

NEW YORK UNIVERSITY SCHOOL OF LAW

**SPRING 2015**  
COLLOQUIUM ON TAX POLICY  
AND PUBLIC FINANCE

**“The Case for Categorical Nonenforcement”**

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**March 24, 2015**  
NYU Law School  
Vanderbilt Hall-208  
Time: 4:00-5:50 p.m.  
Number 8

## **SCHEDULE FOR 2015 NYU TAX POLICY COLLOQUIUM**

(All sessions meet on Tuesdays from 4-5:50 pm in Vanderbilt 208, NYU Law School)

1. January 20 – Brigitte C. Madrian, Harvard Kennedy School. “Does Front-Loading Taxation Increase Savings? Evidence from Roth 401(k) Introductions.”
2. January 27 – David Kamin, NYU Law School. "In Good Times and Bad: Designing Legislation That Responds to Fiscal Uncertainty."
3. February 3 – Kimberly Blanchard, Weil, Gotshal & Manges. "The Tax Significance of Legal Personality: A U.S. View."
4. February 10 – Eric Toder, Urban Institute. “What the United States Can Learn From Other Countries’ Territorial Tax Systems.”
5. February 24 - Linda Sugin, Fordham University, School of Law. “Invisible Taxpayers.”
6. March 3 – Ruth Mason, University of Virginia Law School. “Citizenship Taxation.”
7. March 10 – George Yin, University of Virginia Law School. “Protecting Taxpayers from Congressional Lawbreaking.”
8. March 24 – Leigh Osofsky, University of Miami School of Law, “The Case for Categorical Nonenforcement.”
9. March 31 – Shu-Yi Oei, Tulane Law School. “Can Sharing Be Taxed?”
10. April 7 – Lillian Mills, University of Texas Business School. “Managerial Characteristics and Corporate Taxes.”
11. April 14 – Lawrence Zelenak, Duke University School of Law. “Up in the Air over the Taxation of Frequent Flyer Benefits: the American, Canadian, and Australian Experiences.”
12. April 21 – David Albouy, University of Illinois Economics Department. “Should we be taxed out of our homes? Leisure and housing as complements and optimal taxation.”
13. April 28 – David Schizer, Columbia Law School. “Tax and Energy Policy.”
14. May 5 – Gregg Polsky, University of North Carolina School of Law, "Private Equity Tax Games and Their Implications for Tax Practitioners, Enforcers, and Reformers."

## The Case for Categorical Nonenforcement

Leigh Osofsky<sup>1</sup>

### Abstract

Executive nonenforcement of the law is a hot-button issue. An important question that has surfaced in the debate about such nonenforcement is whether categorical, or complete, prospective nonenforcement of the law is legitimate. A variety of scholars and commentators have suggested that it is not. This Article contests such claims by applying theories of agency legitimacy to the realities of IRS nonenforcement of the tax law. Doing so reveals that in some circumstances categorical nonenforcement may actually increase the legitimacy of the IRS's nonenforcement. Categorical nonenforcement can serve as a particularly salient means of communicating nonenforcement decisions, which may lead to greater political accountability, increasing the legitimacy of nonenforcement under the political accountability theory of agency legitimacy. Also owing to its ability to make enforcement decisions particularly salient, categorical nonenforcement may yield greater public deliberation, increasing the legitimacy of nonenforcement under the civic republican theory of agency legitimacy. Categorical nonenforcement also can serve as a practical (though perhaps not legally enforceable) means for high-level officials to commit the agency to a policy of nonenforcement, which may increase the legitimacy of nonenforcement under the nonarbitrariness theory of agency legitimacy. Categorical nonenforcement, of course, may not always be legitimacy enhancing, nor does this Article attempt to claim that it is. Rather, this Article fundamentally claims that viewing nonenforcement through the lens of agency legitimacy may help apply core values of democratic governance, which are obscured or missed by the existing analyses, to agencies' inevitable, systematic nonenforcement of the law.

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## I. Introduction

Recent presidential administrations have engaged in high-profile nonenforcement of the law, including, in the current administration, nonenforcement of immigration laws, federal marijuana laws, and parts of the Patient Protection and Affordable Care Act.<sup>2</sup> In response to such nonenforcement, commentators have begun asking what would happen if a future President decided not to enforce the tax laws. Could a President decide not to enforce the estate tax, the income tax with respect to millionaires, or the income tax for anyone who has paid a specified percentage of income in taxes?<sup>3</sup>

In answering this question, constitutional scholars have suggested that the President cannot declare categorical, or complete, prospective nonenforcement of some aspect of the law.<sup>4</sup> Even commentators supportive of recent nonenforcement initiatives have suggested as much, drawing a distinction between setting low enforcement priorities and categorical nonenforcement, and arguing that the former is permissible, while the latter, by negative implication, is not.<sup>5</sup> Constitutional scholars have drawn a number of other distinctions to try to explain when nonenforcement is permissible, explaining that it may be permissible if motivated by enforcement resource limitations but not if it is motivated by policy, and it may be permissible if time limited.<sup>6</sup> The implication of all of these distinctions is a presumption against categorical nonenforcement. Recent tax literature examining IRS pronouncements that it will not enforce very particular aspects of the tax law has also concluded that categorical tax law nonenforcement is troublesome from the perspective of the rule of law.<sup>7</sup>

What has been missing in the existing discussion, especially in the preoccupation with flashy, yet relatively infrequent, presidential nonenforcement of the law, is a broad-based examination of the

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<sup>2</sup> For more details regarding these instances, see *infra* text accompanying notes 10-14.

<sup>3</sup> See, e.g., Jonathan Chait, *Obama's Immigration Plan Should Scare Liberals Too*, N.Y. MAG., Aug. 11, 2014 (asking, "What if a Republican President announced that he would stop enforcing the payment of estate taxes?"); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of the Immigration Laws, the Dream Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (asking, "Can a President who wants tax cuts that a recalcitrant Congress will not enact decline to enforce the income tax laws?"); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 688 (2014) (asking whether a President lawfully could decline to enforce the capital gains or estate taxes). Recently, George Stephanopoulos asked President Obama himself, *President Obama Defends Use of Executive Action on Immigration* (Nov. 23, 2014), available at <http://abcnews.go.com/blogs/politics/2014/11/president-obama-defends-use-of-executive-action-on-immigration/>.

<sup>4</sup> This conclusion has applied to criminal and civil law. See *infra* text accompanying notes 15-17.

<sup>5</sup> See *infra* note 17.

<sup>6</sup> See *infra* text accompanying notes 18-19.

<sup>7</sup> See *infra* text accompanying notes 25-28.

endemic nonenforcement that is directed by administrative agencies, and an accompanying examination of such agency nonenforcement through the lens of agency legitimacy. A long and extensive literature regarding agency legitimacy seeks to justify agencies making significant decisions about legal rights and obligations, and this literature offers important insights about agency nonenforcement decisions. This Article brings this literature to bear by applying theories regarding agency legitimacy to tax law nonenforcement directed by the IRS. This examination reveals that, for a number of reasons, when the IRS is inevitably going to be engaging in tax law nonenforcement, categorical nonenforcement may actually help legitimate the nonenforcement.

The IRS inevitably must make nonenforcement decisions on a daily basis because it is tasked with administering many more tax laws against many more taxpayers than its resources allow. As a result, like other administrative agencies as well as prosecutors, the IRS must choose which tax laws to enforce or which taxpayers to enforce against at any point in time. The IRS can make such decisions in a variety of ways. The IRS can decide to engage in complete, prospective nonenforcement of certain aspects of the tax law for a period of time or until future notice (“categorical nonenforcement”). Alternatively, the IRS may focus enforcement resources on particular tax issues or taxpayers (“setting priorities”). Finally, the IRS may nominally maintain a policy of enforcing all tax laws, leaving discretion to individual revenue agents to make enforcement decisions (“case-by-case” decisionmaking). In a world of insufficient enforcement resources, each method of allocating enforcement resources results in nonenforcement of some aspects of the tax law against at least some taxpayers at any given time.

Moreover, the IRS must make at least some high-level decisions regarding tax law nonenforcement. Different types of taxpayers, vastly different costs / yields for different taxpayer types and tax issues, and a sprawling administrative agency all necessitate at least some amount of high-level, systematic allocation of limited enforcement resources. As a result, the IRS must rely on at least some amount of either categorical decisionmaking or setting priorities to direct enforcement resources. The consequence is that nonenforcement of the tax law will not be spread evenly among taxpayers, but rather will be systematically concentrated on certain taxpayers and tax issues.

This tax law nonenforcement landscape that is occurring every day on the ground at the hands of the IRS relates to a deeper question about agency legitimacy. Scholars have wrestled for decades with the uncomfortable role administrative agencies play in United States constitutional democracy, because agencies’ expansive role in the government is not contemplated in the Constitution, and agencies make significant policy decisions about rights and obligations under the law even though they

are not elected to do so.<sup>8</sup> Scholars have developed a number of theories to help explain how agencies can legitimately play this role. Three prominent theories are the political accountability theory, the civic republican theory, and the nonarbitrariness theory. These theories posit, respectively, that agency action is legitimate if: (1) it is subject to the control of the politically accountable branches, (2) it is the product of a deliberative process designed to reach consensus about the common good through reasoned deliberation, and (3) it is nonarbitrary, or rational, predictable, and fair.<sup>9</sup> These theories attempt to apply core principles of democratic governance, which arguably are rooted in fundamental U.S. constitutional values, to the realities of the present day administrative state.

Applying these theories of agency legitimacy to the realities of tax law nonenforcement reveals that in some circumstances categorical nonenforcement may actually increase the legitimacy of the IRS's nonenforcement. Categorical nonenforcement can serve as a particularly salient means of communicating enforcement decisions, which may lead to greater political accountability, increasing the legitimacy of nonenforcement under the political accountability theory. Also owing to its ability to make enforcement decisions particularly salient, categorical nonenforcement may yield greater public deliberation, increasing the legitimacy of nonenforcement under the civic republican theory. Categorical nonenforcement also can serve as a practical (though perhaps not legally enforceable) means for high-level officials to commit the agency to a policy of nonenforcement, which may increase the legitimacy of nonenforcement under the nonarbitrariness theory. Categorical nonenforcement, of course, may not always be legitimacy enhancing, nor does this Article attempt to claim that it is. Rather, this Article fundamentally claims that viewing nonenforcement through the lens of agency legitimacy may help apply core values of democratic governance, which are obscured or missed by the existing analyses, to agencies' inevitable, systematic nonenforcement of the law.

Moreover, focusing on the realities of agency nonenforcement reveals significant limitations of the existing constitutional and rule of law analyses of nonenforcement. In delineating what is acceptable executive nonenforcement, both the existing constitutional and rule of law lenses rely on formal distinctions (such as distinctions between categorical nonenforcement and setting priorities, or between nonenforcement motivated by enforcement resource limitations and nonenforcement motivated by policy) that do not hold up well against the realities of agency nonenforcement. In part by

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<sup>8</sup> See *infra* text accompanying notes 65-67.

<sup>9</sup> See *infra* text accompanying notes 69-96.

highlighting the limitations of the existing analyses, this Article will hopefully underscore how the lens of agency legitimacy may help prompt a deeper consideration of the values of legitimate nonenforcement.

## II. Existing Analyses of Categorical Nonenforcement

Recent, high-profile presidential nonenforcement initiatives have focused scholars' attention on executive nonenforcement. Such initiatives include: (1) the Obama Administration's Deferred Action for Childhood Arrivals "DACA" program, which dictated how the Department of Homeland Security ("DHS") should exercise its prosecutorial discretion with respect to the immigration laws for certain young immigrants who meet various requirements,<sup>10</sup> (2) its expansion of such immigration policies in the form of Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") and an accompanying expansion of DACA,<sup>11</sup> (3) its guidance regarding how the federal government should exercise its prosecutorial discretion with regard to the enforcement of federal marijuana laws,<sup>12</sup> and (4) announcements that enforcement of certain provisions of the Patient Protection and Affordable Care Act<sup>13</sup> would be delayed as a means of providing transition relief for various requirements of the Act.<sup>14</sup>

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<sup>10</sup> See Memorandum from Janet Napolitano, Sec'y of Homeland Sec., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter *Napolitano Memo*].

<sup>11</sup> *Transcript: Obama's Immigration Speech*, WASH. POST (Nov. 20, 2014), [http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340\\_story.html](http://www.washingtonpost.com/politics/transcript-obamas-immigration-speech/2014/11/20/14ba8042-7117-11e4-893f-86bd390a3340_story.html) [hereinafter *Obama Speech Transcript*]; Jeh Charles Johnson, Sect'y, D.H.S., *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* 3 (Nov. 20, 2014), [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [hereinafter *Johnson Memo*].

<sup>12</sup> See, e.g., Memorandum from James M. Cole, Deputy Att'y Gen., U.S. Dep't of Justice, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [hereinafter *Cole Marijuana Enforcement Memo*]; Memorandum from James M. Cole, Deputy Att'y Gen., *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011), available at <http://perma.cc/M5A9-6A8C>; Memorandum from David W. Ogden, Deputy Att'y Gen., *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1-2* (Oct. 19, 2009), available at <http://perma.cc/JEV5-E7AQ> [hereinafter *Ogden Memo*].

<sup>13</sup> Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 19 U.S.C., 20 U.S.C., 26 U.S.C. & 42 U.S.C.).

<sup>14</sup> Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs. (Nov. 14, 2013), available at <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf>; I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013); Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014).

Focusing on such initiatives, constitutional scholars have cast doubt on the legitimacy of categorical nonenforcement, in the case of both prosecutorial and administrative nonenforcement. Using various methodologies such as examinations of the Take Care Clause,<sup>15</sup> separation of powers principles, and the historical backgrounds of the Constitution prior to, at the time of, and after the Founding, constitutional scholars have suggested, to varying degrees, that while failure to execute the law in certain cases may be required,<sup>16</sup> complete, prospective nonenforcement is an unconstitutional aggrandizement of executive power.<sup>17</sup> To be sure, constitutional scholars have drawn several other distinctions to explain how certain types of nonenforcement are more acceptable than others. First, scholars have reached a near consensus that policy-based nonenforcement is impermissible, whereas nonenforcement resulting from enforcement resource limitations may be permissible.<sup>18</sup> Second, some

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<sup>15</sup> U.S. Const. art. 2 § 3 (dictating that the President “shall take Care that the Laws be faithfully executed.”).

<sup>16</sup> Scholars have often agreed that some amount of executive discretion regarding enforcement is inherent in the executive power. See, e.g., Price, *supra* note 3, at 675 (acknowledging that “some degree of enforcement discretion is a natural incident of the core executive function” and that such discretion is essential to protect liberty). As a result, this Article does not push this point, but rather accepts it as a working assumption. The question of interest is whether categorical nonenforcement is a legitimate means of exercising such discretion.

<sup>17</sup> Constitutional scholars have drawn the line in different places in reaching this conclusion. For instance, some scholars have argued that a “deliberate decision to leave a substantial area of statutory law unenforced or underenforced is a serious breach of presidential duty.” Delahunty & Yoo, *supra* note 3, at 785. Others have determined that there is “a presumption against presidential authority to license legal violations or categorically abstain from enforcement.” Price, *supra* note 3, at 689. Indeed, even those supportive of President Obama’s policies have implicitly cast doubt on the legitimacy of categorical nonenforcement by claiming that the Obama Administration has not engaged in categorical nonenforcement, but rather simply was setting priorities. See, e.g., Brian Beutler, *The Liberal Fear of Obama’s Executive Action is Irrational*, NEW REPUBLIC (Aug. 12, 2014), <http://www.newrepublic.com/article/119057/obama-immigration-policy-critics-have-irrational-fear-precedent>; Eric A. Posner, *Obama Is Legally Allowed to Enforce – or Not Enforce – the Law*, NEW REPUBLIC (Aug. 3, 2014), <http://www.newrepublic.com/article/118951/obamas-immigration-policy-lawful-he-can-enforce-what-he-wants>.

Two constitutional scholars have provided some support for categorical nonenforcement. In a recent article, Professor Sant’ Ambrogio discusses some of the benefits of what he calls an extra-legislative veto, which includes, among many other things, the President’s ability not to enforce the law. Michael Sant’ Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 361 (2014). Addressing President Obama’s immigration nonenforcement policies in passing in an even more recent article, Professor Metzger briefly mentioned benefits of categorical nonenforcement. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. (forthcoming 2015) (manuscript at 72-73), available at [http://web.law.columbia.edu/sites/default/files/microsites/constitutional-governance/metzger\\_constitutional\\_duty\\_to\\_supervise\\_11-15\\_draft\\_1.pdf](http://web.law.columbia.edu/sites/default/files/microsites/constitutional-governance/metzger_constitutional_duty_to_supervise_11-15_draft_1.pdf). Both Professor Sant’ Ambrogio and Professor Metzger focus principally on presidentially directed nonenforcement and neither sets forth a framework for analyzing nonenforcement through the lens of agency legitimacy, or provides detailed examples or analyses of agency nonenforcement through such lens or through the alternative lenses. This Article engages in this project.

<sup>18</sup> See, e.g., Rachel E. Barkow, *Clemency and the Unitary Executive* 39 (NYU Pub. Law & Legal Theory Research Paper Series No. 14-38), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2484586](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2484586); Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 265 (2003); Delahunty & Yoo, *supra* note 3, at 850; Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1216-17 (2014); Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 119

scholars have suggested that time-limited nonenforcement may be more permissible than nonenforcement not so limited.<sup>19</sup> In any event, constitutional scholars have set forth a general presumption that categorical nonenforcement, and in particular policy-based categorical nonenforcement or categorical nonenforcement that is not time limited, is deeply problematic.

Indeed, this view is so dominant that it seems to have motivated and shaped the Obama Administration's own framing of its nonenforcement policies. In the context of DACA, for example, the memo announcing the program repeatedly emphasizes that it is simply a means of setting priorities, for instance by stating that the memo is meant to ensure that "our enforcement resources are not expended on these low priority cases but are instead appropriately focused on people who meet our enforcement priorities."<sup>20</sup> The memo even tries to eschew any sense that it sets forth a policy of categorical nonenforcement by stating that any relief from enforcement pursuant to the memorandum will be decided "on a case by case basis."<sup>21</sup> President Obama has also emphasized that "[t]his is not a permanent fix, but rather a temporary stop-gap measure . . . ."<sup>22</sup> In his announcement regarding his more expansive immigration initiative, President Obama similarly emphasized that "We'll prioritize, just like law enforcement does every day,"<sup>23</sup> a sentiment echoed in the relevant Department of Homeland Security memorandum delineating the policies, which carefully used case by case and priorities language.<sup>24</sup> By couching such policies in the language of setting priorities, the Obama Administration has implicitly reflected the view that uncabined categorical nonenforcement is particularly suspect.

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(2000). Love and Garg take a slightly different view on this point than many others, in that they suggest that policy goals for nonenforcement are problematic to the extent that the President chose inaction to promote "his own policy goals at the expense of Congress's." Love & Garg, *supra*, at 1220.

<sup>19</sup> Sant' Ambrogio, *supra* note 17, at 403. Professor Posner has suggested that time limitations on nonenforcement make a difference, explaining that, "The president cannot suspend or change the law: When he leaves office, the law will remain the same as it was, and the next president will be free to enforce it or not." Posner, *supra* note 17.

<sup>20</sup> *Napolitano Memo*, *supra* note 10, at 1.

<sup>21</sup> *Id.* at 2.

<sup>22</sup> Barack Obama, *A Nation of Laws and a Nation of Immigrants*, TIME, June 17, 2012, <http://ideas.time.com/2012/06/17/A-NATION-OF-LAWS-AND-A-NATION-OF-IMMIGRANTS/>.

<sup>23</sup> *Obama Speech Transcript*, *supra* note 11.

<sup>24</sup> *Johnson Memo*, *supra* note 11, at 3 ("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 . . . ."). The Office of Legal Counsel opinion repeatedly emphasizes that the new policy merely sets priorities and still allows case-by-case discretion. See, e.g., Karl R. Thompson, Principal Deputy Ass't Atty. Gen., O.L.C., *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* 28 (Nov. 19, 2014),

There is a separate, recent line of literature in the tax context that has focused on the impropriety of categorical nonenforcement by the IRS, although it has not been in conversation with the constitutional dialogue regarding presidential nonenforcement. Most notably, in a series of articles, Professor Zelenak has explored “customary deviations,” which he defines as, “an established practice of the tax administrators (the IRS and the Treasury Department) that deviates from the clear dictates of the Internal Revenue Code.”<sup>25</sup> Professor Zelenak describes customary deviations as distinct from “simple underenforcement of the law without any indication (beyond the mere underenforcement) that the IRS acquiesces in widespread noncompliance,”<sup>26</sup> making Professor Zelenak’s customary deviations akin to the categorical nonenforcement discussed in this Article.<sup>27</sup> Professor Zelenak concludes that “[t]o anyone who takes the rule of law seriously, it is troubling to contemplate that the Treasury and the IRS are almost unconstrained in their ability to make de facto revisions to the Internal Revenue Code.”<sup>28</sup>

### III. Inevitable, Systematic Tax Law Nonenforcement at the Hands of the IRS

What existing analyses have not done is analyze executive nonenforcement of the law by contemplating how theories of agency legitimacy apply to the realities of agency nonenforcement. This Article engages in this analysis, motivated by the belief that, while it is all well and good for commentators engaged in a high-stakes political debate to imagine the President slashing the income tax through nonenforcement, a comprehensive evaluation of executive nonenforcement should be rooted at least in part in the realities of agency nonenforcement that occur on a daily basis.

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<http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter *OLC Opinion*] (“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.”). For similar caveats in other nonenforcement initiatives, see, for example, Cole, *Marijuana Enforcement Memo*, *supra* note 12, at 1-2, 4; *Ogden Memo*, *supra* note 12, at 1-2; *supra* note 14 (delineating all of the temporary relief under the ACA as transitional and therefore time limited).

<sup>25</sup> Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 833 (2012) [hereinafter *Custom and the Rule of Law*]; see also Lawrence Zelenak, *Up in the Air Over Taxing Frequent Flier Benefits: The American, Canadian, and Australian Experiences*, CAPITAL MARKETS L.J. (forthcoming), available at [http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6012&context=faculty\\_scholarship](http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=6012&context=faculty_scholarship) [hereinafter *Up in the Air*].

<sup>26</sup> Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 834.

<sup>27</sup> Indeed, Professor Zelenak focuses heavily on the example of frequent flier miles earned on business trips paid for by the taxpayer’s employer but used for personal purposes that will also be discussed to some extent in this Article. Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 830-32.

<sup>28</sup> *Id.* at 851.

To delve into these realities, let us begin by indulging for a moment more in another imaginary exercise. Imagine that, at the Hogwart's School of Witchcraft and Wizardry, Hermione Granger faces the following question on a final exam in her Muggle (*i.e.*: non-wizard human) studies class:<sup>29</sup> Would the following items have to be included in income for U.S. tax purposes: wages received by an employee of a large business, payments for services made to a large partnership by a subsidiary partnership, and frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes? Hermione is an extremely diligent student particularly well known for her attention to detail. After doing a search to find the source of U.S. tax law, Hermione turns to the Internal Revenue Code ("Code") enacted by Congress. The governing Code section dictates that "gross income means all income from whatever source derived."<sup>30</sup> Being the excellent student that she is, Hermione confirms that the Treasury Regulations affirm and expand on Congress's already expansive definition,<sup>31</sup> and even finds landmark cases interpreting the governing Code section such as *Glenshaw Glass*, which inclusively describes gross income as any "accessions to wealth, clearly realized . . . over which the taxpayers have complete dominion."<sup>32</sup> Hermione, having done an impressive amount of due diligence, answers that all of the items have to be included in income for U.S. tax purposes.

Unfortunately, Hermione would be wrong. Well, not wrong, exactly. Technically, under the Code and all binding legal authorities, all of the items listed should be considered income for tax purposes. With respect to wages received by an employee of a large business and payments for services made to a large partnership by a subsidiary partnership, the Code section defining gross income (as "all income from whatever source derived") controls, and there is no colorable claim for an exclusion. While there might be some claim that the frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes qualify for an exclusion from gross income as a "de minimis fringe,"<sup>33</sup> the general consensus of the many scholars that have weighed in on the question is that this exclusion does not apply and /or that the miles constitute gross income,<sup>34</sup> and the IRS has not

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<sup>29</sup> Those who are not familiar with Hermione Granger and the Hogwart's School of Witchcraft and Wizardry can read the Harry Potter stories or find my son, who will recount them endlessly.

<sup>30</sup> I.R.C. § 61.

<sup>31</sup> Treas. Reg. § 1.61-1(a).

<sup>32</sup> *Commissioner v. Glenshaw Glass*, 438 U.S. 426, 431 (1955).

<sup>33</sup> I.R.C. 132(e)(1).

<sup>34</sup> See Zelenak, *Up in the Air*, *supra* note 25, at 4-5 n. 8.

claimed otherwise.<sup>35</sup> However, a particularly sophisticated answer to this tax question would have to consider the law on the ground as well as the law on the books. In practice some, more than others, are likely to be included in income or be subject to challenge as a result of non-inclusion. In other words, the IRS will not enforce inclusion in all cases that the Code at the very least arguably calls for it.

Indeed, evidence of this nonenforcement exists. For example, recent evidence suggests the IRS underenforces the tax law against large partnerships. The IRS's audit rate of large partnerships (which are defined as partnerships having \$100 million or more in assets and 100 or more direct and indirect partners<sup>36</sup>) has recently been a staggeringly low .8%,<sup>37</sup> even though IRS agents and other knowledgeable parties suggest that these partnerships have high tax noncompliance potential<sup>38</sup> and engage in aggressive noncompliant behavior.<sup>39</sup> Indeed, a major tax publication's claim that "[t]hese audit proof partnerships essentially shield the partner's income and deductions from challenge by the IRS"<sup>40</sup> echoes the case of IRS nonenforcement. In the case of frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes, the only evidence needed to demonstrate the IRS's nonenforcement is the agency's own statement that it will not "assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel."<sup>41</sup> Here, there is complete, prospective, nonenforcement of the tax law.

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<sup>35</sup> See I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621 (in which the IRS indicated that it will not "assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel").

<sup>36</sup> U.S. GENERAL ACCOUNTING OFFICE, GAO-14-746T, LARGE PARTNERSHIPS: GROWING POPULATION AND COMPLEXITY HINDER EFFECTIVE IRS AUDITS, TESTIMONY BEFORE THE PERMANENT SUBCOMM. ON INVESTIGATIONS, COMM. ON HOMELAND SECURITY & GOV'T AFFAIR, U.S. SEN., STATEMENT OF JAMES R. WHITE 2 (Jul. 22, 2014) [hereinafter LARGE PARTNERSHIPS].

<sup>37</sup> *Id.* at 10.

<sup>38</sup> U.S. GENERAL ACCOUNTING OFFICE, GAO-14-732, LARGE PARTNERSHIPS: WITH GROWING NUMBER OF PARTNERSHIPS, IRS NEEDS TO IMPROVE AUDIT EFFICIENCY 21, 25, 26, 30 (Sept. 2014) [hereinafter GROWING NUMBER].

<sup>39</sup> See, e.g., William R. Davis, *Simplification and Compliance are Goals of Partnership Audit Reform*, 2014 TAX NOTES TODAY 204-3 (for statements by Kristine Roth, legislation counsel, Joint Committee on Taxation, suggesting that if auditing rules were changed for partnerships to make the auditing regime simpler, "taxpayers may not take the same aggressive positions as they would if there was not audit risk"); Monte A. Jackel, *Potential Concerns With Auditing Large Partnerships*, 2014 TAX NOTES TODAY 221-15 (identifying large partnership issues). As part of a detailed study of TEFRA, Professor Brock has recently concluded that an overhauled regime "can help increase not only the audit rates of large partnerships but also the change rates of the returns audited." Noel P. Brock, *Auditing Large Partnerships and TEFRA: Where We Are and Where We Are Going*, The University of Chicago 67th Tax Conference 52 (Nov. 7, 2014), <http://www.law.uchicago.edu/files/file/auditinglargepartnershipsandtefra.pdf>.

<sup>40</sup> *Audit Proof: The Other IRS Scandal*, 2014 TAX NOTES TODAY 66-69.

<sup>41</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.

Undergirding the IRS's nonenforcement is the crucial fact that the IRS has vastly insufficient resources to enforce the entirety of the tax law against all taxpayers at all times.<sup>42</sup> In light of the insufficient resources available to the IRS relative to the extent of its enforcement and other tasks, the tax law in practice must reflect a plethora of IRS decisions about when and how to enforce the tax law.<sup>43</sup> Indeed, in this regard, the IRS faces an enforcement dilemma of Congress's own making.<sup>44</sup>

To be sure, in some cases the nonenforcement may reflect not only enforcement resource limitations, but also other considerations, such as uncertainty regarding the scope of the law. Some might distinguish between nonenforcement decisions motivated by uncertainty regarding the scope of the law and nonenforcement decisions that are instead motivated by administrative or other difficulties. For instance, some might argue that in the case of frequent flier miles, the IRS's nonenforcement announcement may have reflected some uncertainty about the extent to which the definition of gross income really does cover such frequent flier miles.<sup>45</sup> This Article does not distinguish between nonenforcement that is motivated by uncertainty about the scope of the law and nonenforcement that is motivated by administrative or other difficulties because, as will be explained in more detail later, drawing these types of distinctions often will be an indeterminate line-drawing exercise.<sup>46</sup> Even more fundamentally, this Article does not attempt to draw this distinction because

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<sup>42</sup> *IRS 2015 Budget Cut Is 'Troubling Development,' Koskinen Says*, 2014 TAX NOTES TODAY 243-12; Testimony of John A. Koskinen Before the Sen. Fin. Comm. 3 (Dec. 10, 2013), *available at* [http://www.finance.senate.gov/imo/media/doc/JAK\\_Opening\\_statement\\_FINAL.PDF](http://www.finance.senate.gov/imo/media/doc/JAK_Opening_statement_FINAL.PDF) ("I have met with every IRS Commissioner from the past 20 years and the consensus was that a major challenge and constraint was the funding limitations they faced. This is a view shared today by the IRS Oversight Board, the Taxpayer Advocate and, most recently, the Treasury Inspector General for Tax Administration (TIGTA) and the Internal Revenue Service Advisory Council."); NATIONAL TAXPAYER ADVOCATE, 2013 ANNUAL REPORT TO CONGRESS, THE IRS DESPERATELY NEEDS MORE FUNDING TO SERVE TAXPAYERS AND INCREASE VOLUNTARY COMPLIANCE 27 (2013) *available at* <http://www.taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/IRS-BUDGET-The-IRS-Desperately-Needs-More-Funding-to-Serve-Taxpayers-and-Increase-Voluntary-Compliance.pdf>.

<sup>43</sup> Stephanie Hoffer, *Hobgoblins of Little Minds No More: Justice Requires an IRS Duty of Consistency*, 2006 UTAH L. REV. 317, 346 (2006) ("Congress has granted discretion to the Service by promulgating a set of revenue laws so voluminous as to be humanly unenforceable."); Lily Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, 99 CORNELL L. REV. ONLINE 41, 41 (2013) ("To perform its Augean task with constrained resources, the IRS must be allowed to exercise discretion.")

<sup>44</sup> In the tax context the insufficient enforcement resources and procedural limitations on enforcement may even serve an ideological objective. *See, e.g.*, Jared Bernstein, Op-Ed, *Why the GOP Really Wants to Defund the IRS*, WASH. POST (Jul. 1, 2014) (arguing that congressional attempts to defund the IRS are "just a different way to try to shrink government, accommodate tax evasion and even undermine the implementation of health reform.").

<sup>45</sup> *See, e.g.*, Alice G. Abreu & Richard K. Greenstein, *The Rule of Law as a Law of Standards: Interpreting the Internal Revenue Code* (Legal Studies Research Paper No. 2014-33) (forthcoming DUKE L.J. ONLINE 2014) (disputing Professor Zelenak's characterizations of customary deviations as, instead, necessary interpretations of the Code)

<sup>46</sup> *See infra* text accompanying notes 212-221.

doing so would not change this Article's central inquiry: In light of the fact that agencies must make nonenforcement decisions that shape the scope of the law on the ground, how can agencies make such decisions legitimately?

There are various means of making the inevitable nonenforcement decisions.<sup>47</sup> While this list is by no means inclusive, three principal ways to direct nonenforcement are categorical nonenforcement, setting priorities, and case-by-case decisionmaking. In the context of tax law nonenforcement, categorical nonenforcement involves a high-level decision not to enforce some aspect of the law for some specified period of time or until future notice. A prime example of categorical nonenforcement is the frequent flier miles example discussed above.<sup>48</sup> Other examples exist as well.<sup>49</sup>

The next means that the IRS can use to direct nonenforcement is setting priorities. Setting priorities allows high-level decisions to allocate enforcement resources toward one set of tax issues or taxpayers and away from others. Examples, and different iterations of setting priorities, abound. One particularly notable example of setting priorities was the tiering of issues in the large business and international division (LB&I) of the IRS, which occurred from 2006 through 2012 through the Industry Issue Focus ("IIF") program.<sup>50</sup> Setting priorities also can occur through centralized, though not necessarily controlling, advice to tax agents.<sup>51</sup> Centralized allocation of enforcement resources also can serve as a means of setting priorities. The allocation of enforcement resources as between large partnerships and corporations serves as an example of setting priorities as between different return

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<sup>47</sup> Cf. Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L. J. 1032, 1037 (2011) (describing different levels of control within an administrative agency).

<sup>48</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.

<sup>49</sup> See, e.g., Notice 2011-89, 2011-46 I.R.B. 748 (which provided that for "information returns and payee statements pertaining to reportable payments made in calendar year 2011" the IRS "will not impose penalties under sections 6721 and 6722 on payors that must file information returns and payee statements provided that they make good-faith efforts in filing accurate Forms 1099-K and furnishing the accompanying payee statements."). This, of course, is an instance of transition relief, much like the delay of various provisions of the Patient Protection and Affordable Care Act mentioned earlier. Examining the extent to which transition relief raises unique issues is outside of the scope of this Article but may merit examination in future work.

<sup>50</sup> See generally I.R.S., Internal Revenue Manual § 4.51 (Apr. 1, 2007), <http://www.irs.gov/irm> (providing rules and procedures for IIF program).

<sup>51</sup> For instance, in the context of medical expenses, the Internal Revenue Manual (which is a compilation of internal IRS guidelines) advises agents that examining "[h]igh medical expenses for large families, deceased taxpayers, or older taxpayers" is usually not productive). I.R.S., Internal Revenue Manual § 4.1.5.1.11.1.4 (Oct. 24, 2006), <http://www.irs.gov/irm>.

categories.<sup>52</sup> All of these methods of allocating enforcement resources, whether at a high level of resource allocation among enforcement categories or at the lower level of resource allocation to particular returns, direct tax enforcement *toward* certain taxpayers and *away* from others. Indeed, while setting priorities often takes the nominal form of directing tax enforcement resources toward certain taxpayers,<sup>53</sup> in a world of insufficient enforcement resources this very direction has the impact of making other taxpayers less likely to be subject to review.<sup>54</sup> To some extent, the reduced attention to certain taxpayers will map onto the likelihood of higher compliance exhibited by such taxpayers.<sup>55</sup> However, the large difference between what taxpayers owe and what they pay, even after all IRS enforcement action, indicates that much tax law nonenforcement exists,<sup>56</sup> and that setting priorities allocates nonenforcement toward certain taxpayers, tax issues, or tax returns and away from others.

Finally, case-by-case decisionmaking can best be understood as the decisions made by individual tax agents. To use Dworkin's famous metaphor, case-by-case decisionmaking is the doughnut hole of discretion that exists as an area left open by surrounding restrictions.<sup>57</sup> In this case, the surrounding restrictions are the decisions made by categorical decisionmaking and setting priorities. Whatever discretion such higher level decisions leave open can be resolved by case-by-case decisionmaking.

Although some case-by-case decisionmaking will remain inevitable in the tax enforcement system,<sup>58</sup> the IRS must direct tax law nonenforcement at least to some extent through more high-level,

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<sup>52</sup> In terms of individual tax return selection, perhaps the most notable example of setting priorities is the discriminant index function ("DIF"), "a mathematical technique used to score income tax returns for examination potential." I.R.S., Internal Revenue Manual § 4.1.3.2, (Aug. 10, 2012), <http://www.irs.gov/irm>.

<sup>53</sup> Exceptions apply, in which setting priorities takes the direct form of directing resources away from certain issues. See, e.g., W. Edward Afield, *Agency Activism as a New Way of Life: Administrative Modification of the Internal Revenue Code through Limited Issue Focused Examination*, 7 FLA. TAX REV. 455, 476 n. 77 (2006) (describing internal IRS guidance steering agents away from certain timing issues that likely would not be material).

<sup>54</sup> Indeed, this is the intuition behind taxpayers trying to avoid "red flags" that will make them more likely to be subject to review. See, e.g., Kiplinger, *14 IRS Audit Red Flags*, <http://www.kiplinger.com/slideshow/taxes/T056-S001-irs-audit-red-flags-the-dirty-dozen-slide-show/> (last updated Feb. 2014).

<sup>55</sup> See *infra* text accompanying notes 61-63 for a discussion of how high-level direction of enforcement resources helps direct tax enforcement toward the highest and best uses.

<sup>56</sup> This (the difference between amount owed and amount paid, even after IRS enforcement) is known as the net tax gap. For the tax year 2006, the net tax gap was estimated to be \$385 billion. INTERNAL REVENUE SER., TAX GAP "MAP" TAX YEAR 2006, [http://www.irs.gov/pub/newsroom/tax\\_gap\\_map\\_2006.pdf](http://www.irs.gov/pub/newsroom/tax_gap_map_2006.pdf).

<sup>57</sup> RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 31 (1977).

<sup>58</sup> For example, the Internal Revenue Manual describes that, while DIF scoring occurs by computer, "[e]ach selected DIF return will be screened by an experienced examiner to eliminate those returns not worthy of examination," and that such determination is made based on the examiner's "skills, technical expertise, local knowledge, and experience to identify hidden, as well as obvious, issues." I.R.S., Internal Revenue Manual § 4.1.5.1.5.1, (Aug. 24, 2012), <http://www.irs.gov/irm>. Cf. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 43-44 (1969)

centralized mechanisms such as categorical decisionmaking and setting priorities. The IRS must do so in order to efficiently direct its resources in the sprawling tax enforcement system, which includes approximately 85,000 employees spread across the country responsible for administering essentially all U.S. federal taxes against many different types of taxpayers.<sup>59</sup> As with any sprawling bureaucracy, high-level controls are essential to keep enforcement allocation in line with the priorities that high-level research determines are most important. The IRS therefore has an Office of Research that is responsible for, among many other things, “[d]eveloping, maintaining, and advising on methods for selecting taxpayers and issues for enforcement contact and for allocating IRS resources.”<sup>60</sup>

In terms of determining what priorities are most important, the IRS has to take into account that it is responsible for enforcement of the tax laws for taxpayers with extremely different profiles and inclinations toward tax compliance. In terms of individual taxpayers, while some taxpayers are inclined to cheat on their taxes if given the opportunity, for a variety of reasons, others pay their taxes despite the opportunity to cheat.<sup>61</sup> Abstracting up a level from individual differences to different sectors of taxpayers, differing opportunities for tax evasion as well as differing norms of compliance result in different sectors of taxpayers having vastly different compliance rates.<sup>62</sup> And, perhaps most crucially, as a result of vastly different tax dollars at stake in different tax sectors and different, relative costs of enforcement, the return on IRS enforcement resources is drastically different among different taxpayer sectors. Most notably, the IRS uses approximately 20% of its resources for audits of the largest business taxpayers, but such audits yield approximately 66% of recommended tax from IRS audits.<sup>63</sup> The underlying point is that not all tax enforcement is likely to be equal. As a result, motivated by a variety of considerations, the IRS has to use either categorical decisionmaking or setting priorities at least to

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(describing, with respect to administrative agencies generally, that “[t]o fix as the goal the elimination of all discretion on all subjects would be utter insanity.”).

<sup>59</sup> INTERNAL REVENUE SERV. DATA BOOK 2013, tbl. 30, <http://www.irs.gov/pub/irs-soi/13databk.pdf> (detailing range of 83,613 employees at the close of the 2013 fiscal year through 90,280 average positions realized in 2012). Some limited exceptions apply to the IRS’s general responsibility for administering all federal taxes. For example, the Tobacco Tax and Trade Bureau (TTB) administers alcohol, tobacco, firearms, and ammunition taxes. <http://www.usa.gov/directory/federal/alcohol-and-tobacco-tax-and-trade-bureau.shtml> (last visited Oct. 2, 2014).

<sup>60</sup> I.R.S., Internal Revenue Manual § 1.1.18.1.3.4B, (May 9, 2012), <http://www.irs.gov/irm>.

<sup>61</sup> See, e.g., Alex Raskolnikov, *Revealing Choices: Using Taxpayer Choice to Target Tax Enforcement*, 109 COLUM. L. REV. 689, 694-701 (2009) (describing different types of taxpayers and inclinations towards compliance).

<sup>62</sup> INTERNAL REVENUE SERV., OVERVIEW OF TAX GAP FOR TAX YEAR 2006, at 2 [http://www.irs.gov/pub/newsroom/overview\\_tax\\_gap\\_2006.pdf](http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf) (showing different rates of noncompliance with respect to different types of income, which would be generated in different taxpayer sectors).

<sup>63</sup> MICHAEL I. SALTZMAN & LESLIE BOOK, IRS PRACTICE AND PROCEDURE ¶ 8.15[1] (2013).

some extent to direct its limited tax enforcement resources toward their preferred uses. While this high-level direction of tax law nonenforcement can serve a variety of salutary purposes, it also means that unelected tax administrators affect the tax law on the ground in important ways.

#### **IV. Agency Legitimacy and Categorical Nonenforcement**

If unelected tax administrators affect the tax law on the ground in important ways through inevitable nonenforcement of aspects of the tax law, are there more or less legitimate ways for them to engage in this nonenforcement? One way to answer this question is by looking to modern theories of agency legitimacy and asking how different means of engaging in such nonenforcement of the law may be more or less legitimate under such theories.<sup>64</sup> This approach may be particularly enlightening because, as will become evident in the discussion below, the theories attempt to apply core principles of democratic governance, which arguably are rooted in fundamental U.S. constitutional values, to the realities of the present day administrative state. As a result, wrestling with how the theories comport with categorical nonenforcement may bring to bear insights regarding core values of democratic governance, which are obscured or missed by the existing analyses. This Part sets forth the prominent, modern theories of agency legitimacy. This Part then explores why, under such theories, categorical nonenforcement may help legitimate the IRS's inevitable nonenforcement of the tax law.

In this regard, it is helpful to clarify that claiming that an agency action is legitimate or that certain action, such as categorical nonenforcement, promotes agency legitimacy does not mean that it is normatively desirable. In fact, the agency action, such as categorical nonenforcement, may be lamentable and problematic, in that ideally the agency would not have to make systematic nonenforcement decisions. Rather, examining agency legitimacy requires first accepting as a given that agencies are going to be exercising extensive power in modern U.S. government, such as systematically not enforcing the law. Accepting such extensive power as an inevitable backdrop, the examination of agency legitimacy asks how such power can be exercised in a manner that assures that there are adequate checks in place to ensure exercises of the power are consistent with democratic governance.

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<sup>64</sup> This Article will return to alternative approaches in Part V.

### A. Theories of Agency Legitimacy

The central question for agency legitimacy is how to justify the extensive power and responsibilities of administrative agencies in U.S. constitutional democracy. While some scholars simply reject modern administrative agencies as unconstitutional,<sup>65</sup> the reality is that the extensive administrative bureaucracy responsible for running much of the U.S. government exercises significant power all the time, and such exercise is widely seen as crucial to the functioning of the government.<sup>66</sup> As a result, administrative and constitutional law scholars have developed theories to support agency legitimacy. While there are certainly many variations of the central question regarding agency legitimacy, each theory of agency legitimacy attempts to explain in its own way how administrative agencies can operate consistently with constitutional or democratic principles.<sup>67</sup>

There are three principal modern theories of agency legitimacy, each of which will be examined here: the political accountability theory, civic republicanism, and nonarbitrariness theory.<sup>68</sup> Political

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<sup>65</sup> Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (“The post-New Deal administrative state is unconstitutional, and its validation by the legal system amounts to nothing less than a bloodless constitutional revolution.”).

<sup>66</sup> See *Mistretta v. U.S.*, 488 U.S. 361, 372 (1989) (“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”).

<sup>67</sup> See, e.g., Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1284 (1984) (“Each model of bureaucratic legitimacy is a story designed to tell its listeners: ‘Don’t worry, bureaucratic organizations are under control.’”); Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557, 577 (2003) (“In my view, legitimacy can be assessed by answering two component questions: (1) Can agency power be characterized as democratic, especially if Congress, the closest institution to the electorate, is not making key policy decisions, and (2) are agencies accountable for the power they exercise?”); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1672-73 (1975).

<sup>68</sup> Judicial review will be examined separately at *infra* text accompanying notes 179-199. Other theories that do not hold as much, current sway will not be examined in detail. Such theories include the transmission belt model, the expertise model, and the pluralist model. The transmission belt model viewed agencies as merely implementing Congress’s specific and clear directives through impartial, technical decisions. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2253 (2001); Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 357 (2009); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1513 (1992); Stewart, *supra* note 67, at 1675. The transmission belt model at least partially failed because the extensive modern-day delegations to administrative agencies make it unrealistic and therefore insufficient as a means of legitimating much agency action. Mantel, *supra*, at 357; Mendelson, *supra* note 67, at 580; Stewart, *supra* note 67, at 1677. The expertise model acknowledged the scope of substantive agency decisions but maintained that agencies made such decisions by relying on impartial expertise. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); Kagan, *supra*, at 2253; Stewart, *supra* note 67, at 1678. However, the extent to which agencies actually have to make value-laden decisions, and the influence of politics on such decisions, also eroded the explanatory power of the expertise model. Seidenfeld, *supra*, at 1513; Stewart, *supra* note 67, at 1684. The pluralist model views agencies as broad-

accountability theory relies on agencies being subject to the control of politically accountable, elected officials.<sup>69</sup> In standard accounts of political accountability theory, election is important for two reasons. First, under the majoritarian paradigm popularized by Professor Bickel, democratic legitimacy exists to the extent that government officials represent majority will, and elections are the means of ensuring such representation.<sup>70</sup> Second, and relatedly, elections are a means of checking government officials and voting out of office officials who did not, in fact, represent majority will.<sup>71</sup> At first glance, administrative agencies substantially affecting rights and obligations under the law are suspect because administrative officials are not elected and therefore lack the democratic legitimacy conferred by elections.<sup>72</sup> Political accountability theory solves this problem by positing that administrative agencies are controlled by the President and / or Congress.<sup>73</sup> Subjecting agencies to such control legitimates them by positing that agencies are indirect representatives of majority will in the first instance and indirectly subject to electoral checks on the backend, because elected officials can be held accountable for decisions made by administrative agencies.<sup>74</sup> Professor Bickel even foreshadowed the application of the political accountability theory to the administrative state by defending delegations to administrators in part on the grounds that administrative decisions were reversible by officials elected by majorities.<sup>75</sup>

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based aggregators of interest group preferences. Kagan, *supra*, at 2265-66; Mendelson, *supra* note 67, at 587; Stewart, *supra* note 67, at 1712. The principal danger of pluralist models is the potential for capture by powerful interest groups, and the inability to equalize influence. Kagan, *supra*, at 2266-67; Mendelson, *supra* note 67, at 587. It is worth stating that to some extent even these older theories of agency legitimacy have not gone away entirely, but rather have been subsumed to various degrees in the current, dominant theories.

<sup>69</sup> This theory has gone by many names (and, to some extent the differing names reflect slight, underlying differences). See, e.g., Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEO. WASH. L. REV. 1397, 1400 (2013) (“political control” model). I have adopted Professor Bressman’s terminology of “political accountability,” although Professor Bressman also includes in such term certain older theories of agency legitimacy that have been discussed and set aside in *supra* note 68. Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1675 (2004).

<sup>70</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed. 1986) (setting forth highly influential account of judicial review as countermajoritarian, which helped create a majoritarian paradigm of democratic legitimacy). For an influential account of the majoritarian paradigm, see Erwin Chemerinsky, *The Supreme Court, 1988 Term--Forward: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989).

<sup>71</sup> BICKEL, *supra* note 70, at 27.

<sup>72</sup> Cf. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 85-119 (1994) (arguing that administrative agencies have to be accountable and therefore subject to presidential control).

<sup>73</sup> See, e.g., Philip J. Harter, *Executive Oversight of Rulemaking: The President Is No Stranger*, 36 AM. U. L. REV. 557, 568 (1987) (“We vote for presidents, not secretaries or administrators.... White House oversight places accountability precisely where it should be, namely, where the electorate can do something about it.”).

<sup>74</sup> Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 490-91 (2003).

<sup>75</sup> BICKEL, *supra* note 70, at 19-20.

While some scholars have focused on Congress's role in controlling administrative agencies,<sup>76</sup> in recent years the tide of political accountability scholarship has favored a presidential control model, which looks principally to the President to control administrative agencies.<sup>77</sup> There were interrelated developments that led to the rise of the presidential control model. First, constitutional theorists made a variety of arguments in defense of a unitary executive, either based on a belief that the Framers themselves constitutionalized the unitary executive, or because the unitary executive was believed to be the best translation of the Framers' vision into modern context.<sup>78</sup> Second, and relatedly, scholars began looking to the modern presidency as a particularly good nexus of control for the administrative state as a result of the President representing a national constituency and having the position and energy to direct and control the widespread administrative state.<sup>79</sup> Finally, Presidents themselves began asserting their role as chief executives of the administrative state, a trend that helped explain scholars' increasing attention to the presidency as a source of control.<sup>80</sup> In any event, political accountability theory more

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<sup>76</sup> For just a small sample of this literature (and evaluations of it), see, for example, JOEL D. ABERBACH, KEEPING A WATCHFUL EYE 14, 34-37 (1990); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Kagan, *supra* note 68, at 2255-60 (describing views that Congress did not effectively control administrative policymaking, later political science literature suggesting the opposite, and why neither view in the extreme is likely to be correct); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989); Mathew D. McCubbins et al., *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 252 (1987); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984); Terry M. Moe, *An Assessment of the Positive Theory of 'Congressional Dominance'*, 12 LEGIS. STUD. Q. 475 (1987); Barry R. Weingast & Mark J. Moran, *Bureaucratic Discretion or Congressional Control? Regulatory Policymaking by the Federal Trade Commission*, 91 J. POL. ECON. 765 (1983).

<sup>77</sup> Bressman, *supra* note 69, at 1677 ("All or nearly all scholars--whether originalists or pragmatists, Democrats or Republicans--now endorse the presidential control model as a critical means for enhancing agency legitimacy."); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) ("Increasingly, scholars (and, at times, the judiciary) look to the President . . . to supply the elusive essence of democratic legitimation.").

<sup>78</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (for the former view); Lessig & Sunstein, *supra* note 72 (for the latter view).

<sup>79</sup> See, e.g., JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE 152 (1997) (describing "vague delegations to administrative agencies" as "a device for facilitating responsiveness to voter preferences expressed in presidential elections"); Kagan, *supra* note 68; Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

<sup>80</sup> For a particularly notable description of this trend, see Kagan, *supra* note 68, at 2272-2319. Indeed, administrative law now deeply reflects the perceived importance of presidential control. See, e.g., *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837, 865 (1984) (explaining that courts should defer to agency interpretations because "[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices . . .").

generally looks to either or both of the two politically accountable branches, the President and / or Congress, to control, answer for, and thereby legitimate administrative agencies.<sup>81</sup>

The second principal modern theory used to support agency legitimacy, which may be called civic republicanism, emphasizes an agency's deliberative process as the source of its legitimacy.<sup>82</sup> Civic republicanism is borne out of a historical view of the Framers' dedication to deliberative democracy.<sup>83</sup> Although it is difficult to define as a result of differing accounts, as a general matter civic republican theory posits that government should enable consensus about the "common good" which can be "found at the conclusion of a well-functioning deliberative process."<sup>84</sup> Civic republicanism rejects governance that merely seeks to satisfy or aggregate exogenous individual preferences,<sup>85</sup> and instead heralds government that reaches the right outcomes through a reasoned process, informed by transformative public debate that extends beyond mere self-interest.<sup>86</sup> In such a process, government policies are "justified rather than simply fought for,"<sup>87</sup> and the government provides explanations for how its decisions further the common good.<sup>88</sup> The case for the application of civic republicanism to agencies specifically is that agencies are subject to checks by the judiciary, Congress, and the President that can help ensure politically informed discourse, agencies' bureaucratic structures can focus debate on the public interest, and many agency decisions are subject to procedures that can facilitate a reasoned

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<sup>81</sup> Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 35-37 (2009).

<sup>82</sup> Mendelson, *supra* note 67, at 585. For a foundational work, see Seidenfeld, *supra* note 68. This theory, too, has gone by different names, which reflect, to some extent, different emphases. See, e.g., Mantel, *supra* note 68, at 362-65 (exploring what she calls the "trustee paradigm").

<sup>83</sup> See, e.g., J. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, in HOW DEMOCRATIC IS THE CONSTITUTION? 102 (R. Goldwin & W. Schambra eds. 1980).

<sup>84</sup> Cf. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1554 (1988) [hereinafter *Beyond Republican Revival*]; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1154-55 (1986) [hereinafter *Legal Interference*] (explaining that "the role of government is not simply to implement preferences, but to select them through a process of deliberation and debate"). There is extensive literature by prominent legal scholars regarding civic republicanism, and its role in the formulation of government in the U.S. Constitution. For just a few examples see Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013 (1984); Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter *Interest Groups*]; MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988). The legal literature builds on historical literature regarding the influence of republicanism on the American constitutional scheme. See, e.g., Bessette, *supra* note 83.

<sup>85</sup> Michelman, *supra* note 84, at 1526-28; Sunstein, *Beyond Republican Revival*, *supra* note 84, at 1548-49; Sunstein, *Interest Groups*, *supra* note 84, at 32; Sunstein, *Legal Interference*, *supra* note 84, at 1135.

<sup>86</sup> Sunstein, *Beyond Republican Revival*, *supra* note 84, at 1549.

<sup>87</sup> Sunstein, *Legal Interference*, *supra* note 84, at 1155.

<sup>88</sup> Seidenfeld, *supra* note 68, at 1530.

process of deliberation.<sup>89</sup> As Professor Seidenfeld has described, “[t]he deliberative promise of the administrative state stems from the fact that agency decisionmaking can be inclusive, knowledgeable, reasoned, and transformative.”<sup>90</sup> Indeed, Professor Seidenfeld has claimed that “having administrative agencies set government policy provides the best hope of implementing civic republicanism's call for deliberative decisionmaking informed by the values of the entire polity.”<sup>91</sup>

Finally, the third principal modern theory of agency legitimacy may be called the nonarbitrariness theory. Nonarbitrariness theory is rooted in the concerns that prominent early administrative law scholars such as Judge Friendly, Professor Davis, and Professor Jaffe had about excessive agency discretion.<sup>92</sup> In controlling such discretion, nonarbitrariness theory departs from political accountability theory's fixation with majority will, arguing in part that the Framers did not believe that majority will was sufficient to ensure public-regarding law and individual rights, and instead worried about the deleterious effects of majority factions and tyrannous rule.<sup>93</sup> As one might expect, nonarbitrariness theory rejects arbitrary administrative action as an illegitimate exercise of government power. A quintessential example of arbitrary administrative action would be action that deviates from the application of a general, acceptable governance policy, and instead is explained by an improper motive such as disdain for the regulated party at hand, or a desire to provide beneficial treatment to a powerful special interest.<sup>94</sup> In contrast to such illegitimate action, nonarbitrariness theory heralds administration of the law that ensures that individual agency decisions are made in accordance with

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<sup>89</sup> *Id.* at 1541-62. This is certainly not to say that agencies are perfect at this task. Rather, the argument is that they are well-suited relative to alternatives.

<sup>90</sup> *Id.* at 1426.

<sup>91</sup> *Id.* at 1515.

<sup>92</sup> For seminal works, see DAVIS, *supra* note 58; HENRY J. FRIENDLY, *THE FEDERAL ADMINISTRATIVE AGENCIES* (1962); LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

<sup>93</sup> Bressman, *supra* note 74, at 493-94, 497-500; see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1531-35 (1991) (exploring how Framers' concerns about tyranny can be understood as concerns about arbitrary government action). More generally, the literature regarding how best to understand the Framers' concerns regarding factions and tyranny, and the resulting structure of government embodied in the Constitution is extraordinarily vast. See, e.g., *The Federalist* No. 10, at 56 (Madison) (Jack N. Rakove, ed.) (“[T]he majority, having such coexistent passion or interest, must be rendered, by their number and local situation, unable to concert and carry into effect schemes of oppression.”); *The Federalist* No. 51 (Madison); Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000) (describing and critiquing extensive separation of powers literature and concern about tyranny); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984) (providing seminal functionalist view of how separation of powers should be applied to the administrative state); Sunstein, *Interest Groups*, *supra* note 84, at 31-48 (exploring Framers' concerns regarding factions).

<sup>94</sup> See FRIENDLY, *supra* note 92, at 19 (describing “the basic human claim that the law should provide like treatment under like circumstances.”).

public-regarding, generalizable policies and principles. In this way, nonarbitrariness theory posits that nonarbitrary administrative action, which has qualities of being “rational, predictable, or fair,”<sup>95</sup> is central not only to good governance but also to constitutionally legitimate governance.<sup>96</sup>

The three theories of agency legitimacy laid out above are certainly far from unassailable. As one would expect from any theories that attempt to explain how modern government should accord with constitutional and democratic commitments, the theories of agency legitimacy set forth have been subject to a variety of significant counterclaims by scholars of all sorts.<sup>97</sup> Indeed, as alluded to in the discussion of nonarbitrariness theory, the theories themselves offer alternative, and sometimes conflicting visions of legitimate governance and agencies’ place in it. On the other hand, the theories may also overlap in ways that provide mutually reinforcing support for agency legitimacy. For instance, oversight and boundary setting by the politically accountable branches is most relevant for political accountability theory, but it may also help ensure the deliberative process that supports agency legitimacy under civic republicanism.<sup>98</sup> In any event, this Article does not seek to debate the extent to which the theories set forth above can legitimate the administrative state, but rather posits as a working assumption that there are prominent theories, rooted in constitutional and democratic values, that are used to assess agency legitimacy, and evaluates categorical nonenforcement in light of them.

### **B. Application to Categorical Nonenforcement**

Having set forth these three, principal modern theories of agency legitimacy, the next question is whether, under such theories, categorical nonenforcement may actually promote the legitimacy of the IRS’s inevitable, systematic tax law nonenforcement. As will be discussed in detail below, in some circumstances categorical nonenforcement can play this role. Specifically, as a result of increasing the salience of nonenforcement decisions and by serving as a means of committing the agency to a policy of

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<sup>95</sup> Bressman, *supra* note 74, at 496.

<sup>96</sup> *Id.* at 494.

<sup>97</sup> For just a few examples of various counterclaims, see, for example, Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2083 (2005) (“Thus, control over the bureaucracy is exercised by the president according to the succession principle . . . but not according to the electoral accountability principle.”); Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 55 (2008) (arguing that “a moderate degree of bureaucratic insulation alleviates rather than exacerbates the countermajoritarian problems inherent in bureaucratic policymaking.”). The critiques cannot easily be characterized, because different critiques respond to different theories of agency legitimacy.

<sup>98</sup> Seidenfeld, *supra* note 69, at 1448-53.

nonenforcement, categorical nonenforcement may, under certain circumstances, increase the accountability, deliberation, and nonarbitrariness of an agency's inevitable nonenforcement of the law.

As an initial matter, categorical nonenforcement can increase the salience of nonenforcement decisions, making it more likely that the politically accountable branches and the public will focus on them. In general, even significant instances of nonenforcement can be difficult for politically accountable actors and the public to monitor. Unlike when an agency decides to engage in a new enforcement project, or a new initiative, nonenforcement is much more likely to occur *sub rosa*, and thereby evade attention and review.<sup>99</sup> Categorical nonenforcement can buck this tendency by providing a particularly transparent statement of nonenforcement. Even if it is clear, for example, that the IRS historically has not enforced and in all likelihood will not enforce the tax law with respect to a certain issue, the IRS's categorical statement that it will not enforce the law with respect to such issue nonetheless spotlights the IRS's choice, providing a particularly salient notice of the nonenforcement.<sup>100</sup>

Whereas setting a low priority can also indicate that enforcement is going to be low, categorical nonenforcement is likely to have a greater ability to focus attention on what, in any event, is a low likelihood of enforcement. Indicating that a particular enforcement task is a low priority may not communicate with precision the extent of the nonenforcement.<sup>101</sup> Indicating that a particular enforcement task is low priority can also provide cover to disguise what, in reality, is virtually no enforcement.<sup>102</sup> Even to the extent that the low priority is translated into a specific level of enforcement (for instance, imagine that the IRS announces that it is going to set a low priority for auditing large partnerships, such that large partnerships will be subject to a .8% chance of enforcement and a minimal likelihood of an assessment of noncompliance on audit), the formality and extremity of a statement of complete, categorical nonenforcement will nonetheless tend to increase its salience.

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<sup>99</sup> Love & Garg, *supra* note 18, at 1235.

<sup>100</sup> As Professor Diver has more generally remarked with respect to administrative rules, "[t]ransparent rules tend to spotlight a value choice." Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 106 (1983).

<sup>101</sup> For instance, the tiering program in LB&I by negative implication alerted taxpayers to issues that would not be high priorities for review. However, this provided only very vague information that these other issues would be less likely to be reviewed. See *supra* text accompanying note 50.

<sup>102</sup> This might be an intentional choice designed to protect compliance. See *infra* text accompanying note 251.

Increasing the salience of a nonenforcement decision can serve as a means to increase the accountability, and therefore legitimacy, of agency nonenforcement.<sup>103</sup> There are two mechanisms at work that enable greater salience of nonenforcement to increase accountability of nonenforcement. First, more salient nonenforcement decisions can focus the politically accountable branches' attention on the nonenforcement, thereby increasing their likelihood of exerting control over the nonenforcement decision. Presidents in particular have a variety of means to monitor different agency action.<sup>104</sup> For instance, the Office of Management and Budget ("OMB") implements the President's vision across the Executive Branch, including through oversight of agency performance and review of all significant federal regulations by executive agencies.<sup>105</sup> However, agency enforcement decisions for the most part fall outside of centralized presidential review.<sup>106</sup> As a result, decisions to set low priorities for enforcement tasks are unlikely to garner review by presidential administrations. By creating a more salient statement of nonenforcement, categorical nonenforcement is more likely to trigger review by the President or Congress, or, perhaps more realistically, their central apparatuses responsible for monitoring administrative agencies.<sup>107</sup> The greater likelihood of control or review of the nonenforcement decisions by the politically accountable branches promotes legitimacy under the political accountability theory because the politically accountable branches may help ensure that even unelected agencies make decisions in accordance with majority preferences.<sup>108</sup>

The argument here is not that the President and / or Congress will, or even should, weigh in on all enforcement decisions if only such decisions are framed in terms of categorical nonenforcement, but rather that categorical nonenforcement can serve as a means of increasing their likelihood of doing so

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<sup>103</sup> Cf. Daniel T. Deacon, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 820 (2010).

("Binding enforcement directives, promulgated through rulemaking, require agencies, and the administration to which they are accountable, to take a public stand on their enforcement priorities.")

<sup>104</sup> There is more debate about to what extent Congress can effectively monitor administrative agencies. See *supra* note 76.

<sup>105</sup> The Mission and Structure of the Office of Management and Budget, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last accessed Sept. 8, 2014).

<sup>106</sup> Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1033 (2013).

<sup>107</sup> While OMB may be very much like another administrative agency, it nonetheless is charged more directly with carrying out the President's vision. *Id.* at 1104; The Mission and Structure of the Office of Management and Budget, [http://www.whitehouse.gov/omb/organization\\_mission/](http://www.whitehouse.gov/omb/organization_mission/) (last accessed Sept. 8, 2014) ("The core mission of OMB is to serve the President of the United States in implementing his vision across the Executive Branch.")

<sup>108</sup> Nina A. Mendelson, *Disclosing 'Political' Oversight of Agency Decision Making*, 108 MICH. L. REV. 1127, 1137-38 (2010) (making this point with respect to presidential control); Metzger, *supra* note 17, at 44-45, (explaining that "internal administrative oversight is equally required to ensure that policies and priorities specified by elected leaders are actually followed on the ground.")

for important nonenforcement decisions.<sup>109</sup> Take, for example, the case of the IRS auditing large partnerships. As suggested previously, the IRS engages in extremely low rates of audits of large partnerships.<sup>110</sup> These statistics can be explained, at least in part, by the IRS's difficulty in auditing large partnerships. The Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") imposes very onerous requirements on the IRS for auditing large partnerships, significantly limiting the IRS's audit capacity for these entities and making the IRS hesitant to conduct large partnership audits.<sup>111</sup> Various other aspects of large partnership tax return filing create information deficits for the IRS.<sup>112</sup> On top of these difficulties, large partnerships can make extremely complicated even the most fundamental aspects of a tax audit, such as determining the tax partner responsible for working with the IRS to facilitate an audit.<sup>113</sup> Thus far, the IRS has dealt with these enforcement difficulties through setting priorities. The result has been that, in recent years, the IRS has audited only approximately .8% of large partnerships, with minimal findings of noncompliance in large partnership audits,<sup>114</sup> in comparison to a 27.1% audit rate and significantly higher audit determinations of noncompliance for similarly sized C corporations during the same period.<sup>115</sup> Instead of setting a low priority, the IRS instead could categorically decide not to enforce the income tax system as to large partnerships, perhaps for some period of time or for specified issues. The IRS may even indicate that it will not enforce the tax system as against large partnerships until changes in the law are made enabling it to do so efficiently.

At first blush, the notion of the IRS announcing categorically that it will not enforce the income tax system as to large partnerships may seem anathema to legitimate tax administration and a severe abrogation of IRS duty to enforce the tax law. However, viewed in a different way, a categorical

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<sup>109</sup> Cf. Andrias, *supra* note 106, at 1071-72, 1101 (explaining problems with formal presidential review of important individual enforcement actions and explaining that "[t]he degree to which presidential administration actually establishes an electoral link between the public and the bureaucracy, or enables the public to understand better the sources and nature of bureaucratic power, depends in large part on whether the questions at issue are of concern to the public."); Bressman, *supra* note 74, at 111-12 (discussing impossibility of President taking ownership of all of administration as a result of demands on the President's time); Love & Garg, *supra* note 18, at 1235 (making point with respect to congressional review of inaction).

<sup>110</sup> See text accompanying notes 37-39.

<sup>111</sup> JOINT COMMITTEE ON TAXATION, 112TH CONG. 2D SESSION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT'S FISCAL YEAR 2013 BUDGET PROPOSAL 616-18, 624 (June 2012) [hereinafter DESCRIPTION OF REVENUE PROVISIONS]; Brock, *supra* note 39, at 42 (providing anecdotal evidence to this effect).

<sup>112</sup> Jaime Arora, *GAO Calls on IRS to Improve Information for Partnership Audits*, 2014 TAX NOTES TODAY 115-6, at 2-3.

<sup>113</sup> LARGE PARTNERSHIPS, *supra* note 36, at 15; see also GROWING NUMBER, *supra* note 38, at 25 (citing focus group reports that complex large partnership structures were being used to hide income sources and tax shelters).

<sup>114</sup> LARGE PARTNERSHIPS, *supra* note 36, at 10; GROWING NUMBER, *supra* note 38, at 20.

<sup>115</sup> *Id.*

statement of nonenforcement might increase the accountability of the IRS's inevitable at least essential nonenforcement, thus increasing the legitimacy of the agency's decision. A statement by the IRS that, as a result of enforcement difficulties, it would not enforce the income tax system as against the largest partnerships, would be likely to garner involvement of the presidential administration and various interventions by Congress. Granted, even without categorical nonenforcement, the low audit rate of large partnerships has garnered a fair amount of media coverage, at least in the tax world, and led to various Senators acknowledging the problem and indicating that it needs to be fixed.<sup>116</sup> However, such recognition occurred after years of almost no enforcement, and insiders' awareness of the systematic, virtual lack of enforcement.<sup>117</sup> It is harder to imagine that a statement of categorical nonenforcement would escape media attention, and therefore the involvement of accountable, elected officials, or at least their central administrative apparatuses, for as long a period of time. The import of this example is that when an agency is engaging in relatively impotent enforcement for an important enforcement task, making a statement of categorical nonenforcement may serve as a particularly salient means of alerting the accountable branches of government, thereby getting accountable input about the decision, resources, or a change in the legal regime that would make enforcement tenable.<sup>118</sup>

The second way that greater salience of a nonenforcement decision can increase accountability is by increasing the visibility of the decision for the public. Political accountability theory, after all, relies in part on the notion that government actors should be carrying out majority will, and that the public can hold politicians accountable for their failure to do so.<sup>119</sup> By making nonenforcement decisions more salient to the public, as well as to the politically accountable branches, categorical nonenforcement can increase the likelihood that the public registers nonenforcement decisions, expresses satisfaction or dissatisfaction with such decisions, and holds the politically accountable branches accountable for the

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<sup>116</sup> See, e.g., Wyden Statement on GAO Preliminary Report on IRS Audits of Large Partnerships, <http://www.finance.senate.gov/newsroom/chairman/release/?id=59155f87-739a-44e6-9519-a0726e3d4ef5> (Apr. 17, 2014) ("This is a real problem and serves as yet another example of why Congress needs to get serious about comprehensive, bipartisan tax reform.").

<sup>117</sup> As anecdotal evidence, in 2012 (two years prior to the statement above), the tax publication *Tax Notes* published an article indicating that large partnerships are "effectively immune from audit," a conclusion based on "interviews with dozens of practitioners who have direct knowledge of the IRS's large partnership audit practices." Amy S. Elliott, *News Analysis: Audit Proof? How Hedge Funds, PE Funds, and PTPs Escape the IRS*, 136 *TAX NOTES* 351, at 1 (2012).

<sup>118</sup> Cf. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 *ADMIN. L. REV.* 429, 451 (1999) (explaining how external monitors like the President or Congress or a crisis may be necessary in order to get an agency to alter decisionmaking norms).

<sup>119</sup> See *supra* text accompanying notes 70-71.

actual implementation of the law (or lack thereof).<sup>120</sup>

While the notion that the public actually holds politically accountable branches responsible for individual agency decisions (or nonenforcement decisions, in this case) is certainly highly contested,<sup>121</sup> this notion reflects a more deep-seated intuition that the politically accountable branches can and should be held responsible, at some level, for the actual implementation of the law. In this context, to the extent that the politically accountable branches do not respond to a statement of categorical nonenforcement, the categorical nonenforcement may at least force a politically accountable acknowledgement of the unwillingness to provide the means necessary to yield adequate enforcement. To underscore this point, in the case of auditing large partnerships, various changes in the law may be necessary in order to enable the IRS to cost-effectively audit large partnerships,<sup>122</sup> and various proposals have been made to change the law accordingly.<sup>123</sup> Yet, some commentators have suggested that Congress may not be inclined to adopt such changes because doing so would be costly to powerful constituencies.<sup>124</sup> By saliently underscoring the near impossibility of large partnership audits under the current rules through categorical nonenforcement, the IRS may force politically accountable actors to change the law in a manner that makes audit of these entities tenable, or else take more public responsibility for the essential lack of audit of many of the largest and wealthiest businesses in the country. Categorical nonenforcement may thereby serve as a counter to one of the most troublesome, potential legitimacy threats of the administrative state: the ability of Congress and / or the President to garner the benefits of a public-regarding law that they ensure never actually comes to pass by putting in place low visibility constraints on the implementing agency.<sup>125</sup>

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<sup>120</sup> Metzger, *supra* note 17, at 45 (explaining that political accountability also involves “allowing the public to be informed about administrative actions . . .”).

<sup>121</sup> See, e.g., Glen Staszewski, *Reason Giving and Accountability*, 93 MINN. L. REV. 1253, 1266 (2009) (“In short, the presumption that elected officials are politically accountable for their specific policy decisions is wildly unrealistic.”); Farina, *supra* note 77, at 997-1002 (describing how bundling and complexity make it difficult to know what citizens want on particular issues or to hold the President responsible for them).

<sup>122</sup> See Amy S. Elliott, *News Analysis: Why It Matters That the IRS Has Trouble Auditing Partnerships*, 143 TAX NOTES 7, at 5 (2014).

<sup>123</sup> DEPARTMENT OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION’S FISCAL YEAR 2013 REVENUE PROPOSALS 155-56 (Feb. 2012); DESCRIPTION OF REVENUE PROVISIONS, *supra* note 111; Arora, *supra* note 112, at 3-4 (summarizing various proposals); see also GROWING NUMBER, *supra* note 38, at Highlights (explaining how various changes to audit procedures would reduce the IRS’s costs in auditing large partnerships, but how legislative changes were necessary).

<sup>124</sup> Elliott, *supra* note 117, at 7.

<sup>125</sup> See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 46 (2008) (“In essence, agencies and Congress can use the symbolic substantive statute, filled with public interest language that

Certainly, none of this is to say that all politically accountable actors will ignore a nonenforcement problem in the absence of categorical nonenforcement. Indeed, in the case of large partnerships, eventually specific Senators requested the GAO to conduct an investigation of the issue and pronounced the findings problematic.<sup>126</sup> The claim here is a marginal one: Relative to categorical nonenforcement, setting a low priority is a lower visibility way to hamper the law on the books.<sup>127</sup> As a result, by increasing the likelihood that politically accountable actors (or their central delegates) and the public are aware of important nonenforcement decisions, categorical nonenforcement may increase the accountability and therefore the legitimacy of such decisions.<sup>128</sup>

Moving to the next theory of agency legitimacy, by increasing the salience of nonenforcement, categorical nonenforcement may also increase public dialogue about certain nonenforcement decisions. Categorical nonenforcement can thereby help legitimate the agency's nonenforcement under the civic republican theory.<sup>129</sup> Just as categorical nonenforcement may serve as a particularly salient means of alerting politically accountable branches about enforcement difficulties or relatively impotent enforcement, so too is categorical nonenforcement likely to serve as a particularly salient means of alerting the public. Professor Mendelson makes a similar point in the context of presidential administrations entrenching policy shortly prior to leaving power.<sup>130</sup> Professor Mendelson analyzes one method of entrenching policy that, at first blush, seems particularly objectionable: entrenching policy opposed by the President-elect in the form of a binding rule.<sup>131</sup> This tactic seems particularly objectionable for a number of reasons. First, it seems to undermine the President-elect's newly

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promises action on a particular issue, to 'mask' the actual implementation that betrays that promise--and thereby reduce or eliminate any political costs for failing to address the substantive question.").

<sup>126</sup> See, e.g., Levin, Wyden, McCain Release GAO Report on Scant IRS Audit Coverage of Large Partnerships, <http://www.levin.senate.gov/newsroom/press/release/levin-wyden-mccain-release-gao-preliminary-report-on-scant-irs-audit-coverage-of-large-partnerships> (Apr. 17, 2014).

<sup>127</sup> Cf. Elliott, *supra* note 122, at 2 ("A problem needs to get very bad before it attracts congressional attention. That is especially true if some of the people who benefit from the problem – the investment fund managers who don't have to worry about IRS adjustments to their partnership items – are some of the biggest campaign contributors for both parties.").

<sup>128</sup> Cf. Andrias, *supra* note 106, at 1093 ("By elevating responsibility of enforcement to the President in ways subject to public evaluation, we can both increase the degree to which presidential action is likely to track public preferences and the degree to which the public can understand the exercise of the enforcement power.").

<sup>129</sup> In the context mostly of presidential nonenforcement, Professor Sant' Ambrogio explores how what he calls a presidential extra-legislative veto may play a similar role, explaining that it can serve a "deliberation forcing and deliberation-enhancing role." Sant' Ambrogio, *supra* note 17, at 386.

<sup>130</sup> Mendelson, *supra* note 67, at 629-30.

<sup>131</sup> *Id.*

electorally granted power to sway policy in a particular direction and therefore may be a form of antidemocratic “nose-thumbing” at the public’s choice of a new administration.<sup>132</sup> Second, since the flurry of entrenched policy by the outgoing administration occurs at a time when the President faces no future elections, the new policy may be unaccountable to electoral checks on political power.<sup>133</sup>

However, Professor Mendelson explains that, somewhat ironically, the particularly objectionable nature of entrenchment can also benefit democratic governance. The issuance of a rule and the new administration’s attempts to reverse it will be more likely to garner media coverage as a result of the increased visibility. The greater visibility is thereby more likely to spur the involvement of interest groups and voters, who will be more likely to engage in a debate and develop informed policy preferences.<sup>134</sup> The broader dialogue may then yield a more deliberative agency decisionmaking process, since the agency will be better informed by public views and public debate.<sup>135</sup> In other words, the very controversial nature of the decision may help garner the attention necessary to engender dialogue and a deliberative decision about what may otherwise be an ignored bureaucratic rule.

The analogue to categorical nonenforcement is that categorical nonenforcement also can serve as a means of highlighting significant nonenforcement decisions that nonetheless may otherwise escape the public’s attention. Categorical nonenforcement may thereby increase the public’s dialogue and, crucially, the comprehensiveness of the agency’s deliberation regarding the nonenforcement decision. By facilitating a more robust public debate, the agency may take into account a wider array of views and reach a more informed, deliberative decision. Importantly, the very seemingly objectionable nature of categorical nonenforcement may also be the key to increasing the legitimacy of the nonenforcement.

To be sure, for a number of reasons, categorical nonenforcement is not the prototypical example of deliberative governance imagined by civic republicanism. Civic republicanism imagines deliberative debate that shapes agency policy *ex ante*,<sup>136</sup> whereas categorical nonenforcement is an *ex post* statement of government policy. Categorical nonenforcement is also unlikely to be subject to judicial review,<sup>137</sup> even though judicial review can be an important means of ensuring the adequacy of

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<sup>132</sup> *Id.* at 564-65, 604-05, 627.

<sup>133</sup> *Id.* at 566-67.

<sup>134</sup> *Id.* at 629-30.

<sup>135</sup> *Id.* at 629.

<sup>136</sup> Seidenfeld, *supra* note 68, at 1529.

<sup>137</sup> *See infra* text accompanying notes 180-185. However, for reasons discussed elsewhere, categorical nonenforcement is more likely than setting a low priority to gain the attention and feedback of the politically

agency deliberation.<sup>138</sup> Relatedly, a statement of categorical nonenforcement may, but need not, exhibit the type of reasoned explanation that can be central to civic republicanism. However, categorical nonenforcement need not be perfect in order to promote the legitimacy of agency nonenforcement. By making a statement of categorical nonenforcement, an agency may widen the circle of interested parties and counter what is otherwise a tendency for well-connected parties to dominate.<sup>139</sup> If the categorical nature of nonenforcement tends to increase the public dialogue regarding important nonenforcement decisions even after the fact, with such dialogue leading to greater deliberation by the agency regarding the nonenforcement policy and the possibility of changing the policy going forward, then categorical nonenforcement may in some circumstances promote the legitimacy of such nonenforcement decisions under a civic republican theory of agency legitimacy.<sup>140</sup>

Categorical nonenforcement also can commit agencies to nonenforcement policies that may, under certain circumstances, lead to less arbitrary and more public regarding law. One way to commit to a nonenforcement policy, or to any agency policy, is for the agency to be legally bound to such a policy. The extent to which an agency would be legally bound to a policy of nonenforcement depends on how such policy is characterized under the Administrative Procedure Act (“APA”). To briefly summarize the possibilities, if the policy of nonenforcement is characterized as an interpretation of a statute, or an interpretive rule, the agency may be legally bound to the rule until the agency uses notice and comment procedures (“notice-and-comment”) under the APA to change the rule.<sup>141</sup> If the policy of nonenforcement is characterized as a legislative rule, the agency will be legally bound to the rule until the agency uses notice and comment to change the rule.<sup>142</sup> If, instead, the policy of nonenforcement is characterized as a mere policy statement, then the agency is unlikely to be legally bound to the

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accountable branches. Political actors also can evaluate outcomes that agencies reach to make sure they are consistent with consensus values. Seidenfeld, *supra* note 68, at 1550-51.

<sup>138</sup> Seidenfeld, *supra* note 68, at 1547.

<sup>139</sup> See, e.g., Leslie Book, *A New Paradigm for IRS Guidance: Ensuring Input and Enhancing Participation*, 12 FLA. TAX REV. 517, 524 (2012) (explaining this dynamic in the context of IRS guidance).

<sup>140</sup> Stephen M. Johnson, *Good Guidance, Good Grief*, 72 MO. L. REV. 695, 735 (2007) (“[I]ncreased public participation in agency decisionmaking is more democratic and increases the legitimacy of agency decisions and public trust in the agencies.”); Mendelson, *supra* note 67, at 636 (explaining that “a visible public debate more likely would engage less organized segments of the public as well and help assure the agency’s fuller consideration of both the diversity of public views and their intensity.”).

<sup>141</sup> *Mortgage Bankers Ass’n v. Harris*, 720 F.3d 966 (D.C. Cir. 2013), *cert granted* *Nickols v. Mortgage Bankers Ass’n*, 134 S.Ct 2820 (2014).

<sup>142</sup> 5 U.S.C. § 551(5); Thomas W. Merrill, *The Accardi Principle*, 74 GEO. WASH. L. REV. 569, 603 (2006).

nonenforcement policy,<sup>143</sup> meaning that technically the agency can simply fail to abide by the nonenforcement policy or change it informally, although there are some arguments to the contrary.<sup>144</sup>

While distinguishing between interpretive rules, legislative rules, and policy statements is a notoriously difficult task,<sup>145</sup> if an agency's statement of nonenforcement indicates how the agency has exercised its discretionary enforcement (or in this case nonenforcement) authority, and this statement cannot reasonably be seen as the agency's interpretation of an ambiguous statute or an attempt to bind the public, then such statement may be a policy statement, rather than an interpretive or legislative rule.<sup>146</sup> On the other hand, some courts may conclude that, even if not binding on the public, a nonenforcement policy should be treated by the agency as a legislative rule if the rule eliminates the agency's own enforcement discretion.<sup>147</sup> In any event, without engaging in a full-blown analysis of all of the nonenforcement examples discussed in this Article, at least some courts would conclude that at least some of these examples are mere policy statements. As a result, at least as to these examples, the statements of nonenforcement may not actually bind the agency to nonenforcement as a legal matter.

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<sup>143</sup> See, e.g., *Graham v. Ashcroft*, 358 F.3d 931, 935 (2004) (suggesting agencies cannot bind themselves to rules in circumstances in which the rules would undermine a comprehensive statutory scheme); *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (D.C.Cir. 1974) (suggesting that a policy statement is necessarily a tentative expression of how an agency intends to exercise its power, and therefore cannot be legally binding).

<sup>144</sup> See, e.g., *Socop-Gonzalez v. INS*, 208 F.3d 838, 844 (9th Cir. 2000) (*rev'd en banc on other grounds*, *Socop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2001)) (internal citations omitted) (stating that "established policies of an administrative agency may provide the law by which to judge an administrative action or inaction."); see also *Morton v. Ruiz*, 415 U.S. 199, 235 (1974) ("Before the BIA may extinguish the entitlement of these otherwise eligible beneficiaries, it must comply, at a minimum, with its own internal procedures."). Later authority has undermined *Ruiz*. See, e.g., *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (explaining that the Social Security Administration ("SSA") Claims Manual does not bind the SSA). Then again, an agency may have some due process obligation to provide notice and a reasoned explanation for deviation from its policy, although this is far from clear if the policy conflicts with the statute. See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum*, 53 Admin. L. Rev. 803, 844-45 (2001) (fleshing out possibilities).

<sup>145</sup> See, e.g., *Community Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987) (citations omitted) ("The distinction between legislative rules and interpretative rules or policy statements i.e., the main categories of nonlegislative rules has been described at various times as 'tenuous,' 'fuzzy,' 'blurred,' and, perhaps most picturesquely, 'enshrouded in considerable smog.'").

<sup>146</sup> *Conn. Dep't of Children & Youth Servs. v. Dep't of Health & Human Servs.*, 9 F.3d 981, 984 (D.C. Cir. 1993); *Attorney General's Manual on the Administrative Procedure Act* 30 n.3 (explaining that policy statements set forth "the manner in which the agency proposes to exercise a discretionary power"); Daniel T. Shedd & Todd Garvey, CONG. RESEARCH SERV., R43710, *A Primer on the Reviewability of Agency Delay and Enforcement Discretion* 10 (2014) ("Because an agency's decision to enforce a statute in a given situation is discretionary, an agency's announcement of its enforcement policy would appear to qualify as a guidance document . . .").

<sup>147</sup> See *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (1985) (examining possibility of agency binding itself and focusing on the language the agency used); *Texas v. United States*, 2015 WL 648570, at 51-56 (S.D. Tex. 2015).

However, even assuming that all the statements of nonenforcement discussed in this Article are mere policy statements, which are not legally binding, such statements of nonenforcement can still serve as a practical means of committing the agency to the nonenforcement. From an internal perspective, by making an official statement of categorical nonenforcement, high-level officials can communicate the nonenforcement policy to lower level officials to assure they act in accordance with the nonenforcement policy.<sup>148</sup> From an external perspective, even though the agency legally may be able to renege on its nonenforcement promise to regulated parties, doing so would subject the agency to significant ire, and therefore serves as a practical commitment mechanism for the agency. As a result, even if not legally enforceable, the nonenforcement promise can serve as an internal and external means of assuring nonenforcement, at least until the promise lapses or is publicly changed.<sup>149</sup>

The internal and external commitments to nonenforcement can promote nonarbitrariness for a number of reasons. First, in deciding to commit to nonenforcement, rather than simply relying on ad hoc decisionmaking, high-level agency officials have to think through the contours of the policy,<sup>150</sup> a process that can help ensure that the nonenforcement that does occur can be systemically justified. Second, when enforcement in a particular area does not make sense, categorical nonenforcement can serve as an essential means of controlling lower-level officials and aligning their nonenforcement with the public-regarding policy. As Judge Friendly poignantly explained, the “definition of standards is required if the agency members are to be the masters of the staff rather than salves of anonymous Neros, each fiddling his own tune.”<sup>151</sup> Perhaps most importantly, when high-level officials have

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<sup>148</sup> See, e.g., Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like – Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1363-64 (1992). (“Staff members acting upon matters to which the guidance documents pertain will routinely and indeed automatically apply those documents, rather than considering their policy afresh before deciding whether to apply them.”); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 409 (2009); Metzger, *supra* note 17, at 29.

<sup>149</sup> See, e.g., Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 839-40 (discussing IRS’s long-standing history of not abandoning well-established customary deviations); see also Mendelson, *supra* note 148, at 401 (explaining that “despite the lack of formal legal binding effect, agencies increasingly state that they will endeavor to follow guidance document policies”); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 863 (2009) (describing how, even when agency decisions limiting discretion do not legally bind the agency, they may create “expectations and reliance that translate into meaningful pressure for the agency in the future”).

<sup>150</sup> Magill, *supra* note 149, at 887-88.

<sup>151</sup> See *id.* at 884-86; FRIENDLY, *supra* note 92, at 24; Metzger, *supra* note 17, at 48.

determined that enforcement does not make sense in a particular area, categorical nonenforcement can prevent individual agents from using enforcement as a tool to harass disfavored parties.<sup>152</sup>

Of course, an agency could commit to a categorical nonenforcement policy that is not public-regarding. Nonenforcement, like many agency decisions, can serve as a means of giving rents to private parties,<sup>153</sup> and nonenforcement may actually be a particularly dangerous form of rent-giving, because simply not enforcing may be more likely to escape public review than an agency actively providing resources or beneficial regulation to a regulated party. While the close working relationship between the IRS, the Treasury Department, and congressional tax committees, and the close scrutiny of these government actors by an active tax press and an extensive tax bar,<sup>154</sup> in some circumstances may help ensure public regarding decisions, this is not necessarily the case. Like other agencies, the IRS may be particularly swayed by powerful interest groups, which groups will tend to have particular influence on the government actors.<sup>155</sup> Viewed from this perspective, an agency promising permanent (or semi-permanent) nonenforcement could promote particularly insidious agency giveaways.

In response to such concerns, however, it is important to remember that systematically setting a low enforcement priority, which essentially shields a sector of taxpayers from enforcement, can also serve as a form of rent-giving, and would be more likely than categorical nonenforcement to evade review, thereby making the private giveaway less transparent. As a result, while categorical nonenforcement certainly could serve as a particularly strong commitment to a non-public regarding nonenforcement policy, because of its salience the very categorical nature of categorical nonenforcement may actually reduce this danger.

An example from the tax context helps illustrate how categorical nonenforcement may be useful to an agency as a means of regularizing its discretion and producing nonarbitrary enforcement. The example comes from deep inside partnership tax, an extremely complex area of the tax Code, which is

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<sup>152</sup> Bressman, *supra* note 69, at 1691.

<sup>153</sup> Magill, *supra* note 149, at 901 (“[P]romises of nonenforcement—to segments of an industry would be an excellent way for an agency to provide rents to private parties.”)

<sup>154</sup> See, e.g., *About Tax Analysts*, <http://www.taxanalysts.com/www/website.nsf/Web/AboutTaxAnalysts> (last visited Nov. 17, 2014) (describing Tax Analysts publications’ monitoring of the tax news and their extensive readership)

<sup>155</sup> See Book, *supra* note 139, at 524 (describing phenomenon).

quite difficult for many tax practitioners, much less the average congressperson, to understand.<sup>156</sup> A perennial problem for partnership taxation is the taxation of a partnership interest received in exchange for the provision of services.<sup>157</sup> The problem reared its head in the early 1970s, when the Tax Court, in a case called *Diamond v. Commissioner*, determined that the receipt of a so-called profits interest (which is an interest in future profits) in exchange for the provision of services is includible in income at its fair market value at the time of the receipt by the service partner.<sup>158</sup> Commentators reacted fiercely to the decision, criticizing it as presenting great administrative difficulties.<sup>159</sup> The IRS Office of Chief Counsel agreed and advised the Assistant Commissioner (Technical) of the IRS to issue a revenue ruling indicating that, despite the *Diamond* case, the IRS would not attempt to include in income the receipt of a mere profits interest as compensation for services.<sup>160</sup> Had the IRS released the ruling, it would have been forgoing enforcement that was at least arguably allowed under the relevant tax law at the time, as a result of the Tax Court's decision in *Diamond*. Rather than release the ruling, the IRS attempted to unofficially steer agents away from raising the issue.<sup>161</sup> This left advisors with the sense that nonenforcement was the IRS's position, but without any assurances that the IRS was bound to it.<sup>162</sup>

This informal nonenforcement policy worked fairly well for some time, but ultimately the lack of an official policy of nonenforcement meant that individual IRS field agents could wreak havoc for taxpayers and the IRS alike by raising the issue on their own accord. Following the *Diamond* case, the IRS rarely pressed the issue, and, as a result, for almost two decades few cases addressed the question.<sup>163</sup> As a result of a lack of official IRS policy against enforcement, however, an IRS field agent

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<sup>156</sup> See, e.g., Terence Floyd Cuff, *Working with Target Allocations – Idiot-Proof or Drafting for Idiots?*, 35 WG-RETAX 116, 116 (describing that “[p]artnership taxation is an adventure in Wonderland . . .”).

<sup>157</sup> See Laura E. Cunningham, *Taxing Partnership Interests Exchanged for Services*, 47 TAX. L. REV. 247, 247 (1991) (describing “[t]he taxation of a partnership interest issued in exchange for services as “one of the most troublesome issues of partnership tax law.”). A plethora of articles has been written on the subject. See, e.g., Martin B. Cowan, *Receipt of an Interest in Partnership Profits in Consideration for Services: The Diamond Case*, 27 TAX L. REV. 161 (1972); Carolyn S. Nachmias, *Using Profits to Compensate a Service Provider-Potential Partnership Characterization*, 21 FLA. ST. U.L. REV. 1125 (1994); Leo L. Schmolka, *Taxing Partnership Interests Exchanged for Services: Let Diamond / Campbell Quietly Die*, 47 TAX L. REV. 287 (1991).

<sup>158</sup> 56 T.C. 530 (1971), *aff'd*, 492 F.2d 286 (7th Cir. 1974).

<sup>159</sup> See, e.g., A. WILLIS, PARTNERSHIP TAXATION § 11.04 (2d ed. 1976).

<sup>160</sup> G.C.M. 36346 (July 25, 1977). In most relevant part, the proposed ruling stated, “The Internal Revenue Service will not follow the decision in Sol Diamond to the extent that it holds that the receipt by a partner of an interest in future partnership profits as compensation for services results in taxable income.” *Id.*

<sup>161</sup> MCKEE ET AL., FED. TAX’N PARTNERSHIPS & PARTNERS ¶ 5.02[3] at 9.

<sup>162</sup> See *id.* at 7; John A. Townsend, *The Controversy Over Campbell: Slicing the Bologna Too Thin*, 52 TAX NOTES 83 (July 1, 1991).

<sup>163</sup> Cunningham, *supra* note 157, at 250-51.

ultimately asserted that the receipt of profits interests as compensation for services should be included in the income of a married couple in Arkansas.<sup>164</sup> Rumors indicated that the field agent's pursuance of the case occurred without the approval of the IRS's national office, and that had such approval been sought the national office may have buried the case, indicating how the individual field agent's decision did not accord with a high-level, systematic assessment.<sup>165</sup> Indeed, to add insult to injury, the IRS agent not only asserted that receipt of the profits interest should be included in income but even asserted that a negligence penalty should be imposed on the taxpayers for failing to include the receipt of such profits interests in income.<sup>166</sup> The notion that an individual taxpayer could not only be subject to administration of the tax law that high-level officials had determined did not make sense systematically, but also affirmatively be penalized for failure to abide by a policy that had been rejected at high levels underscored how the lack of an official policy could result in unjustifiable unfairness in particular cases.

The IRS agent's assertion was contested by the surprised taxpayers in the case of *Campbell v. Commissioner*,<sup>167</sup> forcing the IRS into court in order to defend the inclusion in income. At the Eighth Circuit, the IRS tried to concede the issue in the case (while still preserving the tax result in the case at issue on other grounds) without actually creating a precedent regarding the taxability of profits interests for taxpayers to rely upon to plan their affairs accordingly.<sup>168</sup> The Eighth Circuit found in favor of the taxpayers in the case, but did not ultimately resolve the general question of whether the receipt of profits interests in exchange for the provision of services to a partnership may be included in income.<sup>169</sup>

In light of the controversy and the remaining uncertainty, the IRS finally stepped in after the Eighth's Circuit decision to issue a statement of nonenforcement. It did so in the form of Revenue Procedure 93-27.<sup>170</sup> According to the IRS, revenue procedures are publicly published "statements of practice and procedure issued primarily for internal use."<sup>171</sup> Revenue Procedure 93-27 begins by

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<sup>164</sup> See *id.* at 247.

<sup>165</sup> See Townsend, *supra* note 162, at n. 43.

<sup>166</sup> *Campbell v. Commissioner*, 59 T.C.M. (CCH) 236 (1990), *aff'd in part and rev'd in part*, 943 F.2d 815 (8th Cir. 1991).

<sup>167</sup> The taxpayer in the case had consulted with several tax attorneys about the matter, including a tax attorney who taught partnership tax at NYU School of Law. They both informed him that, despite *Diamond*, he should not be taxed, with the tax attorney who taught partnership tax at NYU School of Law indicating that "there was little or no chance that he would be taxed on the receipt of such interests." *Campbell*, 59 T.C.M. (CCH) 236 (1990).

<sup>168</sup> *Campbell*, 943 F.2d at 818.

<sup>169</sup> *Id.* at 818-23.

<sup>170</sup> Rev. Proc. 93-27, 1993-2 C.B. 343.

<sup>171</sup> Rev. Proc. 55-1, 1955-2 C.B. 897, § 3.

summarizing the background of the controversy and the uncertainty it had engendered and then states that, unless certain clearly delineated exceptions apply, “if a person receives a profits interest for the provision of services . . . the Internal Revenue Service will not treat the receipt of such an interest as a taxable event for the partner or the partnership.”<sup>172</sup> In other words, regardless of whether or not the IRS could do so, it was promising that it would not enforce the inclusion in income of profits interests received in exchange for services provided to a partnership, unless certain exceptions applied. The language of this statement of nonenforcement is remarkably similar to the IRS’s announcement that “[t]he IRS will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer’s business or official travel.”<sup>173</sup> While the IRS has more recently suggested that it will pursue a different set of legal rules in the context of partnership profit interests in the form of regulations,<sup>174</sup> for over a decade Revenue Procedure 93-27 served as a source of certainty and uniformity. The proposed regulations, if finalized, would offer their own resolution of the issues and presentation of new issues.<sup>175</sup>

The saga regarding taxation of profits interests is instructive regarding the potential benefits of an agency committing to a policy of nonenforcement through categorical nonenforcement. By failing to commit to a policy of nonenforcement after *Diamond*, the IRS opened the door for arbitrary administrative action. Having an unofficial, not transparent policy of nonenforcement left taxpayers

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<sup>172</sup> Rev. Proc. 93-27, 1993-2 C.B. 343. The exceptions are that the revenue procedure will not apply:

- (1) If the profits interest relates to a substantially certain and predictable stream of income from partnership assets, such as income from high-quality debt securities or a high-quality net lease;
- (2) If within two years of receipt, the partner disposes of the profits interest; or
- (3) If the profits interest is a limited partnership interest in a “publicly traded partnership” within the meaning of section 7704(b) of the Internal Revenue Code.

*Id.* at 1-2.

<sup>173</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621. The fact that the IRS would have faced a significant, uphill battle for inclusion on legal grounds in Rev. Proc. 93-27, 1993-2 C.B. 343 supports the contention of Professors Abreu and Greenstein that such statements of “nonenforcement” may be viewed just as easily, or perhaps better, as interpretations of the law. See *supra* note 45. However, this conclusion depends on how strong the law underlying the IRS’s concession is, and the characterization as an interpretation therefore seems stronger in the case of Rev. Proc. 93-27, 1993-2 C.B. 343 than in the case of I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621. As discussed previously, whether the IRS is promising nonenforcement because of its doubts about the law or because of administrative or other noninterpretive reasons, this Article generally views together IRS discretionary statements with respect to enforcement of the law.

<sup>174</sup> Prop. Reg. § 1.721-1(b)(1) (2005); Prop. Reg. § 1.83-3(e) (2005) (applying § 83 to receipt of profits interest but providing elective safe harbor of liquidation value for partnership interest received in exchange for services).

<sup>175</sup> See *id.* For discussion of the proposed regulations, see MCKEE ET AL., *supra* note 161, at ¶ 5.02[8].

uncertain about how to plan their affairs. Rather than being able to rely on a consistent policy determined for all taxpayers, individual taxpayers became vulnerable to the possibility of enforcement by lone revenue agents, motivated by their own, unsystematic sense of their enforcement duties.<sup>176</sup> As described by a leading treatise, between *Diamond* and *Campbell* “millions of service-connected transfers of partnership profits interests went unchallenged, while only a few unfortunates found themselves dealing with the effects of *Diamond*.”<sup>177</sup> The idea of being one of the only taxpayers subject to enforcement for a particular issue, when high-level officials have unofficially precluded such enforcement as a result of concerns about administrability and / or other misgivings is a quintessential example of arbitrary agency action. This possibility also leads to the insidious threat of individual revenue agents using enforcement action, which is not in accordance with high-level policy, as a tool to harass individual taxpayers based on characteristics that the revenue agents dislike.<sup>178</sup> Had the IRS issued a statement of categorical nonenforcement after *Diamond*, it could have committed to less arbitrary and more public regarding policy, increasing the legitimacy of its nonenforcement.

In sum, viewing the realities of agency nonenforcement of the tax law through the lens of agency legitimacy has displayed how categorical nonenforcement may, in certain circumstances, actually increase the legitimacy of agency nonenforcement. Prior to leaving this lens of agency legitimacy, it is useful to address a number of lingering issues. First, would categorical nonenforcement withstand judicial review, should it, and what, if anything, do these conclusions reveal about the legitimacy of categorical nonenforcement? To some, the lack of discussion of judicial review thus far might be striking. Judicial review is often discussed as an independent means of securing agency legitimacy or as a means of promoting the theories of agency legitimacy discussed above.<sup>179</sup> Judicial review has not been discussed thus far, or set forth as an independent theory of agency legitimacy, because of practical constraints on judicial review of nonenforcement. As a general matter, and in the tax context in particular, a combination of restrictive standing doctrine and a general presumption

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<sup>176</sup> Cf. Mendelson, *supra* note 148, at 413 (explaining that guidance documents “enable agencies to manage their numerous employees who have contact with the public, reducing the risk of arbitrary decisions and increasing the chances that individual agency employees will treat like cases alike”).

<sup>177</sup> MCKEE ET AL., *supra* note 161, at ¶ 5.02[3] at 6.

<sup>178</sup> Cf. Strauss, *supra* note 144, at 808 (“Agency administration is aided when central officials can advise responsible bureaucrats how they should apply agency law. Citizens are better off if they can know about these instructions and rely on agency positions, with the assurance of equal treatment such central advice permits, than if they are remitted to the discretion of local agents and to ‘secret law.’”).

<sup>179</sup> See, e.g., M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1413 (2004) (“The dominant narrative of modern administrative law casts judges as key players who help tame, and thereby legitimate, the exercise of administrative power.”).

against reviewability of agency nonenforcement decisions serves as a barrier to judicial review of agency nonenforcement.<sup>180</sup> As for standing, potential litigants do not have standing to challenge the tax liability (or nonenforcement of the tax liability) of others<sup>181</sup> and taxpayers generally will not have an incentive to challenge nonenforcement of their own tax liability,<sup>182</sup> a set of circumstances that mirrors more generally the difficulty that regulatory beneficiaries face in challenging agency nonenforcement.<sup>183</sup> As for nonreviewability, the Supreme Court in *Heckler v. Chaney* declared a general presumption against review of agency nonenforcement decisions, in part because an “agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise,” and particularly outside of a court’s area of expertise.<sup>184</sup> As a result, while judicial review may play an important role in legitimating many agency decisions, at least at present it generally does not serve as an effective means of legitimating agency nonenforcement decisions.<sup>185</sup>

Notwithstanding these practical difficulties, some may point to hints in a number of cases that categorical nonenforcement may be particularly problematic, and therefore may, at least in the right case, be able to overcome the presumption against reviewability of agency nonenforcement (though, unless standing doctrine changes, in most cases review would still be barred by standing doctrine).<sup>186</sup> In *Chaney*, in explaining why the presumption against judicial review made sense, the Supreme Court stated that the agency was better equipped to determine the “proper ordering of its priorities”<sup>187</sup> and

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<sup>180</sup> See Bressman, *supra* note 69, at 1644-45; Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 848-850. For an exception due at least in part to the particular facts at issue, see *Texas*, 2015 WL 648570 at 11-18 (concluding that states had standing to challenge DAPA and expansion of DACA when nonenforcement would require states to provide costly services, such as the provision of drivers’ licenses).

<sup>181</sup> Justice Stewart famously indicated that he could not “imagine a case, at least outside the First Amendment area, where a person whose own tax liability was not affected ever could have standing to litigate the federal tax liability of someone else.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 46 (1976) (Stewart, J., concurring). For another foundational case, see *Allen v. Wright*, 468 U.S. 737, 740 (1984).

<sup>182</sup> Cf. Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 848-850 (coming up with a very particularized example in which taxpayer subject to nonenforcement might challenge it but concluding that “[d]espite the theoretical possibility that a taxpayer could have motivation--and standing--to challenge the application to himself of a taxpayer-favorable customary deviation, in practice such litigation is vanishingly rare.”).

<sup>183</sup> Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 186-88, 195-96 (1992) (discussing how standing and nonreviewability doctrine disadvantage regulatory beneficiaries).

<sup>184</sup> 470 U.S. 821, 831-31 (1985).

<sup>185</sup> It is outside the scope of this Article to critique this result. Others have done so well in other work. See, e.g., Bressman, *supra* note 180. Here, it is enough to say that the inability to challenge nonenforcement decisions is problematic, but also reflects the real difficulties courts would have in judging nonenforcement.

<sup>186</sup> But see *Texas*, 2015 WL 648570, at 11-18 (concluding otherwise in the context of DAPA and expansion of DACA).

<sup>187</sup> 470 U.S. at 832.

indicated in a footnote that the Court was not deciding a case where it could “justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>188</sup> In *Motor Vehicle Manufacturers’ Ass’n v. State Farm Mutual Automobile Insurance Co.*, albeit a case that dealt with regulation rather than nonenforcement, Justice Rehnquist indicated in his concurring opinion that, while an agency may “evaluate priorities in light of the philosophy of the administration,” it could not “choose not to enforce laws of which it does not approve, or to ignore statutory standards . . . .”<sup>189</sup> Other cases have provided similar hints, though certainly not controlling law, that complete failure to enforce the law may not be permissible.<sup>190</sup>

However, the analysis above does not provide a clear-cut case against categorical nonenforcement. For reasons discussed above, and in further detail below, in many cases setting a low priority can have a very similar effect to categorical nonenforcement. In light of this reality, perhaps setting a low priority, in appropriate cases, should not be treated differently than categorical nonenforcement. Moreover, it is not clear whether categorical nonenforcement always should be seen as “so extreme as to amount to an abdication of [the agency’s] statutory responsibilities,”<sup>191</sup> rather than a reasonable decision of the agency, in light of the various considerations it is balancing in a particular case. Categorical, in other words, is not necessarily the same as “so extreme as to amount to an abdication,”<sup>192</sup> and this Article fundamentally posits that they should not be treated synonymously.

Indeed, the limited judicial authority regarding nonenforcement may speak more to the extensiveness of nonenforcement than to the categorical nature of nonenforcement. In *Chaney*, in suggesting that judicial review might be available if an agency “‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities,” the Supreme Court cited a case in which the Department of Health, Education and Welfare (“HEW”) had engaged in extensive nonenforcement of Title VI of the Civil Rights Act of 1964 and had claimed that HEW’s enforcement of Title VI was completely discretionary.<sup>193</sup> Even though HEW actually had not promised categorical nonenforcement of any specific aspect of Title VI, its claim nonetheless was

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<sup>188</sup> *Id.* at 833 n. 4.

<sup>189</sup> 463 U.S. 29, 59 & n. \* (1983).

<sup>190</sup> See, e.g., *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983); *Texas*, 2015 WL 648570 at 32-34 (suggesting that DAPA and expansion of DACA may be an example of abdication).

<sup>191</sup> *Chaney*, 470 U.S. at 833 n. 4.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)).

notable presumably because of how sweeping the potential nonenforcement could be. In another context, Justice Scalia implied that agency discretion may be more acceptable for narrow questions, rather than substantial decisions.<sup>194</sup> In *Allison v. Block*, in concluding that the Secretary of Agriculture could not abdicate responsibility to implement an entire statutory program, the Eighth Circuit suggested that it was the extensiveness of the nonenforcement that was problematic.<sup>195</sup> A recent district court case has also emphasized the “wide-reaching” nature of DAPA and the expansion of DACA in deciding that *Chaney* does not bar judicial review of these immigration nonenforcement initiatives.<sup>196</sup>

In any event, while reasonable minds certainly may differ on how *Chaney* should be read,<sup>197</sup> for reasons hinted at previously, this Article does not necessary adopt the perspective that even particularly extensive categorical nonenforcement should be impermissible. For instance, as discussed above, there may be benefits to categorically not enforcing swaths of the income tax code as to large partnerships until changes can be made allowing the IRS to do so effectively, even though this would arguably be a case of extensive categorical nonenforcement. Indeed, rather than being seen as simply a problem from the perspective of judicial review, categorical nonenforcement perhaps should be viewed as a benefit. By being transparent about nonenforcement, categorical nonenforcement may help facilitate judicial review of the appropriateness of the nonenforcement,<sup>198</sup> and thereby help legitimate it. How and when a court would or should actually strike down a categorical nonenforcement policy, in light of the difficult decisions that must be made in making enforcement decisions (which courts are arguably particularly ill-suited to judge), remains quite unclear. But by at least transparently communicating nonenforcement, categorical nonenforcement could at least offer courts the ability to judge when such decisions are being made in a reasonable fashion, or consistently with what Congress would have wanted had it examined the difficult question, or in accordance with whatever other inquiry courts decide is relevant.

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<sup>194</sup> *Whitman v. Am. Trucking Ass’ns.*, 531 U.S. 457, 475 (2001) (“While Congress need not provide any direction to the EPA regarding the manner in which it is to define ‘country elevators,’ which are to be exempt from new-stationary-source regulations governing grain elevators, see 42 U.S.C. § 7411(i), it must provide substantial guidance on setting air standards that affect the entire national economy.”).

<sup>195</sup> *See, e.g.*, 723 F.2d at 635-36 (distinguishing cases in which nonenforcement of entire program was not at issue). The recent OLC opinion was also sensitive to this question of whether extensiveness of nonenforcement affects its legality. *OLC Opinion, supra* note 24, at 30-31.

<sup>196</sup> *Texas*, 2015 WL 648570 at 44.

<sup>197</sup> *See id.* at 43-44, 50 (also contrasting inadequate enforcement from an announced program of nonenforcement in a way that suggests that categorical nonenforcement may be particularly problematic under *Chaney*).

<sup>198</sup> *See Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676 (D.C. Cir. 1994) (indicating that “an agency’s statement of a general enforcement policy” may be more likely to be “reviewable for legal sufficiency where the agency [has] articulated it in some form of universal policy statement.”).

In sum, while the combination of standing and nonreviewability doctrines generally will prevent judicial review absent very particularized facts, this Article implicitly posits that judicial review *should not* single out categorical nonenforcement as impermissible. Moreover, the very lack of judicial review of agency nonenforcement makes the theories of agency legitimacy discussed above all the more important.<sup>199</sup>

Finally, it is also worth making explicit something that was implicit in the discussion of the theories of agency legitimacy. Categorical nonenforcement may work differently in different situations, and thereby may increase accountability, deliberation, or nonarbitrariness, without necessarily increasing all three. For instance, particularly in a situation in which the agency nonenforcement deals with a question, such as a relatively obscure partnership tax question, that would be perceived as technical, categorical nonenforcement may be unlikely to increase widespread accountability and deliberation (at least by the public at large). Nonetheless, categorical nonenforcement may still increase nonarbitrariness, and therefore the legitimacy of the nonenforcement. Similarly, one could subscribe to a particular theory of agency legitimacy (such as, for example, the nonarbitrariness theory of agency legitimacy) and reject the others, and categorical nonenforcement could still increase the legitimacy of nonenforcement, to the extent that it increases legitimacy under the relevant theory of agency legitimacy. In this regard, it is worth emphasizing that conceptions of the administrative state have tended to swing back and forth between two poles over time: one that emphasizes that agencies are engaging in political, policymaking decisions, and the other that emphasizes that agencies are engaging in decisions that rely on technical expertise.<sup>200</sup> The first pole will tend to look to some form of political accountability theory to legitimate agency action, whereas the second will tend to look to some form of nonarbitrariness theory. An underlying assumption of this Article is that agencies do not engage in just one type of decisionmaking, but rather do a mix of both. For instance, the IRS may make policy-laden decisions about whether to pursue business taxes aggressively or not, as well as expertise-laden decisions about whether administrative concerns preclude enforcement of a very technical tax provision. A comprehensive evaluation of executive nonenforcement should take into account the different types of decisions that agencies make, as fleshed out in the examples above, and how

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<sup>199</sup> Cf. Metzger, *supra* note 17, at 48 (stressing that internal supervision becomes even more important as a means of “guarding against arbitrary use of governmental power . . . when judicial review is lacking.”).

<sup>200</sup> See, e.g., Lessig & Sunstein, *supra* note 72, at 97-101 (describing “large-scale shifts in the nature of our understanding of what the administrators’ power is” and characterizing the then predominant view of agencies engaging in political, policy-laden decisions); Jody Freeman & Adrian Vermeule, *Massachusetts v EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 88 (describing recent pendulum swing back to concern for agency expertise).

categorical nonenforcement can impact such decisions, and, in some circumstances, increase the accountability, deliberation, and / or nonarbitrariness of agency nonenforcement.

## V. Return to Alternative Lenses

Having examined the case for categorical nonenforcement through the lens of agency legitimacy, it is useful to return to the alternative lenses of constitutional law and rule of law, which other scholars have used in examining nonenforcement generally and tax law nonenforcement specifically. As will be discussed below, in delineating what is acceptable executive nonenforcement, both the existing constitutional and rule of law lenses rely on formal distinctions, such as distinctions between categorical nonenforcement and setting priorities, or between nonenforcement motivated by enforcement resource limitations and nonenforcement motivated by policy, that do not hold up well against the realities of agency nonenforcement. Especially in light of such limitations, the agency legitimacy lens has much to offer to the ongoing contemplation of executive nonenforcement.

To begin, the distinctions that constitutional law scholars have tried to draw between categorical nonenforcement and setting priorities may be more illusory than real.<sup>201</sup> To take an example from the tax context, as described previously, the IRS has been engaging in seemingly impotent enforcement of the Code for large partnerships. The result has been an audit rate of only approximately .8% for large partnerships,<sup>202</sup> as compared to a 27.1% audit rate during the same time period for C corporations with \$100 million or more in assets,<sup>203</sup> and even those audits of large partnerships that did occur resulted in minimal findings of noncompliance.<sup>204</sup> Indeed, looking at large partnership audits on a net basis, in at least some recent years the total audit adjustments from large partnerships were negative, meaning that on a net basis the IRS actually ended up paying large partnerships money!<sup>205</sup> While this result has occurred under the formal guise of setting priorities rather than categorical nonenforcement,<sup>206</sup> the notion that virtually impotent audit is clearly distinct from categorical nonenforcement just because it technically occurs through setting a low enforcement priority is

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<sup>201</sup> Indeed, even some proponents of the line have acknowledged its difficulties. *See, e.g., Price, supra* note 3, at 677 (acknowledging that “the line between a priority and a policy will be unclear in many cases.”).

<sup>202</sup> LARGE PARTNERSHIPS, *supra* note 36, at 10.

<sup>203</sup> *Id.*

<sup>204</sup> GROWING NUMBER, *supra* note 38, at 20.

<sup>205</sup> *Id.* at 21.

<sup>206</sup> For a discussion of how failure to reallocate resources to partnerships has in part led to the current state of affairs with partnership audits, see Brock, *supra* note 39, at 55-60.

untenable. As this example illustrates, setting priorities, like a formal policy of categorical nonenforcement, can have the result of a policy of essentially no enforcement, making any sharp distinction between the two enforcement mechanisms somewhat meaningless. Moreover, for reasons described in Part III, impotent enforcement of at least some aspects of the tax law at least some of the time is an inevitable part of modern tax administration. From a practical perspective, therefore, the IRS cannot avoid setting low priorities, nor would it make sense to attempt to force the IRS to do so. Accepting low priorities as inevitable, and often virtually indistinguishable from categorical nonenforcement, suggests the disutility of singling out categorical nonenforcement as impermissible.

While not the focus of this Article, the high-profile cases that constitutional scholars have themselves been sparring over illustrate this point as well. Referring to DACA, Professors Delahunty and Yoo have characterized the program as a “decision not to enforce the removal provisions of the Immigration and Nationality Act (INA) against an estimated population of 800,000 to 1.76 million individuals illegally present in the United States,”<sup>207</sup> or, in other words, a case of categorical nonenforcement, and Professor Price has seconded that “this policy amounts to a categorical, prospective suspension of [the law].”<sup>208</sup> In contrast, as previously alluded to, the Obama Administration actually took pains to indicate that it was merely setting priorities and even that particular decisions would be made on a “case-by-case” basis.<sup>209</sup> Other scholars and commentators have argued that President’s Obama’s immigration actions, far from categorical nonenforcement, are merely setting enforcement priorities, which they describe as a quintessentially executive role.<sup>210</sup> The differing characterizations by different people looking at the same, exact policy shines light on how the distinction itself at the very least does not lead to self-evident or particularly satisfying conclusions.

On the one hand, a statement that reserves the right to deport particular individuals if circumstances merit the deportation, despite a general policy against it, is for all intents and purposes the same as a policy of categorical nonenforcement if such right is never, or even virtually never, exercised. Even to the extent that such right is exercised in an exceptional case, for the millions of individuals who will not be deported and gain the virtual assurance of nondeportation, a policy that formally sets priorities and leaves some technical space for case-by-case deviations nonetheless

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<sup>207</sup> Delahunty & Yoo, *supra* note 3, at 783.

<sup>208</sup> Price, *supra* note 3, at 760.

<sup>209</sup> See *supra* text accompanying notes 20-22.

<sup>210</sup> See *supra* note 17.

provides assurances almost identical to that provided by categorical nonenforcement.<sup>211</sup> To elevate the very unlikely possibility that the executive will deviate from a policy of nonenforcement to a saving grace from a constitutional perspective pushes form over function to an unreasonable degree.

On the other hand, if we reasonably reject the terms of the policy as a means of distinguishing between categorical nonenforcement and setting priorities, the distinction itself becomes somewhat meaningless. If DACA, which was explicitly formulated as an exercise in setting priorities, should be considered for all intents and purposes an instance of categorical nonenforcement, then any supposed exercise in setting priorities may really be categorical nonenforcement. The task, then, of distinguishing between a policy of setting priorities from a policy of categorical nonenforcement will be factually intensive and almost certain to produce no intellectual coherence, or promote clearly important values.

At least some constitutional law scholars might counter that, nonetheless, a distinction must be drawn between nonenforcement, and even categorical nonenforcement, that is motivated by enforcement resource limitations (which may be an acceptable exercise of executive power) and nonenforcement that is motivated by policy (which may not be an acceptable exercise of executive power). Indeed, much of the IRS's nonenforcement discussed in this Article may be understood as a function of the IRS's limited resources.<sup>212</sup> Constitutional scholars might argue, therefore, that all of the nonenforcement discussed in this Article is acceptable nonenforcement explainable by enforcement resource limitations, and that no new, agency legitimacy lens is necessary for thinking about nonenforcement. However, the notion that there is such a clear divide, or that even all of the nonenforcement in this Article can be explained by such a divide, is also untenable.<sup>213</sup> When dealing with an agency that is perpetually underfunded, there often will be some sort of enforcement resource limitation that could explain why an agency has chosen not to enforce a particular aspect of the law. Indeed, in a resources strapped agency, any instance of nonenforcement could be explained, at least in

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<sup>211</sup> Obama, *supra* note 22 (explaining that, through DACA, "DHS is lifting the shadow of deportation from these young people.").

<sup>212</sup> See *supra* text accompanying notes 61-63 (discussing how IRS has to take into account, at least in part, yields relative to costs per audit).

<sup>213</sup> Even strong proponents of such a divide acknowledge the real difficulties. See, e.g., Love & Garg, *supra* note 18, at 1215 (acknowledging that "resource constraints are ubiquitous, presidents are in the business of making decisions that serve their predetermined policy goals, and priorities and obligations will often conflict"), and 1229 (noting that courts might be unwilling or incapable of policing this divide).

part, by enforcement limitations.<sup>214</sup> However, various policy decisions are often going to be intermixed with enforcement considerations, making it difficult to disentangle them.

For example, the decision to engage in categorical nonenforcement with respect to frequent flier miles earned on business trips paid for by the taxpayer's employer but used for personal purposes can be explained in part by the difficulty for the IRS in enforcing the inclusion of such miles in income. The IRS's statement of nonenforcement with respect to frequent flier miles specifically indicates that the IRS had not "pursued a tax enforcement program with respect to promotional benefits such as frequent flyer miles" as a result of "unresolved issues" which are "technical and administrative" in nature.<sup>215</sup> Principally, IRS attempts to value the miles for each taxpayer may engender a nightmarish valuation hassle.<sup>216</sup> However, it is quite difficult to enforce many aspects of the tax law, including, to take just one of many examples, inclusion of the cash wages received by a nanny.<sup>217</sup> Pointing solely to enforcement difficulties alone isn't enough to understand why the IRS engaged in categorical nonenforcement with respect to frequent flier miles, but not with respect to cash wages paid to nannies. In addition to enforcement difficulties, there must be some other reason why the IRS chose categorical nonenforcement with respect to frequent flier miles. The additional reason is likely that there is an underlying sense that the frequent flier miles just do not feel like income in the same way as the cash

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<sup>214</sup> Of course, it might be possible to find an example of an agency that is not resource strapped, and in such cases the enforcement limitations explanation might be less plausible. See Love & Garg, *supra* note 18, at 1218-20 (making such an argument with respect to the Bush administration's underenforcement of the Voting Rights Act). However, even the conclusion in this very specific instance is not indisputable. *Id.* at 1219 n. 114.

<sup>215</sup> I.R.S. Announcement 2002-18, 2002-10 I.R.B. 621.

<sup>216</sup> A number of commentators have suggested using a fixed value per mile to overcome the valuation difficulties. See, e.g., Dominic L. Daher, *The Proposed Federal Taxation of Frequent Flyer Miles Received From Employers: Good Tax Policy But Bad Politics*, 16 AKRON TAX J. 1, 7 (2001); Lee S. Garsson, *Frequent Flyer Bonus Programs: To Tax or Not To Tax--Is This The Only Question?*, 52 J. AIR. L. & COMMERCE 973, 989-92 (1987); Zelenak, *Up in the Air*, *supra* note 25, at 39. These suggestions would ease administration, but at the cost of accuracy in individual cases. There is also a question about when the frequent flier miles would be included. For an example of differing views, compare Zelenak, *Up in the Air*, *supra* note 25, at 27-33 (inclusion at time miles are earned), with M. Bernard Aidinoff, *Frequent Flyer Bonuses: A Tax Compliance Dilemma*, 31 TAX NOTES 1345, 1352 (1986) (inclusion when miles are used), and Joseph M. Dodge, *How to Tax Frequent Flyer Bonuses*, 48 TAX NOTES 1301, 1302 (1990) (same).

<sup>217</sup> See Debra Cohen-Whelan, *Protecting the Hand that Rocks the Cradle: Ensuring the Delivery of Work Related Benefits to Child Care Workers*, 32 IND. L.J. 1187, 1193-1201 (1999); Catherine B. Haskins, *Household Employer Payroll Tax Evasion: An Exploration Based on IRS Data and on Interviews with Employers and Domestic Workers* (Feb. 1, 2010) (Pd.D. dissertation, University of Massachusetts, Amherst) (manuscript at 124), available at [http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1171&context=open\\_access\\_dissertations](http://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1171&context=open_access_dissertations) ("[N]o fewer than three-quarters of all household employers are currently failing to pay their nanny taxes"). Indeed, as pointed out in these and other sources, the lack of compliance in this instance has more profound, negative consequences than mere reduction in revenue, because of the implications for worker benefit entitlement.

wages, making it less palatable to tax them.<sup>218</sup> While the Code does not provide explicit room for the IRS to make enforcement decisions based on underlying senses such as these, these senses, which are really policy views about the law, inevitably motivate an agency's resource allocation decisions.

The cases that constitutional law scholars have been sparring over outside the tax context also underscore the difficulty of determining when nonenforcement can be explained by limitations on enforcement resources and when it can be explained by policy. Focusing explicitly on the question of whether DACA saves enforcement resources, Justice Scalia (among many others) has claimed that "the husbanding of scarce enforcement resources can hardly be the justification for this . . ." <sup>219</sup> Others have countered the opposite.<sup>220</sup> Certainly, with enough effort a cost benefit analysis could be performed, indicating how much money is or is not saved by the DACA program. To the extent that such an analysis reveals that DACA actually costs, rather than saves, money the enforcement resource limitations explanation might be invalid. But what about in presumably the majority of cases that agencies face (and maybe even in the case of DACA), in which cutting enforcement in a particular area does save scarce resources? Would the enforcement resources limitation necessarily excuse the nonenforcement decision? Like with the categorical nonenforcement of frequent flier miles, even such an analysis would not necessarily explain why the particular nonenforcement was chosen to save resources.<sup>221</sup>

At bottom, in deciding between different means of saving enforcement resources, value judgments not motivated solely by saving enforcement resources are inevitably going to come into play. For instance, an agency might very reasonably decide it should save resources by cutting enforcement against offenders that pose a low threat to the public. But once anything other than saving enforcement resources becomes a factor, the decision becomes motivated by a mix between policy and a desire to save enforcement resources. As a result, like the distinction between categorical nonenforcement and setting priorities, this distinction between nonenforcement motivated by policy and nonenforcement motivated by enforcement resource limitations often is not going to map onto reality in a satisfying way.

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<sup>218</sup> Cf. Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 841 (explaining that "taxation of many in-kind benefits may be nonintuitive and objectionable in the minds of the general public"). Somewhat similarly, the IRS's decision in Rev. Proc. 93-27 may be explained by the underlying sense that, even if the receipt of a profits interests has some value, it just does not feel like income when the profits interest has not yet produced any profits.

<sup>219</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2521 (2012) (Scalia, J., dissenting).

<sup>220</sup> *Sant' Ambrogio*, *supra* note 17, at 396 n. 289.

<sup>221</sup> Indeed, in opining regarding President Obama's more expansive immigration initiative, the Office of Legal Counsel does not rely solely on a distinction between nonenforcement motivated by enforcement resource limitations and nonenforcement motivated by policy, instead shifting to an analysis of whether the policy based reasons are consistent with congressional policy. *OLC Opinion*, *supra* note 24, at 26.

Finally, this Article also does not rely on the distinction between time limited nonenforcement policies and nonenforcement policies that are not so limited, even though some constitutional scholars have suggested that this formal distinction might be important. Scholars who have provided some support for the distinction have not provided much explanation as to why such time limitations may remedy potential constitutional violations, nor will this Article put forth a vigorous counterargument.<sup>222</sup> It is enough for now to say that if a nonenforcement policy did somehow breach the limits on executive power and therefore pose constitutional problems, it is hard to see why limiting such breach to a specified period of time would remedy, rather than limit, the constitutional breach.<sup>223</sup>

Moving to the other, prominent existing lens for examining categorical nonenforcement, Professor Zelenak has suggested in the tax context that categorical nonenforcement may upset the rule of law.<sup>224</sup> This claim in some ways is difficult to evaluate because it is notoriously unclear what, exactly, the rule of law means.<sup>225</sup> Notwithstanding this ambiguity, however, rule of law accounts tend to emphasize consistency and notice of how the government intends to use its powers.<sup>226</sup> The strongest rule of law argument against categorical nonenforcement would begin by asserting that Congress's law is supreme<sup>227</sup> and therefore the relevant body of law for notice and consistency. If Congress's law is the relevant body of law in terms of notice and consistency, so the argument would go, then applications of the law, including categorical nonenforcement, that do not comport with Congress's law violate the rule of law. Relatedly, some might argue that separating lawmaking from law execution was an important constitutional value that was essential to promote the rule of law because lawmakers, foreclosed from the natural temptation to make bad law and then exempt themselves from it on an ad hoc basis, will instead be forced to create general rules that will apply to all.<sup>228</sup> Since, as some argue, categorical

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<sup>222</sup> For one explanation, see Sant' Ambrogio, *supra* note 17, at 403 (explaining that time limitations "would lend legitimacy to the President's actions by showing that the Executive is not permanently rewriting the law.").

<sup>223</sup> Love & Garg, *supra* note 18, at 1239; Price, *supra* note 3, at 706.

<sup>224</sup> See *supra* text accompanying note 28.

<sup>225</sup> Margaret Jane Radin, *Reconsidering the Rule of Law*, 89 B.U. L. REV. 781, 781 (1989). Indeed, in some accounts, rule exploitation (or violation) itself threatens the rule of law. Edward A. Morse, *Reflections on the Rule of Law and "Clear Reflection of Income": What Constrains Discretion?*, 8 CORNELL J.L. & PUB. POL'Y 445, 461-62 (1999). To the extent that categorical nonenforcement raised overall compliance, it might be possible to argue that categorical nonenforcement actually enhanced the rule of law. See Leigh Osofsky, *Concentrated Enforcement*, 16 FLA. TAX REV. 325 (2014) (examining how announcing concentrated enforcement, with implicit indication of reduced enforcement in some areas, may increase overall compliance in certain circumstances).

<sup>226</sup> See, e.g., LON L. FULLER, *THE MORALITY OF LAW* 209-10 (rev. ed., 1969); Morse, *supra* note 225, at 453.

<sup>227</sup> U.S. Const. art. 1 § 1.

<sup>228</sup> John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 646 (1996); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 434

nonenforcement changes the effective scope of the law and thereby may look a lot like lawmaking,<sup>229</sup> having an executive agency, like the IRS, engaging in such practice may blur the lines between lawmaking and execution and thereby undermine the rule of law the Constitution arguably meant to protect. This line of argument, of course, would be relying on the malleable terminology of rule of law to find another way of worrying about the potential problems with an agency overriding Congress.

Prior to accepting and addressing this argument, it is worth pushing back and suggesting that the concept of rule of law may not be the best lens for worrying about an agency's ability to override Congress. Rule of law accounts may as reasonably (or even more reasonably) look to the agencies themselves to evaluate how administration of the law comports with the rule of law. When the law on the ground inevitably will differ systematically from the law on the books, the agency making clear rules about how the law will actually apply can at least theoretically best promote the asserted, important constitutional values of notice of general rules and their consistent application.<sup>230</sup> For example, to the extent that the IRS has informally decided on nonenforcement with respect to partnership profits interests, making a categorical statement of nonenforcement may provide the notice and guarantee the consistency that are arguably among the hallmarks of the rule of law. As to the concern that blurring lawmaking and execution can lead to bad law and the exemption of lawmakers from it, categorical nonenforcement simply seems unlikely to lead to this outcome. Rather than making law that will apply to others, categorical nonenforcement is an express commitment to general nonenforcement. Indeed, as discussed previously, categorical nonenforcement can serve as a way to prevent low level officials from applying the law in an undesirable way. Professor Luna has provocatively made this point in the prosecutorial context by posing the following thought experiment: "Imagine an elected district attorney conveying to his constituency the rules or principles that will be used in exercising prosecutorial discretion, stating with a degree of specificity the conditions under which his office will not prosecute particular crimes or seek certain punishments," and concluding that such overt prosecutorial decriminalization can be a valuable means of "guiding law enforcement, communicating honestly with

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(1987); Paul R. Verkuil, *The American Constitutional Tradition of Shared and Separated Powers: Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 317-18 (1989). This has roots in the ideas of Locke, Montesquieu, and Blackstone, among others. *Id.*

<sup>229</sup> See, e.g., Price, *supra* note 3, at 705.

<sup>230</sup> Cf. DAVIS, *supra* note 58, at 94 ("A common kind of confused thinking is to prefer the secret ad hoc policies to the open uniform policies on the ground that the enacted law should be respected!").

the citizenry, and allowing individuals to conform their behavior to the effective scope of the law.”<sup>231</sup> Along similar lines, important court authority has intimated that setting administrative standards that limit otherwise excessive agency discretion may be inherent in the rule of law.<sup>232</sup>

Accepting for the sake of argument, however, that the rule of law concern appropriately seeks to protect Congress’s law, the most pressing objection to categorical nonenforcement would be as follows. Imagine the IRS announces it is engaging in categorical nonenforcement of the income tax as to large partnerships. Congress disagrees with the categorical nonenforcement decision. By its nature, the fact that the agency is engaging in categorical nonenforcement means that the law already indicates that enforcement should be occurring. In response to the offensive categorical nonenforcement, then, what can Congress do to protect its prerogative? Can it pass the “we really mean it” law?<sup>233</sup>

While this question implicates an expansive inquiry into how and whether Congress can control agencies, this Article need not delve deeply into the extensive literature about this inquiry<sup>234</sup> in order to posit that Congress has tools at its disposal to respond to categorical nonenforcement it dislikes. As an initial matter, in at least some instances Congress will be able to respond to disapproved of categorical nonenforcement decisions by using various levers at its disposal, such as oversight hearings, appropriations control, informal influence, and even the threat of legislation reigning in the agency.<sup>235</sup> In one case study in the tax context, a congressional mandate to crack down on earned income tax credit (“EITC”) noncompliance and Congress’s appropriation of funds to carry out this task caused the IRS to subject the EITC to particularly high rates of enforcement,<sup>236</sup> despite concerns about the low revenue dollars per audit at stake in EITC audits and the hardship such audits impose on the working

<sup>231</sup> Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801, 816 (2012); *see also* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 Colum. L. Rev. 1010, 1015 (2005) (positing that “[l]ike sentencing guidelines for judges, guidelines for prosecutors vindicate the rule of law”).

<sup>232</sup> *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737, 758 (D.D.C. 1971).

<sup>233</sup> I thank Michael Froomkin for posing this colorful inquiry.

<sup>234</sup> *See, e.g.*, sources cited in *supra* note 76.

<sup>235</sup> Jack M. Beermann, *The Turn Toward Congress in Administrative Law*, 89 B.U. L. REV. 727, 727 (2009) (“Congress engages in an extensive and ever-increasing level of oversight of the activities of the executive branch.”); Kagan, *supra* note 68, at 2258 (explaining view that “[t]he legislative sanctions backing up the system include new legislation, budget cuts, and embarrassing oversight hearings”); RICHARD J. PIERCE, *ADMINISTRATIVE LAW* 133 (2d ed. 2012) (“Congress has more power over agencies than any other institution.”); Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 DUKE L.J. 1059, 1076 (2001) (describing threat of legislation).

<sup>236</sup> *See, e.g.*, Leslie Book, *The IRS’s EITC Compliance Regime: Taxpayers Caught in the Net*, 81 OR. L. REV. 351, 373 (2002) (providing detailed explanation); *Taxing the Poor*, PBS NEWSHOUR (Apr. 15, 2004), [http://www.pbs.org/newshour/bb/business-jan-june04-taxes\\_04-15/](http://www.pbs.org/newshour/bb/business-jan-june04-taxes_04-15/) (last visited Nov. 20, 2014); Liz Pulliam Weston, *Low Incomes More Prone to Audits by IRS*, L.A. TIMES (Apr. 16, 2000).

poor.<sup>237</sup> Indeed, the IRS's willingness to dutifully crack down on the EITC as a result of Congress's intervention, even in the face of such concerns, serves as a good example of Congress's ability to direct enforcement when it wants to and bear political responsibility for doing so. There are other examples of Congress responding to enforcement it did not like in the tax area and beyond. For instance, as Professor Zelenak points out, beginning in the late 1970s, Congress prevented the IRS from carrying out its threat of asserting inclusion of a variety of fringe benefits in income by imposing a moratorium and then enacting legislation narrowing the scope of the law and the resulting enforcement.<sup>238</sup> More recently, Congress has cut the IRS's budget, seemingly in at least partial response to disagreement with certain IRS enforcement practices and the threat of the IRS enforcing tax provisions that some lawmakers view as regulatory overreach, such as various aspects of the Patient Protection and Affordable Care Act.<sup>239</sup> Of course, these last two examples illustrate the threat of enforcement, rather than nonenforcement, activating Congress. Perhaps more relevantly with respect to nonenforcement, Congress's response to President Nixon's impoundment of funds is an additional, useful example of congressional response to executive inaction.<sup>240</sup> While some have argued that Congress's action with respect to President Nixon's impoundment of funds is the exception that proves the rule of congressional inaction,<sup>241</sup> the tax examples of congressional action in response to both disapproved of tax enforcement and nonenforcement, as the case may be, suggest that Congress has a more robust ability to respond generally to executive action it dislikes.<sup>242</sup>

If Congress does not respond to categorical nonenforcement, that failure may itself be valuable. As discussed previously, a particularly troubling aspect of the extensive administrative state is that it offers Congress the opportunity to pass public-regarding law that it ensures never comes to pass, for example by providing insufficient enforcement funding.<sup>243</sup> Congress's failure to respond to an enforcement difficulty that was great enough to merit an agency's categorical nonenforcement may play the valuable role of forcing Congress to take public responsibility for failed implementation of the law.

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<sup>237</sup> The EITC audit literature is extensive. See, e.g., Book, *supra* note 236.

<sup>238</sup> Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 843-44.

<sup>239</sup> See, e.g., Rachael Bade, *Republicans Seek to Cripple IRS*, POLITICO (Dec. 11, 2014, 5:33 AM), <http://www.politico.com/story/2014/12/republicans-irs-regulations-113484.html>.

<sup>240</sup> N.Y. TIMES, Feb. 1, 1973, at 20 (providing transcript of President Nixon press conference).

<sup>241</sup> Love and Garg, *supra* note 18, at 1236-37

<sup>242</sup> See also Leandra Lederman & Ted Sichelman, *Enforcement as Substance in Tax Compliance*, 70 WASH. & LEE L. REV. 1679, 1739 (2013) (explaining, in context of proposed measured enforcement regime in which the IRS would have substantial discretion to set the tax rates, that Congress could "respond to those rates with statutory changes if it found them warranted").

<sup>243</sup> *Supra* text accompanying note 125.

On the other hand, some might object that forcing Congress to respond to categorical nonenforcement or take public responsibility for failure to respond is inherently inappropriate. While Congress may theoretically respond to categorical nonenforcement in a number of ways, it may be quite difficult for Congress to mobilize to do so.<sup>244</sup> Some might argue that, even if Congress *could* mobilize to respond, it should not *have* to. The law says what it says and Congress should not have to say it twice. Perhaps most problematically, even if Congress does mobilize to declare its disapproval, there is nothing to stop the agency from nonetheless again failing to enforce, motivated by the same beliefs about the reasons for nonenforcement. At its worst, then, categorical nonenforcement may serve as a limitless tool for runaway, unelected administrative agencies to violate Congress's lawmaking supremacy.

The difficulty with this concern is that setting low priorities also can violate Congress's law when setting priorities has essentially the same impact as categorical nonenforcement. In this regard, the rule of law objection to categorical nonenforcement also relies on the formal distinction between categorical nonenforcement and setting priorities that in many circumstances may be more illusory than real. In such circumstances, categorical nonenforcement's virtue of being transparent may very well outweigh any formal, greater infringement on Congress's law. Indeed, by making nonenforcement more salient and specific, categorical nonenforcement may actually increase the ability of Congress to respond.<sup>245</sup>

As to the possibility of runaway nonenforcement that Congress cannot stop, this Article admittedly has no foolproof means of ensuring that agency officials stay within the bounds of acceptable nonenforcement practices. However, it is important to realize that neither of the alternative lenses, at least at present,<sup>246</sup> offers a judicially enforceable means of policing nonenforcement to ensure

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<sup>244</sup> Cf. Andrias, *supra* note 106, at 1084-85 (exploring reasons why, "while Congress could theoretically address coordination and prioritization issues, it is unlikely to do so in any effective or sustained way."); Seidenfeld, *supra* note 235, at 1075-76 (cataloguing reasons why it is difficult for Congress to override an agency rule).

<sup>245</sup> Cf. Lisa Schultz Bressman, *Schechter Poultry at the Millenium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1423-24 (2000) (exploring, in the regulatory context, how an administrative-standards requirement for agency exercises of delegated power "may enhance congressional oversight by providing an additional piece of information for Congress to consider in evaluating a controversial agency proposal"); Love & Garg, *supra* note 18, at 1236-37 (noting that "Congress has only stepped in where the president's decision not to act was particularly public and thus where it was relatively easy for Congress to identify the issue and generate support for a legislative response.")

<sup>246</sup> Of course, it is possible that judicial review of nonenforcement may evolve in the future. Cf. Freeman & Vermeule, *supra* note 200, at 95 (describing landmark administrative law case finding that EPA had failed to adequately justify denying a rulemaking petition as "one in a series of rebukes to the Bush administration's generous vision of executive power"). Even if courts revisit judicial review of presidentially directed nonenforcement, for reasons expressed in *Heckler v. Chaney* it is unlikely judicial review will apply routinely to

that it stays within perceived, acceptable boundaries (and, for the reasons suggested previously, it is not even necessarily clear whether policing the boundaries along the lines set forth by the existing lenses would necessarily be desirable). Rule of law is an aspirational concept not subject to legal doctrines or judicial enforcement. While constitutional law is very much the business of courts, as discussed above, the difficulty of courts policing nonenforcement has caused the Supreme Court to declare a general presumption against review of agency nonenforcement under administrative law.<sup>247</sup> Even constitutional scholars concerned about categorical nonenforcement have, for similar reasons, suggested that executive branch officials may have to police themselves to ensure that nonenforcement comports with proper conceptions of executive power.<sup>248</sup> Even if courts could police the lines of acceptable nonenforcement (and decided to do so), restrictive standing doctrine would make it difficult to find parties who could challenge the nonenforcement, making the likelihood of judicial review remote.<sup>249</sup> To make this point most sharply, imagining that the alternative lenses offer a judicially enforceable means of delineating acceptable nonenforcement requires imagining a different judicial review regime than the one that exists at present. If one is imagining such a regime, one should just as well imagine a regime in which categorical nonenforcement could be evaluated to ensure it promotes agency legitimacy.

All of this is to say that the alternative lenses offered by scholars are best understood as abstract contemplations of when and how nonenforcement is acceptable.<sup>250</sup> The lens of agency legitimacy offered in this Article is no different in this regard. This Article has argued that, under certain circumstances, agencies like the IRS may use categorical nonenforcement in order to increase accountability for, deliberation regarding, and nonarbitrariness of inevitable agency nonenforcement of the law. Moreover, if agencies do so only as a particularly salient means of communicating difficult enforcement decisions (accompanied by a willingness to respond to cues to change such decisions), or as a means of regularizing their enforcement decisions, the agencies' uses of categorical

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agency nonenforcement decisions. In any event, to the extent any evolution in judicial review occurs, hopefully the interaction between nonenforcement and agency legitimacy examined in this Article is considered.

<sup>247</sup> See *supra* text accompanying notes 181-183.

<sup>248</sup> See, e.g., Price, *supra* note 3, at 747-48.

<sup>249</sup> See *supra* text accompanying note 184.

<sup>250</sup> The argument for administrative agencies to police themselves when judicial enforcement is too difficult has been made in other contexts. See, e.g., Anthony, *supra* note 148, at 1372 (explaining that “[t]o induce agency observance of proper rulemaking procedures, it is not efficient to rely upon judicial review, which is uncertain and spasmodic and at best a belated curative” and that “[i]t would seem much more productive to set forth for the agencies a clear and comprehensive statement of the precepts they should obey.”).

nonenforcement may not threaten Congress's lawmaking supremacy. While this Article cannot ensure that nonenforcement will stay within these bounds, it nonetheless posits that scholars and administrative officials may benefit from integrating agency legitimacy into the analysis of executive nonenforcement of the law. Doing so may help prompt a deeper consideration of how important values of democratic governance apply to the realities of agencies' systematic nonenforcement of the law.

## VI. Potential Objections

In addition to the possible arguments that an alternative lens might be a better mode of analysis for categorical nonenforcement, a number of other potential objections to the argument set forth in this Article can be made. Before addressing some of the more pressing objections, it is worthwhile to emphasize the scope of the argument being made. This Article certainly is not making an affirmative, normative case that categorical nonenforcement is appropriate in all instances of nonenforcement. Rather, the Article seeks to sketch with clarity how an examination of categorical nonenforcement through the lens of agency legitimacy can offer a more nuanced view than what has been suggested recently by commentators and scholars. The key point to recognize is that this Article sketches how agencies *can*, under certain circumstances, use categorical nonenforcement in a manner that will increase accountability, deliberation, and / or nonarbitrariness regarding inevitable nonenforcement, not that they always *will* use categorical nonenforcement to meet these objectives.

Perhaps most pressingly, a powerful objection to categorical nonenforcement might be that, even to the extent that it promotes certain values, it can pose a significant threat to compliance. The argument might go as follows. Categorical nonenforcement might increase the legitimacy of an agency's nonenforcement decision. However, categorical nonenforcement also all but ensures zero compliance with the law, and the erosion of deterrence may be a significant agency failing.<sup>251</sup> One answer to this concern is to respond that there are counterbalancing factors at work. Compliance with the law (which, in the tax context, results in tax revenue) has some value, but so does the legitimacy of an agency's nonenforcement decisions. Hopefully focusing on the latter opens the door to a consideration of how to

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<sup>251</sup> Elliott, *supra* note 122, at 5 (2014) ("Telling taxpayers that the IRS can't audit them won't encourage compliance."). Indeed, even if the compliance of the taxpayers at issue does not fall, voluntary compliance of other taxpayers may fall if the announcement of nonenforcement reduces norms of compliance. On the other hand, an announcement of nonenforcement as to certain taxpayers or tax issues may cause taxpayers to believe that the probability of enforcement has increased elsewhere, thereby raising compliance. In any event, a close examination of the impact of categorical nonenforcement on compliance is outside the scope of this Article.

balance values, even if it does not complete the task. A more pointed, and necessarily preliminary, response is that these values may not necessarily always be in clear tension. For instance, as suggested previously, insiders were purportedly aware of the enforcement difficulties with auditing large partnerships prior to the issue becoming a subject of public awareness and debate.<sup>252</sup> This example underscores a more general point, which is that sophisticated, regulated parties are often more aware of informal policies of nonenforcement than the general public.<sup>253</sup> As a result, in many circumstances, increasing agency legitimacy or promoting other values through categorical nonenforcement may not come at much of a price at all in terms of reduced compliance of the parties subject to the law at issue. In such cases, categorical nonenforcement may score legitimacy gains without raising significant, counterbalancing concerns regarding compliance. In any event, while future analysis certainly should try to refine when compliance is going to be a significant, counterbalancing factor, it is but one factor to consider in a broader evaluation of categorical nonenforcement. Focusing on the factors discussed in this Article is a necessary step in order to ultimately reach this broader, comprehensive evaluation.

Additionally, some might object that categorical nonenforcement poses a threat to the ability of the President and Congress to set their own agendas. Both politically accountable branches face significant limits on their time and political capital,<sup>254</sup> and being forced to address an instance of categorical nonenforcement may distract them from other concerns they view as more pressing.<sup>255</sup> Categorical nonenforcement certainly may distract the President and / or Congress from other, preferred issues. However, it need not do so. As scholars have fleshed out, one major way that Congress can monitor agencies is by so-called “fire alarm” oversight, whereby individuals and interest groups sound a metaphorical fire alarm when the agency is engaging in problematic behavior.<sup>256</sup> Categorical nonenforcement is a fire alarm of sorts, but it is rung by the agency itself, rather than other

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<sup>252</sup> See *supra* text accompanying note 117; Brock, *supra* note 39, at 42 (reporting based on interviews that “practitioners generally know that the Service does not want to conduct TEFRA partnership audits”).

<sup>253</sup> Andrias, *supra* note 106, at 1098.

<sup>254</sup> See, e.g., Love & Garg, *supra* note 18, at 1235 (“Congress could not possibly choose to exercise its oversight powers to revisit every instance of executive inaction.”); Sant’ Ambrogio, *supra* note 17, at 361, 391 (explaining that “presidents have a finite amount of time to devote to a seemingly infinite number of matters under their supervision and must focus their attention on their most important priorities” and exploring how responding to extra-legislative vetoes consumes congressional time that could be spent elsewhere); Peter L. Strauss, *The Courts and the Congress: Should Judges Disdain Political History?*, 98 COLUM. L. REV. 242, 255 (1998) (citing the “limited resources of time and effort Congress has available to it for its legislative agenda”).

<sup>255</sup> Bressman, *supra* note 74, at 512 (describing problem with proposals that envision heavy involvement of the President or Congress in details of regulatory policy).

<sup>256</sup> McCubbins & Schwartz, *supra* note 76.

constituents. As with the fire alarms that other constituents ring, Congress and / or the President can respond to the fire alarm, but need not do so.<sup>257</sup> To the extent that the categorical nonenforcement fire alarm is meant to alert Congress, the President, and the public of important enforcement decisions or severe enforcement difficulties, failure to respond at least forces a politically accountable acknowledgement of the unwillingness to respond, even if it is justified by the need to focus on other concerns. Additionally, agencies ringing a fire alarm in situations that merit attention may lower the costs that the President and / or Congress might otherwise expend monitoring enforcement.<sup>258</sup>

Finally, some might ask whether there might be better ways to go about getting some of the benefits of categorical nonenforcement fleshed out in this Article.<sup>259</sup> For instance, Professor Andrias has set forth an extensive proposal to institutionalize presidential involvement in enforcement, for instance by having the President's central apparatus involved to a greater extent in shaping, coordinating, and publicizing enforcement policy.<sup>260</sup> Accordingly, some might argue that institutionalizing presidential involvement in enforcement might produce accountability benefits without the same costs in terms of potential infringement on Congress's legislative prerogative. While institutionalizing presidential control over enforcement may have a number of virtues, it has not happened yet, and there are certainly a variety of barriers to such a system being put in place.<sup>261</sup> Even to the extent that it is put in place, presidential administrations will never have enough time and resources to exert control over all of every agency's enforcement agenda, nor does Professor Andrias suggest that presidential administrations

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<sup>257</sup> Cf. Sant' Ambrogio, *supra* note 17, at 386 (explaining how Congress "is not obligated to reconsider a vetoed bill and frequently does not" and how Congress may respond similarly to other instances of executive override of Congress's laws).

<sup>258</sup> *Id.* at 391 (explaining that the "extra-legislative veto obviates the need for Congress to anticipate every circumstance in which the law might be applied poorly . . ."). Indeed, the potential time and cost savings contributed by fire alarm oversight was central to its original conception. See McCubbins & Schwartz, *supra* note 76, at 168.

<sup>259</sup> Some might ask whether presidential pardons should play a more central role in controlling enforcement discretion. For an interesting, recent article discussing this issue, see Barkow, *supra* note 18. With much tax enforcement (and other administrative enforcement), however, the enforcement may not result in a claim that an offense against the United States has occurred, U.S. Const. art. II, § 2, and as a result pardoning may not be a viable means of controlling the enforcement discretion.

<sup>260</sup> Andrias, *supra* note 106, at 1090-94. Similarly, Professor Sant' Ambrogio has suggested that "an executive order might require agencies to submit proposed enforcement policies, like proposed rulemakings, to the White House and Congress in advance of their implementation." Sant' Ambrogio, *supra* note 17, at 403.

<sup>261</sup> See *supra* text accompanying note 125; see also Andrias, *supra* note 106, at 1107 (acknowledging as much); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 646 (2010) ("No President has used directives on any more than a selective basis as to executive-branch agencies. The White House has picked its battles, acting only when an issue is particularly salient.").

should exert such plenary control.<sup>262</sup> As a result, Professor Andrias's proposal, if put in place, may help yield greater accountability for some nonenforcement, but does not preclude questions regarding the legitimacy of the nonenforcement that would remain outside of institutionalized presidential control.<sup>263</sup>

Alternatively, some might argue that, rather than making mere statements of categorical nonenforcement, agencies should use the APA's notice-and-comment procedures to the extent possible to issue their nonenforcement policies. This idea is rooted in deep-seated beliefs that the APA's notice-and-comment procedures for rulemaking serve important purposes in a "fair and effective" system of limited government, such as providing notice to affected parties of the rules being considered, increasing the quality of the rules by requiring the agency to gather and take into account comments from the public, increasing public acceptance as a result of the openness of the process, and providing a record that can facilitate judicial review.<sup>264</sup> Mere statements of categorical nonenforcement that are not promulgated subject to APA notice-and-comment may lose these valuable benefits. Indeed, proponents of nonarbitrariness theories of agency legitimacy have tended to support the use of notice-and-comment to the extent possible. Professor Davis argued that enforcement policy should be made through notice-and-comment "to give systematic and clear answers to all the major questions, thus reducing the power of selective enforcement in individual cases, and thereby reducing the injustice that results from uneven enforcement."<sup>265</sup> Professor Bressman has similarly argued that "agencies must choose notice-and-comment procedures, to the extent possible, for issuing standards in advance of applying them to particular facts" because "[o]ther procedures . . . do not best promote the values of fairness, predictability, and participation important to a genuinely nonarbitrary administrative state."<sup>266</sup>

There are several responses to this proposed alternative. While this Article certainly does not mean to suggest that a mere statement of categorical nonenforcement is superior to rules issued through notice-and-comment, this Article also argues that for a number of reasons categorical nonenforcement nonetheless may play a salutary role. First, notice-and-comment rulemaking may not be an available vehicle for many nonenforcement policies. When the nonenforcement is a policy

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<sup>262</sup> Andrias, *supra* note 106, at 1038.

<sup>263</sup> See Price, *supra* note 3, at 755 n. 360 (noting that Professor Andrias's proposal "largely sidesteps the question of whether categorical nonenforcement policies should be permissible in the first place.").

<sup>264</sup> Robert A. Anthony & David A. Codevilla, *Pro-ossification: A Harder Look at Agency Policy Statements*, 31 WAKE FOREST L. REV. 667, 677 (1996); Anthony, *supra* note 148, at 1314, 1373-74; Mendelson, *supra* note 148, at 409.

<sup>265</sup> DAVIS, *supra* note 58, at 92-93.

<sup>266</sup> Bressman, *supra* note 74, at 533-34.

statement that the agency will not be enforcing clear law on the books, as a legal matter it is unlikely that a court would uphold such a policy if the agency attempted to issue it through notice-and-comment.<sup>267</sup> And yet, despite the likely unavailability of notice-and comment, for the reasons fleshed out previously, a well-reasoned statement of categorical nonenforcement issued outside of notice-and-comment may provide a number of valuable benefits. While less desirable, even a *poorly* reasoned statement of categorical nonenforcement can have benefits, such as preventing the arbitrary result of being the only taxpayer ever enforced against under unadministrable aspects of the tax law.

Professor Zelenak has argued that when enforcement difficulties preclude enforcement, Congress should provide agencies the regulatory authority to alter the law so as to accommodate the enforcement difficulties, thereby allowing agencies to act through the transparent mechanism of notice-and-comment rulemaking.<sup>268</sup> However, this proposal faces difficulties. In many cases, Congress simply will not accept this suggestion, perhaps because Congress does not know of the enforcement conundrums or because Congress simply does not get around to providing the authorization. The lack of authorization does not necessarily indicate a desire for full enforcement, but rather leaves the agency at square one in terms of what to do when enforcement decisions have to be made. Additionally, the seemingly unlimited delegation may create a nondelegation problem, even under the extremely limited application of such doctrine,<sup>269</sup> although standing considerations may prevent such a challenge.

Indeed, and perhaps more controversially, even in situations in which notice-and-comment procedures may be a viable means of issuing the nonenforcement policy, making mere statements of categorical nonenforcement may still have some benefits.<sup>270</sup> To provide some context, an agency may be able to use notice-and-comment procedures to issue a nonenforcement policy if either (1) the nonenforcement policy is an interpretation of the statute, or (2) the nonenforcement policy actually binds the public (for instance by setting enforcement or nonenforcement standards, which then serve

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<sup>267</sup> Such a statement may run afoul of *Chevron's* step one, in which "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. *Contra* DAVIS, *supra* note 58, at 93 (explaining that, surprisingly, the police can "formally through rules provide that church bingo games and social poker games are not a crime" when "a statute flatly prohibits that gambling is a crime."). Davis reaches this conclusion based on its desirability, not an analysis of legality.

<sup>268</sup> Zelenak, *Custom and the Rule of Law*, *supra* note 25, at 852.

<sup>269</sup> See *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457 (2001).

<sup>270</sup> *Cf. Metzger*, *supra* note 17, at 66 (arguing that "courts should give agencies more leeway to issue informal guidance without running afoul of the APA's notice and comment requirements, on the grounds that such guidance is a crucial part of agency efforts to fulfill their internal oversight responsibilities and curtail lower-level discretion").

conclusively as the basis for enforcement action).<sup>271</sup> The former may, but is not required, to be issued through notice-and-comment,<sup>272</sup> and the latter must be issued through such procedures.<sup>273</sup>

Notwithstanding the availability (or even the requirement) of notice-and-comment in such cases, an agency may not actually use notice-and-comment. A perennial objection to notice-and-comment procedures is that they are quite costly for agencies and a requirement that agencies use them may have the unintended consequence of causing agencies to engage in less transparent policymaking to avoid the costs of the procedures (and / or less policymaking altogether).<sup>274</sup> While this objection can be countered with the argument that the benefits of notice-and-comment procedures may outweigh the costs and that agencies may abide by notice-and-comment if they have no alternative means of issuing the guidance,<sup>275</sup> the objection nonetheless has particular power in the nonenforcement context.<sup>276</sup> Whereas agencies will often bear the costs of notice-and-comment in order to get regulated parties to abide by standards of behavior that the agency is charged with obtaining and in order to get courts to defer to the agency's interpretation of what standards of behavior bind the regulated parties,<sup>277</sup> nonenforcement is a standard of behavior that the agency would voluntarily impose on itself. Agencies may not have as strong of an incentive to ensure that they abide by their nonenforcement, and therefore may not be as willing to bear the costs of notice-and-comment in such circumstances.

Indeed, at least one interesting case-study illustrates the dangers of forcing an agency to abide by notice-and-comment rulemaking with respect to an enforcement policy or a nonenforcement

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<sup>271</sup> See, e.g., *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943 (D.C. Cir. 1987) (finding that FDA "action levels" for contaminants, which indicated levels of contamination below which enforcement proceedings ordinarily would not occur, were subject to notice-and-comment procedures).

<sup>272</sup> Anthony, *supra* note 148, at 1376-77 (explaining that, although not required to do so, agencies may use notice-and-comment to issue interpretive rules and discussing benefits of doing so).

<sup>273</sup> 5 U.S.C. § 553.

<sup>274</sup> For seminal treatments of the widespread "ossification" thesis, see, for example, Thomas O. McGarity, *Some Thoughts on "Deossifying" The Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995). For a recent challenge to this widespread and deeply influential thesis, see Jason Webb Yackee & Susan Webb Yackee, *Testing the Ossification Thesis: An Empirical Examination of Federal Regulatory Volume and Speed, 1950-1990*, 80 GEO. WASH. L. REV. 1414 (2012).

<sup>275</sup> David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 304-05 (2010); Mendelson, *supra* note 148, at 403.

<sup>276</sup> Cf. Sant' Ambrogio, *supra* note 17, at 403-04 (explaining that "requiring rulemaking to set enforcement policies might discourage agencies from adapting their enforcement policies to a changing environment or encourage them to conceal such adjustments").

<sup>277</sup> Yackee & Yackee, *supra* note 274, at 1474-75.

standard. In a protracted litigation in the 1980s, plaintiffs argued that the FDA's establishment of "action levels" for aflatoxin levels in feed corn violated a number of requirements.<sup>278</sup> The action levels indicated levels of contamination below which enforcement proceedings ordinarily would not occur.<sup>279</sup> After the case went up to the Supreme Court and back down the D.C. Circuit, the D.C. Circuit ultimately held that the action levels were invalid because they should have been issued via notice-and-comment procedures.<sup>280</sup> Instead of then complying with the procedures, the FDA simply announced that its action levels would not be binding, thereby denying regulated parties and the public reliable information regarding the FDA's nonenforcement policy.<sup>281</sup> As lamented by one commentator regarding the case, "[t]o the extent that the agency's own statement of prosecutorial policy is in some sense 'binding' on the agency, then the policy only serves the function of regularizing agency behavior and reducing case-specific arbitrariness all the more" and if an agency abandons statements of such policies as a result of notice-and-comment procedures being imposed, the agency also gives up "the assurances of predictability, fairness, openness, and agency personnel management that self-binding regulation may have provided."<sup>282</sup> The case serves as a cautionary tale of how forcing nonenforcement policy to abide by notice-and-comment procedures may simply drive the procedures deeper underground, away from public view. The bottom line is that, although statements of categorical nonenforcement might not always serve as a procedurally ideal means of an agency limiting its discretion, it may play an essential role in situations in which agencies cannot use notice-and-comment procedures, and it may even have benefits in situations in which agencies could use notice-and-comment procedures but will not do so in practice. In sum, despite potential objections, categorical nonenforcement has a role to play in legitimating agencies' inevitable, systematic nonenforcement of the law.

## VII. Conclusion

This Article has taken a close look at categorical nonenforcement of the tax law through the lens of agency legitimacy. This Article has displayed that in some circumstances agencies can use categorical nonenforcement in a manner that increases accountability, deliberation, and nonarbitrariness of agency

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<sup>278</sup> *Community Nutrition Inst. v. Young*, 757 F.2d 354 (D.C.Cir.1985), *rev'd*, 476 U.S. 974 (1986), *on remand*, 818 F.2d 943 (D.C.Cir.1987).

<sup>279</sup> *Id.* at 977.

<sup>280</sup> *Id.* at 948-49.

<sup>281</sup> Food and Drug Administration Notice, 53 Fed.Reg. 5043 (Feb. 19, 1988).

<sup>282</sup> Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 152-53 (1992).

nonenforcement, thereby increasing the legitimacy of the nonenforcement. In some ways this claim is quite controversial and faces significant pressure on a number of fronts. On the one hand, to the extent that the nonenforcement is clearly in conflict with Congress's law, categorical nonenforcement may run afoul of Congress's lawmaking supremacy. On the other hand, to the extent the nonenforcement may be an interpretation of or consistent with the law, a mere statement of categorical nonenforcement may undercut the important values of notice-and-comment rulemaking. Focusing on the difficult nonenforcement decisions that agencies must make on a daily basis nonetheless reveals that in some circumstances mere statements of categorical nonenforcement may be the most realistic means of communicating important nonenforcement decisions to politically accountable officials and /or the public, or to regularize nonenforcement decisions within the agency. Moreover, these nonenforcement decisions do not necessarily represent the final say regarding the law, but rather may be a step toward a more accountable, deliberative, nonarbitrary set of rules. While in an ideal world agencies may not face hard choices about when not to enforce the law, in reality they do, and, in light of such realities, categorical nonenforcement may help increase the legitimacy of at least some of those choices.

This Article certainly does not examine every facet of nonenforcement. Notably, this Article does not directly examine whether the values of accountability, deliberation, and / or non-arbitrariness can save presidentially directed categorical nonenforcement, although these values may very well be important in evaluating such nonenforcement. For instance, one could view presidentially directed categorical nonenforcement as increasing the visibility of what would otherwise be an agency nonenforcement decision, meaning that agency legitimacy would remain central to the analysis. To take a prominent example, to the extent that the capital gains or estate tax (hypothetically) is already being impotently enforced at the hands of the IRS, presidential direction of categorical nonenforcement may provide valuable accountability and public deliberation, as well as possibly increase nonarbitrariness by committing IRS agents not to enforce in a uniform fashion. Alternatively, if the President is directing categorical nonenforcement in a manner that does not map onto the agency's own choices, the analysis may be somewhat different. Depending on one's perspective (and the nature of the decision, along with the relevant theory of agency legitimacy), such direction may raise concerns about the President overriding considered agency judgment.<sup>283</sup> However, in such a case presidentially directed categorical

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<sup>283</sup> For discussions of concerns about presidential direction of agency decisions (primarily in the rulemaking context), see, for example, Freeman & Vermeule, *supra* note 200; Thomas O. McGarity, *Presidential Control of Regulatory Agency Decisionmaking*, 36 AM. U. L. REV. 443 (1987); Peter L. Strauss, *Overseer, or "The Decider"?* *The*

nonenforcement really raises two, separate issues. The first is whether categorical nonenforcement by the agency is legitimate. The second is whether it is appropriate for the President to direct the agency nonenforcement policy. By starting from the premise that categorical nonenforcement can be evaluated from the perspective of agency legitimacy, this Article helps clarify the potentially competing values at stake, and helps clear the way for a conversation focused on presidential direction.

Moreover, completely aside from how this Article contributes to recent debates about presidentially directed categorical nonenforcement, this Article's framework for examining the legitimacy of agency nonenforcement is crucial. Even if a President never comes along and attempts to slash the income tax through nonenforcement, the IRS will be making decisions every day about how not to enforce the tax law. Indeed, this Article has hopefully persuaded readers that the IRS's mission to "enforce the law with integrity and fairness to all,"<sup>284</sup> inevitably implies an accompanying responsibility *not to enforce* the law with the greatest possible integrity and fairness to all. The latter portion of the mission might not make for as great of a slogan, but it is nonetheless an inextricable part of what the IRS and many other agencies do. Examining the IRS's, as well as other agencies', nonenforcement decisions at least in part through the lens of agency legitimacy is essential to ensure that agencies across government are not enforcing the law in a manner that is consistent with democratic governance for all.

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*President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 714-15 (2007). Even proponents of the political accountability theory may argue that the President should have supervisory authority, but should not necessarily direct or override a considered agency decision. For an argument that presidential influence should be disclosed and, in certain cases, provided some respect, see Watts, *supra* note 81. For a related argument that agency action potentially should be treated differently than presidential action, see Strauss, *supra* note 93, at 636 ("It is the potential powerfulness of those heads of government that gives special meaning to the formalities of the [Constitution]. For the inferior parts of government, subject to law and the webs of control woven by all three of the named heads, the same risks do not arise; agency actions are of lesser concern than the President's for just this reason."). *But see id.* at 642 (suggesting that President plays an appropriate role in setting enforcement priorities).<sup>284</sup> The Agency, Its Mission and Statutory Authority, <http://www.irs.gov/uac/The-Agency,-its-Mission-and-Statutory-Authority> (last visited Sept. 24, 2014).