with genuine discretion. *Id.* at 765. In its assessment of whether judicial review was available, the panel's analysis suggests deep skepticism of the government's effort to characterize DAPA as the mere exercise of prosecutorial discretion. It even points to provisions in the INA that would suggest that the Secretary's discretion to provide relief based on humanitarian concerns is limited to specific cases, *id.* at 760, and observes that "[a]gainst that background, we would expect to find an explicit delegation of authority to implement DAPA—a program that makes 4.3 million otherwise removable aliens eligible for lawful presence, work authorization, and associated benefits—but no such provision exists," *id.*

312. *See* Michael D. Shear, *Appeals Panel Weighs Fate of Obama's Immigration Overhaul*, N.Y. TIMES, Apr. 27, 2015, http://www.nytimes.com/2015/04/18/us/obamas-immigration-overhaul-halted-by-judge-comes-before-appeals-court.html [http://perma.cc/S7LL-M7GA].

313. While the legislative rules doctrine is (in)famously incoherent, courts considering whether an agency action constitutes a legislative rule tend to focus on the following question: does the agency action create new legal obligations or benefits for the regulated party? *See, e.g.*, Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 251-52 (D.C. Cir. 2014). As John Manning and others have noted, this question cannot be answered without some account of how one distinguishes the act of interpreting law from the act of making law and, ultimately, without an account of what constitutes law. *See, e.g.*, John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893 (2004); *see generally* Manning, *supra* note 178. Formalist and functionalist approaches to these questions produce dramatically different results, and that is part of what accounts for the doctrinal confusion and indeterminacy. Despite this

Obama relief policies would have benefited from more procedural formality, or transparent public input, should be taken seriously. The Administration's defenders have tried valiantly to frame the relief initiatives as entirely ordinary. But this framing obscures the innovative nature of DAPA and DACA that we described in Part III—a characteristic that, when combined with the scale of the programs, marks them as significant acts of policymaking by the Executive, much as the historical precedents the Administration cites were. DACA and DAPA may not confer formal legal status, but they enable millions of unauthorized immigrants to live and work free of the fear of removal, further entrenching their interests in remaining in the United States. The Obama relief initiatives thus significantly increase the political and humanitarian costs of removing this population at some future point.

Significant policymaking of this sort would have benefitted from public scrutiny and involvement.[314] Open debate could have informed the

confusion, however, the cases on which the Texas district court relied are clearly inapposite. In nearly all of those cases, an agency tasked with enforcing a vague statutory obligation—often one in which the statute required the regulated party to engage in "reasonable" behavior—cached out that obligation in a guidance document that created a precise, often numerical standard. *See, e.g.*, Nat. Res. Def. Council v. EPA, 643 F.3d 311 (D.C. Cir. 2011); Gen. Elec. Co. v. EPA, 290 F.3d 377 (D.C. Cir. 2002); Appalachian Power Co. v. EPA, 208 F.3d 1015 (D.C. Cir. 2000); Cmty. Nutrition Inst. v. Young, 818 F.2d 943 (D.C. Cir. 1987). In each case, the court concluded that the agency had created new legal obligations—mandatory rules of conduct—that were not themselves embodied in the statute. And for that reason the court held that the agency action must be treated as a legislative rule, regardless of how the agency itself had characterized it.

While these decisions do sometimes speak about whether the agency has "bound itself" to a course of conduct, the cases are not—contrary to the suggestion of the Texas district court—focused on the internal organization of the agency *independent* of the question of whether the agency has created new legal obligations. Under these cases, the fact that an agency directive "binds" low-level employees, by requiring them to comply with rules issued by their superiors, is not itself sufficient to render an agency action a legislative rule. Issuing rule-like commands to subordinates is consequential for the legislative rules calculus only insofar as those commands create or alter the legal obligations of the regulated parties.

If courts take that approach to DACA and DAPA, then there can be little doubt that they are not legislative rules. As we explained earlier, the President's relief initiatives do not create or alter the legal rights or obligations of immigrants. In contrast to the D.C. Circuit cases discussed above, they do not clarify or move some otherwise vague or shifting boundary between lawful and unlawful immigration status. That formal boundary is plain from the Immigration Code itself: all of the immigrants eligible for relief under the programs are currently in violation of immigration law, and they will remain in violation of immigration law even if they receive deferred action pursuant to one of those programs. Nothing in DACA or DAPA itself changes their legal status, and it has been well understood for a half century that the grant of deferred action itself does not confer any legal benefit.

314. *Cf.* Texas v. United States, No. 15-40238, slip op. at 29 (5th Cir. May 26, 2015) ("[W]e do not construe the broad grants of authority [in the INA and elsewhere] as assigning unreviewable decisions of vast economic and political significance to an agency.").

Administration's judgments on questions such as the relevant criteria, the scale of the program, and the range of "benefits" that should flow from the granting of relief, which may have improved the design of the program and certainly would have enhanced the legitimacy of the President's initiatives.[315] Such public deliberation also would have facilitated a central goal underlying the APA of increasing the accountability of the policymaking process while also bolstering public confidence in the measures ultimately adopted.

These potential benefits do not mean, however, that courts should overhaul existing legislative rules jurisprudence in order to force programs like DACA and DAPA to go through notice-and-comment rulemaking, as the litigants in the Fifth Circuit aim to do. The protracted multi-year nature of modern rulemaking would likely have made such a process unworkable from the Administration's point of view,[316] especially to the extent both DACA and DAPA were timed to maximize the political payoff of the announcements.[317] Perhaps interest group meetings in the White House were all that could reasonably have been expected by way of public input into an initiative of this sort. But that points to a more general dilemma posed by modern

315. For a sustained and compelling argument that the current legal debate over DAPA and DACA really dissolves into a debate about the legitimacy of the President's policies in substance, see Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. (forthcoming 2015-2016).

316. In July 2015, DHS issued an advanced notice of proposed rulemaking and invited comments on a decision to expand another program designed to stabilize the status of unauthorized immigrants. *See* Expansion of Provisional Unlawful Presence Waivers of Inadmissibility, 80 Fed. Reg. 43,338 (proposed July 22, 2015) (to be codified at 8 C.F.R. pts. 103 & 212). The original program permitted certain immediate relatives of U.S. citizens to apply for waivers from the ground of inadmissibility related to unauthorized presence from the United States, rather than continue to require that they travel abroad. This requirement, which was the previous practice, not only led to lengthy separations from families due to processing delays, but also meant those noncitizens ran the risk of being denied a waiver and then being barred from entering the United States for three or ten years in light of section 212(a)(9)(B)(i) of the INA. The 2015 proposed rule would substantially expand those eligible to apply for such waivers by opening the process to anyone eligible for a visa and thus substantially counters the disincentives created by the three and ten year bars in section 212(a)(9)(B)(i). The Administration's decision to invite comment on this proposal may provide some evidence as to how difficult and protracted a notice-and-comment period would be for DAPA, though we suspect even this proposal would spark far less controversy than the deferred action programs.

317. The Administration announced DACA in the summer before the 2012 presidential election, leading some commentators to conclude that the President's quest for re-election and a strong showing among Latino voters motivated the decision. *See* Julia Preston & John H. Cushman, *Obama To Permit Young Migrants to Remain in U.S.*, N.Y. TIMES, June 15, 2012, http://www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html [http://perma.cc/KF3E-R8R3] (quoting Senator Charles Grassley arguing that the President put "politics above responsible policies").

administrative law, where the choice too often is between a cumbersome notice-and-comment regime and minimal procedural formality.[318]

Faced with this choice, the incentives of executive branch officials have predictably produced more and more informality in the sphere of administrative action. In a way, it would have been shocking had the development of DACA and DAPA unfolded any differently. Nonetheless, the absence of manageable channels for public input highlights the basic failure of administrative law to address the central role that enforcement discretion plays in important regulatory arenas. Some form of public input into the development of enforcement priorities with more formality than private meetings convened by the Executive and less than notice-and-comment rulemaking would be a valuable contribution to regulatory spheres in which the enforcement power drives application of the law, as well as the politics and substantive policy of the area.

2. *Prosecutorial Discretion in a Second-Best Regulatory Environment*

Perhaps the most fundamental problem still in need of a solution stems from the facts on the ground that gave rise to DACA and DAPA in the first place. As we have chronicled here and in previous work, de facto delegation endows the President with asymmetrical screening power, giving him much more power at the back end of the system than the front. While exclusion and deportation are clearly substitute mechanisms for screening migrants, restricting most regulatory innovation to the ex post screening environment leaves us stuck in a second-best regulatory environment.

If the President is to have primary responsibility for the structure of the immigrant screening system, he should be able to determine the optimal mix of ex ante and ex post screening mechanisms. A better-designed system would prevent such a large pool of potentially removable noncitizens from arising in the first place, reducing the need for the coercive power of the state and therefore the sort of policymaking through enforcement that can tend toward the opaque and create the impression, if not the reality, of arbitrary decision making. In other words, the fact that policymaking through enforcement can play a desirable function within a scheme of separated powers does not mean that alternative forms of more transparent policymaking are not preferable.[319]

318. For a discussion of the law-like customs and practices that govern the administrative state outside the purview of the courts and APA-based policing, see Nestor M. Davidson & Ethan J. Leib, *Regleprudence—at OIRA and Beyond*, 103 GEO. L.J. (forthcoming 2015), http://ssrn.com/abstract=2442413 [http://perma.cc/8GCS-SKC8].

319. A related problem has been the proliferation of states of legal limbo created through executive action. As compensation for its lack of control over ex ante screening and to

We can imagine numerous ways to address this problem of an overly large enforcement realm. Eliminating or narrowing some of the grounds of removability and scaling up border enforcement represent two opposite ends of the political spectrum (and each addresses a different source of de facto delegation). We doubt that either will be especially effective, however, as a means of curbing the enforcement power. Whereas the former will have an effect primarily on the margins (at least as long as unauthorized presence remains a ground of removal), the latter offers a blunt instrument for reducing the deportable pool and only magnifies the unreviewed power of the Executive by focusing enforcement where law enforcement power is at its most robust and judicial review and due process norms are at their weakest. What is more, the pathologies of de facto delegation have not arisen solely from the legal structure of immigration law. As we emphasized earlier, the intersection of this legal structure with powerful social and demographic forces has produced the current state of affairs. For those whose answer to our dilemma of de facto delegation would be to use law to prevent the unauthorized pool from arising in the first place, we suggest that such thinking is likely wishful.

For all of these reasons, we have advocated in the past delegating greater ex ante screening authority to the Executive to enable the government to respond to demographic and labor market factors with sensitivity to their fluctuations, trading explicit delegation for de facto delegation.[320] Seen in light of our analysis in this Article of the role of the President as independent policymaker, this option should seem normatively attractive.[321] An ex ante process would make room for far more significant public input than an ex post enforcement regime—even one as transparent as DACA and DAPA. It also would channel executive power into less coercive forms than the operation of a law enforcement bureaucracy. We happen to be at a moment in time when net

address exigencies that have arisen but that the Code does not address, the Executive has created a variety of immigration non-statuses like deferred action that leave their recipients at the mercy of executive discretion. Compared to a world in which the Executive has not wielded such authority, this increasing complexity can seem like a positive development. But it is less than ideal. For a thorough articulation of these various executive-created statuses, see Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115 (2015).

320. *See* Cox & Rodríguez, *supra* note 7, at 544; Rodríguez, *supra* note 265.

321. Of course, that presumes the Executive Branch does not prefer to have a pool of potentially removable and therefore vulnerable immigrants as a labor supply. But ferreting out and combating this tendency, we think, will be easier if the Executive Branch's responsibilities are more clearly defined and subject to public scrutiny at the ex ante stage than at the enforcement stage.

illegal migration appears to have approached zero,[322] and so the need for such ex ante authority may be less pressing than it would have been a decade or two ago. But our very point is that the Executive should have substitute tools at its disposal to adapt to circumstances.

This call for delegation ultimately feeds into one final point. The President's powers over immigration policy remain limited as compared with those of Congress. The President has significant control over our shadow immigration system, but he cannot confer legal status directly on unauthorized immigrants; only Congress can do that through a legalization program. It has become commonplace for defenders of the President's actions to emphasize this point as a way of underscoring that the President's actions have remained within his domain.[323] Within our framework, however, this point highlights the centrality of Congress to addressing the policy issues raised by the persistence of a large, unauthorized population. In our view, however, Congress has been a poor participant in the debate. In 2013, the Senate passed an astoundingly comprehensive bill that would have launched a legalization program, but that bill has languished. Congress has contributed to the debate precipitated by the Obama relief initiatives largely through symbolic appropriations riders forbidding the President from implementing the initiatives, as well as threats to defund the Department of Homeland Security. These forms of debate serve primarily to escalate political conflict while offering no real hope for policy reform. Perhaps enough members of Congress prefer the pre-DACA state of affairs, such that we can read these symbolic gestures as reflective of a considered policy position. But even if one does not support a legalization program as a matter of policy, the rule-of-law concerns we have identified as emblematic of the pre-DACA world should be cause for legislative debate and action.

Some commentators seem to fear that the President's actions have compounded congressional policy passivity and partisan grandstanding—that DACA and DAPA have had the effect of disabling Congress, or at least pushing it into an oppositional posture rather than a lawmaking one.[324] We are skeptical

322. *See* Jeffrey S. Passel et al., *Net Migration from Mexico Falls to Zero—and Perhaps Less*, PEW RES. CTR. (Apr. 23, 2012), http://www.pewhispanic.org/2012/04/23/net-migration-from-mexico-falls-to-zero-and-perhaps-less [http://perma.cc/YB8W-4RBR].

323. *See, e.g.*, Wadhia, *supra* note 265.

324. This argument resembles claims by the likes of James Bradley Thayer about the impact of judicial supremacy on congressional action, *see* James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, *in* LEGAL ESSAYS 1, 32-33 (1908) ("[W]e introduced for the first time into the conduct of government through its great departments a judicial sanction . . . . It will only imperil the whole of it if it is sought to give [courts] more. They must not step into the shoes of the law-maker."), or the claim that robust judicial

of the claim that they have prevented Congress from acting, because it seems equally plausible that such actions could spur congressional action. Historically, politicians, advocates, and strategists have offered two different strategies for prompting Congress to fix the immigration laws. Some advocates argue that the President should publicly grant relief to millions (or even declare a moratorium on deportation) in order to highlight the broken nature of the system and prompt Congress to act. Others argue, instead, that the President should do his best to enforce the law to the hilt in order to expose the harshness and futility of the formal rules and thereby create political pressure for legislative change.[325] In other words, not even those who are enmeshed in the congressional-executive dynamic seem to agree on how presidential action will affect Congress's ability and willingness to legislate.

Moreover, there is an additional reason to be skeptical of the claim that executive action reduces the likelihood of congressional action. This worry typically arises in contexts where executive action can serve as a *substitute* for congressional action. If the Executive takes action on its own to regulate greenhouse gases, for example, some worry that its measures will reduce the pressure for Congress to take steps that will lead to the same outcome—the regulation of greenhouse gases. Or if courts engage in judicial review to evaluate the constitutionality of legislation, then Congress will stop worrying about constitutional questions when it drafts legislation. The crucial difference between these contexts and the present immigration context is that the actions of the Executive and Congress are emphatically not substitutes. President Obama did not legalize five million unauthorized migrants with his relief initiatives, and he lacks the authority to do so. Action by Congress will be

review absolves Congress of its obligations to conform its actions to the Constitution, *see* LOUIS FISHER, DEFENDING CONGRESS AND THE CONSTITUTION 1-2 (2011) (criticizing the "submissive attitude" taken by many congressmen towards their constitutional oath in light of judicial constitutional interpretation). In statutory interpretation, textualists similarly claim that a certain type of judicial interpretation—textualism as opposed to purposivism—will give Congress incentives to draft laws more responsibly and clearly, and by implication that purposivism promotes sloppy legislative work. *See, e.g.*, John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 647-48 (1996) ("[S]eparation of lawmaking from law-exposition . . . provid[es] legislators an incentive to enact rules that impose clear and definite limits upon governmental authority, rather than adopting vague and discretionary grants of power.").

325. For a collection of contexts in which actors use full compliance with the law to highlight what they see as failings in the formal rules, see DORIS KEARNS GOODWIN, THE BULLY PULPIT: THEODORE ROOSEVELT, WILLIAM HOWARD TAFT, AND THE GOLDEN AGE OF JOURNALISM 209–10 (2013) (discussing Roosevelt's strategy of using strict enforcement to generate support for legal change among elites); and Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 831-32 (2015) (describing "maximalist enforcement tactics that have been adopted by certain chief executives").

required to provide a lawful immigration status to most unauthorized migrants living in the United States. And given that only Congress can confer such status, it is hard to understand why the President's limited relief programs would somehow eliminate the pressure for future congressional action on immigration reform.

Recent history ultimately suggests that Congress would not have acted on immigration, even if President Obama had not pursued his relief initiatives. Generally speaking, the partisanship reflected in the debate over deferred action dominates the relationship between the branches, making it unlikely that continuation of the pre-DAPA and DACA status quo would have resulted in more meaningful cross-branch debate. But even so, when turning to executive branch policymaking as a viable alternative to congressional stasis, we should not lose sight of what can be lost when the Executive becomes the primary engine of policy—not just the open and transparent decision making more likely to come from a less disciplined but more multi-faceted congressional debate, but also the *collaboration* between Congress and the Executive that defines any legislative process.

To be clear, we do not mean to suggest that executive policymaking as a general matter is always a second best option to congressional action. We hope that our arguments in Part II, highlighting the dynamic, iterative conception of the separation of powers and the role the enforcement power plays in shaping a regulatory domain over time, shine through as reasons to appreciate executive policymaking within a proper and healthy distribution of powers. But we also believe that, when the President must take bold action to address threats to the rule of law within the domain of enforcement, a more fundamental recalibration of political branch responsibilities may be necessary.

CONCLUSION

Presidential immigration law is ascendant. The dominant policymaking role long played by the President, combined with the twentieth-century rise of de facto delegation, destabilizes a simple principal-agent model as a way of understanding the separation of powers in immigration regulation. These developments have produced an immigration regime in which the President has significant *responsibility* for—not just power over—the rules for screening immigrants. The Executive Branch has actually helped construct the screening system over time as it has wielded its enforcement power and decided how to put the INA's statutory framework into effect—a process that has entailed considerable executive policymaking dynamically related to, but still separate from, congressional policy. The separation-of-powers framework that emerges from this history is thus far from static. De facto delegation has not entailed a simple transfer of power from one branch to another; as we have documented

here and in our 2009 work, the structure of modern immigration law has produced an iterative relationship between the branches in which Congress has played an important, if not dominant, role. Without both an awareness of and appreciation for these dynamics, the President's immigration enforcement power cannot be properly understood—let alone cabined.

The separation-of-powers framework we have uncovered is not just an institutional reality to be bemoaned. We believe there are reasons to accept, and even to endorse, presidential policymaking through enforcement, perhaps especially in the immigration context. Such acceptance does not mean that the President's (and the agencies') exercise of discretion should go entirely unchecked. But it does suggest that the constraint in most cases will not come from an inquiry into whether the substantive policy choices embodied in enforcement initiatives such as DACA and DAPA promote congressional priorities. In place of that sort of doomed Take Care Clause inquiry, enforcement policies should be evaluated for whether they make reasonable rule-of-law tradeoffs and thereby advance the general purposes of the constitutional separation of powers—constraining and rendering accountable government power.

Crucially, this rule-of-law inquiry requires that one attend as much to relationships of power *within* the branches as *across* them, as a growing body of scholarly work has come to appreciate with respect to the administrative state as a whole. Within this framework, we think it clear that the Obama relief initiatives are lawful. By using rules to centralize discretionary decision making, DACA and DAPA make visible the political and policy choices the Executive Branch has made while enhancing the consistency of the government's use of its coercive powers. Further, the initiatives tame the faceless prosecutor by imposing politically accountable constraints on the decisions of low-level officials. Critics have argued that the programs are dangerous because they permit the President to replace Congress's judgments with his own. In reality, however, the relief initiatives have enabled him to discipline the judgments of low-level enforcement officials, bringing order and discipline, along with his own substantive preferences, to an immigration enforcement regime in which the Executive has significant responsibility for the structure of screening. Advocates for the President's actions who tout the virtues of "individualized" prosecutorial discretion in this setting obscure the institutional reality of how that discretion has operated in immigration law, and they distract attention from the crucial benefits that flow from the way that DACA and DAPA actually centralize and *limit* discretionary judgments.

Presidential policymaking has always provoked political controversy, at least as much because of deep ideological disagreements over immigration policy as because of the perception it creates of an aggressive or boundless Executive. The fact that today's particular controversy over the Obama relief

initiatives has vivid partisan overtones is not to say that limits on policymaking through enforcement do not exist, even when they do not appear visibly or clearly in the statutes that set the parameters for executive action. But those limits will be excruciatingly difficult to define without disabling legitimate and desirable executive action, given the inevitability of enforcement discretion and the values-based judgments that attend it. The bright-line rules critics have offered may have the appeal of ease of application, but they constrain executive power in ways that are neither constitutionally required nor necessarily consistent with the goal of keeping executive power in check. The separation of powers ultimately amounts to a messy political contest, and the search for clear, lawyerly lines to draw around the powers of the branches, we have come to believe, is misguided. Even if the current lawsuits succeed in scuttling the Obama initiatives, the imperatives of enforcement will not disappear, and any President will respond to those imperatives while pursuing his own objectives. We can only hope that he has the necessary freedom to structure the enforcement power in ways that serve the goals of accountability and constraint, and that he faces public and congressional pressure to do precisely that.

Secretary
U.S. Department of Homeland Security
Washington, DC 20528

Homeland Security

November 20, 2014

MEMORANDUM FOR: León Rodríguez
Director
U.S. Citizenship and Immigration Services

Thomas S. Winkowski
Acting Director
U.S. Immigration and Customs Enforcement

R. Gil Kerlikowske
Commissioner
U.S. Customs and Border Protection

FROM: Jeh Charles Johnson
Secretary

SUBJECT: **Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents**

This memorandum is intended to reflect new policies for the use of deferred action. By memorandum dated June 15, 2012, Secretary Napolitano issued guidance entitled *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*. The following supplements and amends that guidance.

The Department of Homeland Security (DHS) and its immigration components are responsible for enforcing the Nation's immigration laws. Due to limited resources, DHS and its Components cannot respond to all immigration violations or remove all persons illegally in the United States. As is true of virtually every other law enforcement agency, DHS must exercise prosecutorial discretion in the enforcement of the law. Secretary Napolitano noted two years ago, when she issued her prosecutorial discretion guidance regarding children, that "[o]ur Nation's immigration laws must be enforced in a strong and sensible manner. They are not designed to be blindly enforced without consideration given to the individual circumstances of each case."

Deferred action is a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time.[1] A form of administrative relief similar to deferred action, known then as "indefinite voluntary departure," was originally authorized by the Reagan and Bush Administrations to defer the deportations of an estimated 1.5 million undocumented spouses and minor children who did not qualify for legalization under the *Immigration Reform and Control Act* of 1986. Known as the "Family Fairness" program, the policy was specifically implemented to promote the humane enforcement of the law and ensure family unity.

Deferred action is a form of prosecutorial discretion by which the Secretary deprioritizes an individual's case for humanitarian reasons, administrative convenience, or in the interest of the Department's overall enforcement mission. As an act of prosecutorial discretion, deferred action is legally available so long as it is granted on a case-by-case basis, and it may be terminated at any time at the agency's discretion. Deferred action does not confer any form of legal status in this country, much less citizenship; it simply means that, for a specified period of time, an individual is permitted to be lawfully present in the United States. Nor can deferred action itself lead to a green card. Although deferred action is not expressly conferred by statute, the practice is referenced and therefore endorsed by implication in several federal statutes.[2]

Historically, deferred action has been used on behalf of particular individuals, and on a case-by-case basis, for classes of unlawfully present individuals, such as the spouses and minor children of certain legalized immigrants, widows of U.S. citizens, or victims of trafficking and domestic violence.[3] Most recently, beginning in 2012, Secretary Napolitano issued guidance for case-by-case deferred action with respect to those who came to the United States as children, commonly referred to as "DACA."

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[1] Deferred action, in one form or another, dates back to at least the 1960s. "Deferred action" per se dates back at least as far as 1975. *See,* Immigration and Naturalization Service, Operation Instructions § 103.1(a)(1)(ii) (1975).

[2] INA § 204(a)(1)(D)(i)(II), (IV) *(Violence Against Women Act (VAWA) self-petitioners not in removal proceedings are "eligible for deferred action and employment authorization");* INA § 237(d)(2) *(DHS may grant stay of removal to applicants for T or U visas but that denial of a stay request "shall not preclude the alien from applying for . . . deferred action")*; REAL ID Act of 2005 § 202(c)(2)(B)(viii), Pub. L. 109-13 *(requiring states to examine documentary evidence of lawful status for driver's license eligibility purposes, including "approved deferred action status")*; National Defense Authorization Act for Fiscal Year 2004 § 1703(c) (d) Pub. L. 108-136 *(spouse, parent or child of certain U.S. citizen who died as a result of honorable service may self-petition for permanent residence and "shall be eligible for deferred action, advance parole, and work authorization").*

[3] In August 2001, the former-Immigration and Naturalization Service issued guidance providing deferred action to individuals who were eligible for the recently created U and T visas. Two years later, USCIS issued subsequent guidance, instructing its officers to use existing mechanisms like deferred action for certain U visa applicants facing potential removal. More recently, in June 2009, USCIS issued a memorandum providing deferred action to certain surviving spouses of deceased U.S. citizens and their children while Congress considered legislation to allow these individuals to qualify for permanent residence status.

By this memorandum, I am now expanding certain parameters of DACA and issuing guidance for case-by-case use of deferred action for those adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities, as set forth in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum.

The reality is that most individuals in the categories set forth below are hard-working people who have become integrated members of American society. Provided they do not commit serious crimes or otherwise become enforcement priorities, these people are extremely unlikely to be deported given this Department's limited enforcement resources—which must continue to be focused on those who represent threats to national security, public safety, and border security. Case-by-case exercises of deferred action for children and long-standing members of American society who are not enforcement priorities are in this Nation's security and economic interests and make common sense, because they encourage these people to come out of the shadows, submit to background checks, pay fees, apply for work authorization (which by separate authority I may grant), and be counted.

A. Expanding DACA

DACA provides that those who were under the age of 31 on June 15, 2012, who entered the United States before June 15, 2007 (5 years prior) as children under the age of 16, and who meet specific educational and public safety criteria, are eligible for deferred action on a case-by-case basis. The initial DACA announcement of June 15, 2012 provided deferred action for a period of two years. On June 5, 2014, U.S. Citizenship and Immigration Services (USCIS) announced that DACA recipients could request to renew their deferred action for an additional two years.

In order to further effectuate this program, I hereby direct USCIS to expand DACA as follows:

Remove the age cap. DACA will apply to all otherwise eligible immigrants who entered the United States by the requisite adjusted entry date before the age of sixteen (16), regardless of how old they were in June 2012 or are today. The current age restriction excludes those who were older than 31 on the date of announcement (*i.e.*, those who were born before June 15, 1981). That restriction will no longer apply.

Extend DACA renewal and work authorization to three-years. The period for which DACA and the accompanying employment authorization is granted will be extended to three-year increments, rather than the current two-year increments. This change shall apply to all first-time applications as well as all applications for renewal effective November 24, 2014. Beginning on that date, USCIS should issue all work

authorization documents valid for three years, including to those individuals who have applied and are awaiting two-year work authorization documents based on the renewal of their DACA grants. USCIS should also consider means to extend those two-year renewals already issued to three years.

Adjust the date-of-entry requirement. In order to align the DACA program more closely with the other deferred action authorization outlined below, the eligibility cut-off date by which a DACA applicant must have been in the United States should be adjusted from June 15, 2007 to January 1, 2010.

USCIS should begin accepting applications under the new criteria from applicants no later than ninety (90) days from the date of this announcement.

B. Expanding Deferred Action

I hereby direct USCIS to establish a process, similar to DACA, for exercising prosecutorial discretion through the use of deferred action, on a case-by-case basis, to those individuals who:

- have, on the date of this memorandum, a son or daughter who is a U.S. citizen or lawful permanent resident;
- have continuously resided in the United States since before January 1, 2010;
- are physically present in the United States on the date of this memorandum, *and* at the time of making a request for consideration of deferred action with USCIS;
- have no lawful status on the date of this memorandum;
- are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

Applicants must file the requisite applications for deferred action pursuant to the new criteria described above. Applicants must also submit biometrics for USCIS to conduct background checks similar to the background check that is required for DACA applicants. Each person who applies for deferred action pursuant to the criteria above shall also be eligible to apply for work authorization for the period of deferred action, pursuant to my authority to grant such authorization reflected in section 274A(h)(3) of

the Immigration and Nationality Act.[4] Deferred action granted pursuant to the program shall be for a period of three years. Applicants will pay the work authorization and biometrics fees, which currently amount to $465. There will be no fee waivers and, like DACA, very limited fee exemptions.

USCIS should begin accepting applications from eligible applicants no later than one hundred and eighty (180) days after the date of this announcement. As with DACA, the above criteria are to be considered for all individuals encountered by U.S. Immigration and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), or USCIS, whether or not the individual is already in removal proceedings or subject to a final order of removal. Specifically:

- ICE and CBP are instructed to immediately begin identifying persons in their custody, as well as newly encountered individuals, who meet the above criteria and may thus be eligible for deferred action to prevent the further expenditure of enforcement resources with regard to these individuals.

- ICE is further instructed to review pending removal cases, and seek administrative closure or termination of the cases of individuals identified who meet the above criteria, and to refer such individuals to USCIS for case-by-case determinations. ICE should also establish a process to allow individuals in removal proceedings to identify themselves as candidates for deferred action.

- USCIS is instructed to implement this memorandum consistent with its existing guidance regarding the issuance of notices to appear. The USCIS process shall also be available to individuals subject to final orders of removal who otherwise meet the above criteria.

Under any of the proposals outlined above, immigration officers will be provided with specific eligibility criteria for deferred action, but the ultimate judgment as to whether an immigrant is granted deferred action will be determined on a case-by-case basis.

This memorandum confers no substantive right, immigration status or pathway to citizenship. Only an Act of Congress can confer these rights. It remains within the authority of the Executive Branch, however, to set forth policy for the exercise of prosecutorial discretion and deferred action within the framework of existing law. This memorandum is an exercise of that authority.

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[4] INA § 274A(h)(3), 8 U.S.C. § 1324a(h)(3) ("As used in this section, the term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the[Secretary]."); 8 C.F.R. § 274a.12 (regulations establishing classes of aliens eligible for work authorization).