

FAITHFUL NONEXECUTION

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Decisions by the federal executive branch to under-enforce statutes, whether on a case-by-case or programmatic basis, are a commonplace feature of the modern administrative state. Critics may challenge “non-execution” decisions in court or otherwise as inconsistent with the President’s constitutional duty to “take care that the laws be faithfully executed.” Such decisions, however, are most helpfully viewed not as instances of the executive’s failure to act, but rather as part and parcel of an agency’s affirmative strategies for implementing its statutory mandates. As such, their legality is appropriately judged not under the terms of Article II, but rather according to the scope of enforcement discretion that Congress has explicitly or implicitly delegated to the agency by statute. In other words, these are statutory, not constitutional disputes, and are subject to ordinary administrative law principles.

*Following this framework, courts should not treat the Faithful Execution Clause as itself expanding the scope of statutory discretion conferred on the executive branch by statute in either civil or criminal contexts. The controversies that genuinely raise constitutional issues of faithful execution fall into two categories: cases like *Youngstown* in which the President asserts that the Take Care Clause confers administrative powers beyond those conferred by statute and episodes in which the President is accused of intentionally undermining the ability of the executive branch to function effectively. The latter episodes, however, will all-but-inevitably take the form of alleged acts of an informal character that do not present justiciable controversies. Whether alleged instances of self-sabotage contravene the President’s faithful execution duty will be a matter for congressional and public judgment.*

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INTRODUCTION

Among the most controversial cases pending before the Supreme Court at the time of Justice Antonin Scalia’s death was *United States v Texas*,¹ the state of Texas’s challenge to the Obama Administration’s program of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA).² That program had promised at least temporary relief from deportation to undocumented parents of children who had been born in the United States or who had otherwise attained permanent lawful status.³ The trial court issued a preliminary injunction against the program⁴ on the ground that it was impermissibly adopted without

¹ *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

² See Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship and Immigration Servs. et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect too Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action_1.pdf [hereinafter DAPA Memorandum].

³ *Id.*

⁴ See *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex.), *aff’d*, 809 F.3d 134, 184 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

following the Administrative Procedure Act's notice-and-comment process for informal rulemaking.⁵ The Fifth Circuit affirmed, but concluded additionally that the program exceeded the executive branch's legal authority with regard to immigration enforcement.⁶ Given the importance of the program and the intense controversy surrounding it, the Supreme Court's grant of certiorari had surprised no one. What was surprising was that the Court, on its own motion, had added a question to be briefed, namely, whether the program "violate[d] the Take Care Clause of the Constitution, Article II, section 3."⁷

Putting the issue that way more or less dramatized a persistent and perhaps growing degree of legal confusion surrounding the execution of law. When a federal agency forbears from implementing the law with the fullest stringency possible, is it resting on authority granted by Congress or on law enforcement discretion vested in the President by Article II? Is the answer the same whether the law is civil or criminal? Is a legal challenge to administrative nonexecution a statutory or a constitutional challenge? Both courts and the Justice Department have fudged on these questions, and the "fudginess" has become counterproductive. It invites both arguably overbroad assertions of administrative authority and challenges to executive initiative that confuse good faith error with constitutional illegitimacy. This Article is an attempt to provide clearer answers to these questions and thus to enable a more coherent perspective on nonexecution of the law than currently exists. It argues that virtually all domestic peacetime law enforcement discretion that the executive branch possesses is rooted in statutes, not the Constitution, and with few exceptions, administrative law-style judicial review is well suited to policing the executive branch's fidelity to law where judicial review is appropriate at all.

Part of the confusion surrounding the role of judicial review rests on a rhetorical conflation of two kinds of nonexecution, namely, decisions not to prosecute individual cases and programmatic decisions to implement statutes in ways other than the most comprehensive enforcement possible. For example, among the Government's unsuccessful efforts to fend off Texas's challenge to DAPA was its argument that the program should be seen as an unreviewable exercise of the executive branch's prosecutorial discretion.⁸ In *Heckler v. Chaney*, the Supreme Court held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an

⁵ 5 U.S.C. § 553 (2012).

⁶ See *Texas*, 809 F.3d at 186.

⁷ See *Texas*, 136 S. Ct. at 906.

⁸ See *Texas*, 86 F. Supp. 3d at 614 ("In opposition to the States' claims, the Government asserts that it has complete prosecutorial discretion over illegal aliens and can give deferred action status to anyone it chooses.").

agency's absolute discretion."⁹ According to the Justice Department, DAPA should therefore have been viewed as simply an exercise of administrative discretion not to impose involuntary removal for particular undocumented immigrants. Although I believe DAPA was actually lawful, both the District Court and the Court of Appeals correctly rejected this argument.¹⁰ The trial court put the matter bluntly: "While agency 'non-enforcement' might imply 'inaction' in most circumstances, . . . to the extent that the DAPA Directive can be characterized as 'non-enforcement,' it is actually affirmative action rather than inaction."¹¹ Although the utility of the action/inaction distinction is often in doubt, the district court was right about this. DAPA, embodied as it was in written administrative policy and requiring as it did considerable resources to carry out, represented more than a decision *not* to do something. It was, whether or not lawful, an actual scheme of statutory implementation and deserved to be judged as such.

The reason I belabor this point at the outset is that the frequent references to DAPA as nonenforcement, nonprosecution, "abdication," or the like implicitly frame the issue posed by the program as a question about what the government is *not* doing, arguably in derogation of a constitutional mandate to enforce law. If, however, DAPA were treated as an affirmative scheme for statutory implementation, the question it poses would be statutory, not constitutional—important to be sure, but not going to the essence of the President's constitutional legitimacy. The question posed would be the permissibility of DAPA as a form of implementation. Prior to *United States v. Texas*, the Court had never suggested that a justiciable measure of the executive branch's enforcement obligations might come from the Take Care, or Faithful Execution Clause.¹² The measure of the executive's legal duties, that is, has routinely been sought through statutory interpretation, a process colored by presumptions rooted in constitutional values, but framed in terms of ordi-

⁹ 470 U.S. 821, 831 (1985).

¹⁰ See *Texas*, 86 F. Supp. 3d at 654, *aff'd*, 809 F.3d at 188.

¹¹ See *Texas*, 86 F. Supp. 3d at 654.

¹² Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1853 (2016) (The Supreme Court has referred to the Take Care Clause "without any attention to detailed interpretive questions about the clause's meaning or history." The penultimate clause of U.S. Const. art. II, § 2, reads: "[H]e shall take Care that the Laws be faithfully executed." Although most often called the Take Care Clause, I prefer to call it the Faithful Execution Clause, which more pointedly captures its essence. I am encouraged in this practice by the endorsement of Professor Saikrishna Prakash. Despite our profound disagreements regarding the legal import of the Clause, he has written: "[Professor] Shane's label, though unconventional, is a superior description of the clause." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 706 n.10 (2003). May we always be so gracious to those with whom we are in academic disagreement.

nary, extra-constitutional administrative law.¹³ That is the better approach. The legality or illegality of DAPA should not be treated as a constitutional question.

For its part, however, the executive branch contributed to this conceptual confusion. In its elaborate defense of DAPA, the DOJ's Office of Legal Counsel suggested that the program drew both on the President's constitutional powers and on authorities granted by statute to the Secretary of Homeland Security.¹⁴ Its opinion rests DAPA in part on powers of prosecutorial discretion that OLC links to the vesting of executive power and the President's "take care" authority.¹⁵ If DAPA were so grounded, then elevating the challenge to DAPA to constitutional status would likewise seem an appropriate move. In other words, OLC's assertion that the president is acting within his power faithfully to execute the laws naturally invites a challenger to stake its argument partly on similar constitutional grounds. It should be added that President Obama did not help matters by referring to DAPA and its predecessor, DACA, as "his" initiatives, rather than initiatives of the Department of Homeland Security, which, for legal purposes, they were.¹⁶

For our legal system to accept too quickly the idea that programs of legal nonenforcement pose problems of a constitutional dimension is, I think, a dangerous step. Our national politics is severely polarized as is; the specter of turning disagreements over statutory interpretation into constitutional challenges risks too much in terms of undermining government legitimacy. As the Trump Administration finds itself embroiled in its own controversies about fidelity to the law, it is both possible and helpful to disentangle several threads. The key to undoing the confusion over nonenforcement policies as action or inaction and the confusion over statutory and constitutional challenges to nonenforcement lies in attending to a distinction that is both central to administrative law and helpful in distinguishing the different varieties of nonexecution, namely,

¹³ *Dalton v. Specter*, 511 U.S. 462, 473 (1994) ("[C]laims simply alleging that the President has exceeded his statutory authority are not 'constitutional' claims . . .").

¹⁴ See 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, 38 Op. O.L.C. (Nov. 19, 2014) [hereinafter OLC DAPA Memorandum], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf>.

¹⁵ *Id.* at 20. ("The practice of granting deferred action, like the practice of setting enforcement priorities, is an exercise of enforcement discretion rooted in DHS's authority to enforce the immigration laws and the President's duty to take care that the laws are faithfully executed.")

¹⁶ *E.g.*, Daniel Halper, *Obama Admits: 'I Just Took an Action to Change the Law,'* WASH. EXAM'R (Nov. 25, 2014), <https://www.washingtonexaminer.com/weekly-standard/obama-admits-i-just-took-an-action-to-change-the-law>. ("Now, you're absolutely right that there have been significant numbers of deportations. That's true. But what you are not paying attention to is the fact that I just took an action to change the law.")

the distinction between quasi-adjudicative and quasi-legislative—or what I will call “programmatically”—decision making.¹⁷ Quasi-adjudicative decisions are based on contextual factors peculiar to individual cases, not to more general considerations. Quasi-legislative, or programmatic, decisions are based on general factors or categorical considerations not based on the facts of any one case. Although the distinction is hardly airtight, it has a common-sense appeal and enables us to distinguish between nonprosecution decisions driven primarily by the kinds of considerations administrative lawyers call adjudicative facts and nonenforcement policies based primarily on broader considerations. It also helps in generating a coherent framework for assessing claims of executive branch nonenforcement discretion and challenges to those claims.

In brief, I would argue that the following propositions represent the proper framework for understanding both executive branch claims to nonenforcement authority and the appropriate legal bases for challenging such claims:

1. The executive branch’s statutory enforcement discretion, in both civil and criminal contexts, is best understood as derived entirely from authority conferred by Congress, not from Article II.¹⁸
2. Where nonexecution takes the form of case-by-case nonprosecution, an unbroken history of administrative practice confirms the presumption that Congress has conveyed such authority implicitly. Congress may, if it chooses, mandate practices of comprehensive law enforcement, except where the law in question is itself unconstitutional.¹⁹
3. Correspondingly, the authority the executive branch possesses to design nonenforcement policies on a programmatic basis must also be authority delegated explicitly or implicitly by Congress. Such authority cannot be inferred—or disconfirmed—through a doctrinal presumption. The breadth of executive

¹⁷ Administrative lawyers often refer to the distinction between adjudication and rulemaking as the “*Londoner/Bi-Metallic* distinction,” drawing on *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908) and *Bi-Metallic Investment Co. v. State Board of Equalization of Colorado*, 239 U.S. 441, 445 (1915). See *infra* Parts I–B and I–C.

¹⁸ See *infra* Part II–A. Professor Kevin Stack has argued powerfully that presidential claims to statutory authority to execute the law personally should be limited to statutes that delegate such authority to the President explicitly. Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). To the extent one is persuaded by his analysis, as I am, it follows that treating the Faithful Execution Clause as an additional source of presidential statutory enforcement power is unsound.

¹⁹ See *infra* text accompanying notes 27–41.

branch discretion to “under-implement” a law must be determined on a statute-by-statute basis.²⁰

With regard to challenges to programmatic executive nonenforcement, what follows from these propositions is that challenges to the non-execution of specific statutes are statutory, not constitutional challenges. They can and should be assessed under ordinary principles of administrative law. The only *justiciable* constitutional claims that a President is failing to execute the laws faithfully would be claims that a President—without statutory authority of his own—ordered administrative agencies to act beyond their statutory powers. These would be cases, in other words, resembling *Youngstown*.²¹ Other possible claims that a President is failing to take care that the laws be faithfully executed—for example, that he or she is willfully rendering an agency unable to perform its responsibilities—may be urgent, but they are not justiciable.

My attempt to establish this framework proceeds in five parts. Part I surveys the variety of forms in which nonenforcement of the law appears, underscoring both the familiarity, but also the complexity of the nonexecution phenomenon. Part II draws on Part I to argue for the unsuitability of the Faithful Execution Clause as a measure of the legality of programmatic nonenforcement. Part III explains why “ordinary” administrative law is the logical check on conventional nonenforcement abuse, if abuse there be, using DAPA to illustrate the point. Part IV surveys some of the “faithful execution” controversies that have arisen under the Trump Administration, attempting to distinguish between controversies that actually involve nonenforcement from cases challenging what are actually just changes, however dramatic, in policy orientation. The Trump Administration’s record also reminds us of the one kind of faithful execution case that should be adjudicated on constitutional grounds, as well as a host of nonjusticiable challenges to alleged attempts to undermine effective administration.

I. VARIETIES OF NONEXECUTION

A. *General Definition*

Cataloguing all forms of under-implementation of the law that are potentially anxiety-provoking from a rule-of-law point of view requires a broad definition of “nonexecution.” If we start with the assumption that the executive’s job is to perform those tasks that Congress assigns within its legislative authority, then it makes sense to use “nonexecution” to refer to any government decision:

²⁰ See *infra* text accompanying notes 172–77.

²¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

- To forego the implementation of penal or other regulatory law in circumstances that, to the knowledge of the government, would technically support the application of that law;
- To forego investigative activity despite the government's expectation that such activity would likely bring to the government's attention circumstances that would support the imposition of penal or regulatory law; or
- To forego the implementation of a statutorily authorized program of public benefits.

The first of these categories presumably covers what would most often strike observers as the underenforcement of law. There are circumstances, that is, in which government is aware of activities within its jurisdiction that it could regulate or penalize, but it fails to do so.²² It is necessary, however, to add the second category. The largest volume of potentially regulable activity untouched by government is most likely to be activity of which government is unaware. Yet ignorance cannot completely assuage rule-of-law anxieties because some of that ignorance may be intentional. That is, the government's unawareness of potentially regulable activity may result from deliberate investigative decisions that insulate such activity from probable discovery.²³ Anyone concerned with the possible faithlessness of legal execution needs to be worried not only about government decisions to ignore regulable activity of which officials are aware, but also about government decisions not to investigate activity that, if discovered, would be subject to regulation or penalty.

The third category simply recognizes that not all the law that the government executes is regulatory. Congress also enacts programs for the direct conferral of public benefits.²⁴ Such programs regulate, if anyone, only those persons who seek to obtain government benefits conditioned on compliance with applicable rules. Yet should an Administration refuse categorically to distribute statutory entitlements—refusing, for example, to send out social security checks or tax refunds—such policy could betray the rule of law ideal as easily as if the Administration were to forebear entirely from the regulation of air pollution or securities fraud.²⁵

²² See *infra* notes 82–89 and accompanying text for the discussion of the Justice Department's "passive enforcement policy" regarding draft nonregistrants, upheld in *Wayte v. United States*, 470 U.S. 598, 613 (1985).

²³ *Id.*

²⁴ See, e.g., 42 U.S.C. § 1396a (2012); 42 U.S.C. § 1305 (2012).

²⁵ Cf. *State of Iowa ex rel. Miller v. Block*, 771 F.2d 347, 358 (8th Cir. 1985) (compelling Secretary of Department of Agriculture to implement three federal agricultural disaster relief programs).

B. *Quasi-Adjudicative Nonexecution*

Courts have confronted questions of nonexecution within each of the three broad categories I have named, but implicitly make a threshold distinction between what might be called quasi-adjudicative nonexecution and programmatic nonenforcement.²⁶ In the domain of criminal law, what I mean by quasi-adjudicative nonexecution covers much of what is typically described as “prosecutorial discretion.” Nonexecution in the form of case-by-case nonprosecution is quasi-adjudicative in the sense that it is based on contextual factors peculiar to an individual case, not to more general considerations. For example, in a particular criminal case, federal prosecutors may believe that an offense has occurred, but that the offense is excusable under the circumstances, that proof would be difficult, that a jury would be unlikely to convict for some reason other than the evidence, that the offender’s cooperation in another criminal investigation justifies lowering or dropping the charges, or that the public interest would be served in some other way by prosecutorial forbearance.²⁷ Case-by-case prosecutorial discretion in the realm of criminal law has been described as an inherent executive power conveyed by necessary implication from specific obligations or powers mentioned in Article II, including the pardon power.²⁸ The better view, however, is that the authority for exercising such discretion is implicitly conferred by criminal statutes given what is surely the near-universal expectation that it is an ordinary feature of criminal law enforcement.²⁹ This distinction may be of more conceptual than practical significance, except that the Article II-based account of prosecutorial discretion could imply constitutional limits on congressional power to demand “full execution” of the criminal law, as it may occasionally be inclined to do.³⁰

²⁶ Cf. *Heckler v. Chaney*, 470 U.S. 821, 838 (1985) (Brennan, J., concurring) (“Today the Court holds that *individual* decisions of the Food and Drug Administration not to take enforcement action in response to citizen requests are presumptively not reviewable under the Administrative Procedure Act. . . . This general presumption is based on the view that, in the normal course of events, Congress intends to allow broad discretion for its administrative agencies to make *particular enforcement decisions*, and there often may not exist readily discernible ‘law to apply’ for courts to conduct judicial review of nonenforcement decisions.”) (emphasis added).

²⁷ See generally Michael Edmund O’Neill, *Understanding Federal Prosecutorial Declinations: An Empirical Analysis of Predictive Factors*, 41 AM. CRIM. L. REV. 1439 (2004).

²⁸ *In re Aiken Cty.*, 725 F.3d 255, 262 (D.C. Cir. 2013) (“The Presidential power of prosecutorial discretion is rooted in Article II, including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause.”).

²⁹ Prosecution for Contempt of Cong. of an Exec. Branch Official who has Asserted A Claim of Exec. Privilege, 8 Op. O.L.C. 101, 122 (1984) (“Because of the wide scope of a prosecutor’s discretion in determining which cases to bring, courts, as a matter of law, do not ordinarily interpret a statute to limit that discretion unless the intent to do so is clearly and unequivocally stated.”).

³⁰ For example, Section 3 of the Alien Contract Labor Law of 1885—a statute famous chiefly for the controversy it provoked on the legality of facilitating the emigration from

The Supreme Court has recognized an analogous and similarly longstanding form of non-prosecution discretion in the civil context.³¹ In the canonical case of *Heckler v. Chaney*,³² the Supreme Court held non-reviewable a decision by the Food and Drug Administration not to pursue enforcement actions based upon allegations that Oklahoma and Texas were violating the Federal Food, Drug and Cosmetic Act³³ in their use of drugs for lethal injection that the FDA had not approved for that purpose.³⁴ The Court determined that agency decisions not to initiate civil enforcement proceedings were presumptively within the category of “agency action committed to agency discretion by law,”³⁵ and thus ordinarily beyond judicial review under the Administrative Procedure Act. It cited a number of earlier decisions that it took to establish what is “generally” an agency’s “absolute discretion” “not to enforce [law], whether through criminal or civil process.”³⁶ The Court noted that Congress, in particular statutes, might withdraw “discretion from the agency and provide [] guidelines for exercise of its enforcement power.”³⁷ Absent such statutory constraints, however, agencies could simply exercise their own judgment.³⁸ Actions “committed to agency discretion” include agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise.³⁹

In explaining why individual cases of nonexecution are generally unsuited for judicial review, the Court recognized that agencies “generally cannot act” against every technical statutory violation and that a de-

London of an Anglican priest to serve in New York’s Church of the Holy Trinity, Church of the Holy Trinity v. United States, 143 U.S. 457 (1892)—provided that “it shall be the duty of the district attorney of the proper district to prosecute every such suit [seeking to levy fines on violators of the Act] at the expense of the United States.” Alien Contract Labor Act of 1885, ch. 164, 23 Stat. 332 (repealed 1952). The Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (codified as amended at 42 U.S.C. §§ 1981–1982 (2000)) likewise appears to command universal enforcement, although modern courts nonetheless treat the text as non-mandatory. *See, e.g.,* Peek v. Mitchell, 419 F.2d 575 (6th Cir. 1970); Moses v. Kennedy, 219 F. Supp. 762, 765–66 (D.D.C. 1963), *aff’d*, 342 F.2d 931 (D.C. Cir. 1965) (per curiam). For an analysis supporting stricter judicial review of failure to enforce in individual cases, see Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016).

³¹ For an ambitious analysis of civil nonenforcement that proposes its own taxonomy drawing on a detailed survey involving nine different federal agencies, *see* Aaron L. Nielson, Admin. Conference of the U.S., *Waivers, Exemptions, and Prosecutorial Discretion: An Examination of Agency Nonenforcement Practices* (2017), <https://www.acus.gov/report/regulatory-waivers-and-exemptions-final-report>.

³² 470 U.S. 821 (1985).

³³ Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 et seq.

³⁴ *Heckler*, 470 U.S. at 824.

³⁵ 5 U.S.C. § 701(a)(2) (2018).

³⁶ *Heckler*, 470 U.S. at 831.

³⁷ *Id.* at 834.

³⁸ *Id.* at 834–35.

³⁹ *Id.* at 832–33.

cision not to enforce “often involves a complicated balancing of a number of factors which are peculiarly within its expertise.”⁴⁰

As long as case-by-case nonexecution is not motivated by corrupt or illegitimate factors, such as bribery, personal or political favoritism or animosity, or unconstitutional animus, quasi-adjudicative nonprosecution—even if it involves large numbers of cases—is not constitutionally faithless. Even with regard to DAPA, opponents conceded that the Department of Homeland Security would have unreviewable discretion to grant deferred action on an individuated basis to each of the applicants covered by that program.⁴¹ It is the program’s categorical approach to priority-setting that raised anxieties about faithful execution.

C. *Programmatic Nonexecution*

Unlike prosecutorial discretion, what could be called “programmatic nonenforcement” involves a categorical determination to forego comprehensive legal implementation with relatively little regard to the nuances of individual cases. The distinction between programmatic and quasi-adjudicative nonexecution is analogous to the rulemaking/adjudication distinction around which much administrative law doctrine and practice are organized.⁴² The distinction is concededly imperfect. After all, one could characterize a prosecutor’s exercise of quasi-adjudicative discretion not to prosecute an individual case based on weak circumstantial evidence as implementing a programmatic determination to prefer prosecutions based on direct evidence.⁴³ Conversely, it is almost always the case that formal policies of “programmatic nonenforcement” reserve to the relevant agency the discretion to execute the law fully in particular cases.⁴⁴ Moreover, the more flexible the programmatic criteria for non-execution, the more quasi-adjudicative judgment is entailed in deciding

⁴⁰ *Id.* at 831.

⁴¹ *Texas v. United States*, 809 F.3d 134, 166 (5th Cir. 2015), *aff’d by equally divided court*, 136 S. Ct. 2271 (2016) (“[N]either the preliminary injunction nor compliance with the APA requires the Secretary to remove any alien or to alter his enforcement priorities.”).

⁴² *Compare Londoner v. Denver*, 210 U.S. 373, 386 (1908) (requiring administrative hearings on request before the levying of taxes on individual properties based on value of improvements), *with Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that Denver property owners were not entitled to administrative hearings prior to an across-the-board upward evaluation of the value of all Denver taxable property).

⁴³ A corresponding mundane example of police discretion involves what most motorists undoubtedly presume is the general practice of not enforcing speeding laws against drivers who operate their vehicles five to ten miles per hour over the speed limit, so long as no other evidence of recklessness or illegality appears.

⁴⁴ *E.g.*, U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 9-2.031 at *4, <https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals-#9-2.031> (“Satisfaction of the three substantive prerequisites [for initiating federal prosecution] does not mean that a proposed prosecution must be approved or brought. The traditional elements of federal prosecutorial discretion continue to apply.”).

whether a particular case qualifies. Even with regard to the category-driven DAPA program, for example, the Secretary of Homeland Security repeatedly reserved DHS's discretion in individual cases to deny deferred action to an otherwise qualified applicant if individual circumstances so warranted—thus potentially commingling programmatic and quasi-adjudicative judgments.⁴⁵ Nonetheless, the distinction provides a helpful basis from which to think through the issues concerning nonexecution and the President's "Take Care" responsibilities.

Within the general category of programmatic nonenforcement, there exist at least six different familiar varieties. They are by no means mutually exclusive, but each arguably raises somewhat different issues regarding fidelity to law.

1. *Unconstitutional Laws.* It is longstanding doctrine within the executive branch that mere doubts as to a statute's constitutionality do not excuse the President or an administrative agency from its implementation.⁴⁶ There are, however, exceptions. One of the earliest and most celebrated examples of nonexecution involved the Sedition Act of 1798, passed by the Federalist Congress during the Adams Administration to criminalize criticism of the government.⁴⁷ As President, Thomas Jefferson, believing the Act to be unconstitutional, called a halt to its implementation.⁴⁸ In theory, it is not difficult to reconcile such a decision with the faithful execution ideal: Jefferson thought the statute of no force because of its unconstitutionality and implicitly treated his obligation to enforce the law as an obligation to protect the Constitution, just as the presidential oath would require. Nonetheless, instances of nonexecution based on individual constitutional rights have been rare. Where a claim to constitutionality is at least plausible, the executive branch has typically regarded itself as duty-bound to enforce the law, leaving those whose rights are in question to put their constitutional challenge to a court for resolution.⁴⁹

The executive branch has claimed somewhat broader authority to ignore statutes that violate separation of powers limits.⁵⁰ Statutes that intrude impermissibly on presidential prerogatives presumably stand on different ground because, in many instances, no one other than the presi-

⁴⁵ DAPA Memorandum, *supra* note 2.

⁴⁶ *See, e.g.*, Rendition of Ops. on Constitutionality of Statutes-Fed. Home Loan Bank Act, 39 Op. Att'y Gen. 11, 14 (1937).

⁴⁷ Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

⁴⁸ *See* Letter from Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), available at <https://founders.archives.gov/documents/Jefferson/03-01-02-0223> (explaining that he directed Sedition Act prosecutions to be discontinued because of the law's unconstitutionality).

⁴⁹ *See* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 200 (1994).

⁵⁰ Constitutionality of Congress' Disapproval of Agency Regulations by Resolutions Not Presented to the President, 4 Op. O.L.C. 21, 22 (1980).

dent would have the capacity to mount an effective challenge. For example, the George W. Bush Administration refused to implement Section 214 of the Foreign Relations Authorization Act of 2003,⁵¹ which—contrary to then-longstanding executive branch policy—would have entitled citizens born in Jerusalem to list their place of birth as “Israel.” The Administration’s resistance was based on the Act’s alleged interference with the President’s exclusive power over the recognition of other nations’ sovereignty, a position ultimately upheld by the Supreme Court.⁵² In a similar vein, both the Bush and Obama Administrations ignored appropriations riders that would have forbidden the State Department to use appropriated funds to send U.S. representatives to international organizations chaired by Iran.⁵³ Both presidents asserted that the restriction amounted to an unconstitutional encroachment on the President’s exclusive authority to conduct international relations.⁵⁴ Although such decisions are also reconcilable in principle with the faithful execution ideal, presidents rarely ignore statutes on separation of powers grounds—even if they have formally objected to them—for the obvious reason that such refusals can evoke congressional anger, putting other political goals at risk.⁵⁵

2. *Doubts as to Legal Authority.* A second category of potential nonexecution cases would involve cases in which an agency declines to

⁵¹ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. 107-228, § 214, 116 Stat. 1350, 1365–66 (2002).

⁵² *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015).

⁵³ Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act, 33 Op. O.L.C. 1 (2009).

⁵⁴ *Id.* at 4–5.

⁵⁵ An example was the interbranch dispute over the so-called “stay provisions” of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, Title VII, 98 Stat. 1175 (1984). When the Office of Management and Budget instructed executive agencies not to comply with certain determinations made by the Comptroller General, on the ground that the Comptroller General was an arm of the legislative branch, its order triggered an uproar in Congress. The mood was well captured by the opening statement of then-Chairman of the House Committee on Government Operations, Jack Brooks:

I don’t decide whether the law is Constitutional or not. I think that it is, but I don’t make that decision. The courts will make that decision. Until they do, as long as it was signed into law and duly passed by Congress, it is the law of this country. We don’t individually decide whether we think a law is constitutional or not. If you don’t like to pay your taxes, say it is unconstitutional like those that don’t pay them; and let’s see if they don’t haul you off and put you in the clink.

I will just say that the President has chosen to do otherwise, and as a result, he has failed to exercise his constitutional duty to take care that the laws be faithfully executed.

Constitutionality of GAO’s Bid Protest Function: Hearing on Competition in Contracting Act Before the Subcomm. on Legislation & Nat’l Sec. of the H. Comm. on Gov’t Operations, 99th Cong. 615, 628 (1985). The executive branch abandoned its position after CICA’s stay provisions were upheld against separation of powers challenges by the Circuit Court of Appeals for the Third Circuit in *Ameron, Inc. v. U.S. Army Corps of Eng’rs*, 809 F.2d 979 (3d Cir. 1986), *cert. granted*, 485 U.S. 958 (1988), *cert. dismissed*, 488 U.S. 918 (1988).

pursue a course of action because it doubts its own jurisdiction. Thus, for example, the Environmental Protection Agency famously relied on a jurisdictional argument in rejecting a 1999 rulemaking petition urging the EPA to regulate “greenhouse gas emissions from new motor vehicles under § 202 of the Clean Air Act.”⁵⁶ The Supreme Court subsequently concluded that the EPA’s interpretation was in error. The Court read the Act as conveying sufficient authority for EPA to treat carbon dioxide from automobile emissions as an “air pollutant,” and thus to regulate greenhouse gas emissions, if otherwise appropriate.⁵⁷ Although EPA’s statutory reading was overridden, it would be odd to regard nonexecution based on a good-faith reading of statutory limits as “faithless.” By its own lights, an agency refraining from administrative action on legal grounds is attempting to execute faithfully the limits Congress placed on the agency’s administrative discretion.

3. Statutorily Authorized Waivers. A third category of nonexecution, which likewise confounds the execution/nonexecution distinction, involves cases where nonenforcement is itself explicitly authorized by law. For example, Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended,⁵⁸ permits the Secretary of Homeland Security “to waive all legal requirements such Secretary, in such Secretary’s sole discretion, determines necessary to ensure expeditious construction of the barriers and roads under this section.” On August 2 and September 12, 2017, DHS Secretary John Kelly and Acting Secretary Elaine Duke, respectively, published the legally required notices to waive a lengthy roster of federal environmental and conservation statutes as they might have applied to the construction of new border security infrastructure, including border wall prototypes, in the San Diego and Calexico areas to help interdict unlawful movement from Mexico into the United States.⁵⁹ The waivers have so far withstood legal challenge.⁶⁰

⁵⁶ *Massachusetts v. E.P.A.*, 549 U.S. 497, 510–11 (2007).

⁵⁷ *Id.* at 528–29.

⁵⁸ Illegal Immigration Reform and Immigrant Responsibility Act of 1996 Public Law 104-208, Div. C, 110 Stat. 3009-546, 3009-554 (Sept. 30, 1996) (8 U.S.C. 1103 note), as amended by the REAL ID Act of 2005, Public Law 109-13, Div. B, 119 Stat. 231, 302, 306 (May 11, 2005) (8 U.S.C. 1103 note), as amended by the Secure Fence Act of 2006, Public Law 109-367, § 3, 120 Stat. 2638 (Oct. 26, 2006) (8 U.S.C. 1103 note), as amended by the Department of Homeland Security Appropriations Act, 2008, Public Law 110-161, Div. E, Title V, § 564, 121 Stat. 2090 (Dec. 26, 2007).

⁵⁹ Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 35,984, 35, 985 (Aug. 2, 2017); Determination Pursuant to Section 102 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, as Amended, 82 Fed. Reg. 42,829, 42,830 (Sept. 12, 2017).

⁶⁰ *In re Border Infrastructure Env'tl. Litig.*, 284 F. Supp. 3d 1092 (S.D. Cal. 2018).

It is sometimes even the case that a statute that makes conduct regulable simultaneously and explicitly confers discretion on the executive branch with regard to limiting enforcement. For example, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁶¹ authorizes the Secretary of Health and Human Services to waive certain requirements that would otherwise limit state flexibility in administering the federally funded public assistance program called Temporary Assistance to Needy Families.⁶² In 2012, Earl S. Johnson, Director of the HHS Office of Family Assistance, issued an “Information Memorandum” intended “to notify states of the [HHS] Secretary’s willingness to exercise her waiver authority . . . to allow states to test alternative and innovative strategies, policies, and procedures that are designed to improve employment outcomes for needy families.”⁶³ Controversially, the demonstration projects HHS suggested as possible “alternative . . . strategies” included hypothetical initiatives that would appear to relax work-participation requirements for TANF recipients that states would otherwise be required to enforce.⁶⁴ The Department of Education has issued similar guidance⁶⁵ that would have the effect of relieving states from obligations otherwise enforceable as a condition of federal funding under the No Child Left Behind Act.⁶⁶

These examples of administrative initiative exemplify what Professors David Barron and Todd D. Rakoff have called “big waiver.”⁶⁷ As they explain in an article generally favorable to the practice, Congress sometimes will enact “a fully reticulated, legislatively defined regulatory framework” that contains within it a delegation of “broad, discretionary power to determine whether the rule or rules that Congress has established should be dispensed with.”⁶⁸ Authorizations of “big waiver” seem

⁶¹ See Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193, 333, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.)

⁶² Pub. L. No. 104-193, 401, 110 Stat. 2105, 2113 (1996) (codified at 42 U.S.C. § 601).

⁶³ Information Memorandum from Earl S. Johnson, Dir. Off. of Fam. Assistance, to States Administering the Temporary Assistance for Needy Families (TANF) Program and Other Interested Parties (July 12, 2012), available at <https://www.govinfo.gov/content/pkg/CREC-2012-09-10/html/CREC-2012-09-10-pt1-PgS6047-2.htm>.

⁶⁴ For example, HHS might look favorably upon “[p]rojects that test systematically extending the period in which vocational educational training or job search/readiness programs count toward participation rates, either generally or for particular subgroups, such as an extended training period for those pursuing a credential. The purpose of such a waiver would be to determine through evaluation whether a program that allows for longer periods in certain activities improves employment outcomes.” *Id.*

⁶⁵ See ESEA Flexibility Renewal, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/elsec/guid/esea-flexibility/flex-renewal/index.html>.

⁶⁶ See No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2001), repealed by Every Child Succeeds Act, Pub. L. 114-95, 129 Stat. 1802 (2015).

⁶⁷ David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 272–90 (2013).

⁶⁸ *Id.* at 267–68.

to confound the execution/nonexecution distinction because the implementation of a waiver program simultaneously does away with legal requirements that might otherwise have been enforced, but does so pursuant to explicit congressional license. It is important, however, to include authorized waiver programs as instances of nonexecution because even explicit waiver authority may be exercised beyond permissible bounds and thus in derogation of the law.

A close cousin of the “big waiver” is statutorily authorized regulatory forbearance authority.⁶⁹ The Federal Communications Act, for example, provides the FCC two explicit forbearance authorities. Section 332 of the Act, added in 1993, imposes common carrier status on cellular telephony, but authorizes the agency, in certain circumstances, to exempt cellular telephony from many of the regulatory obligations that common carrier status would otherwise automatically entail.⁷⁰ Yet another provision actually requires the FCC to forbear from applying to a telecommunications carrier any Communications Act provision or Commission regulation if certain statutory criteria are met.⁷¹ Faithful execution of such forbearance authority results, by definition, in the deliberate nonenforcement of other statutory provisions. In the FCC’s case, the exercise of both mandatory and discretionary forbearance authority, like “big waiver,” entails an affirmative, deliberate determination by an agency as to how a set of statutory objectives is best accomplished. The exercise of “big waiver” authority may also entail significant commitments of agency time and administrative energy. As with DAPA, nonexecution in this form is better seen as agency action, not inaction.

4. Maximizing the Effectiveness of the Underenforced Statute with Limited Resources. Among the most probable common categories of underenforcement is non-implementation to advance program effectiveness. Agencies typically lack the resources for comprehensive administration of even those programs with which they are sympathetic as a matter of policy and about which they harbor no constitutional doubts. Nonexecution in this context simply reflects priority setting to get the most bang for Congress’s appropriated buck, consistent with Congress’s own explicit or imputed priorities. Thus, for example, the Occupation Safety and Health Administration (OSHA) lists on its website⁷² and in its operations manual⁷³ a set of workplace inspection priori-

⁶⁹ For a thorough description of the phenomenon and a normative analysis in its favor, see Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548 (2016).

⁷⁰ 47 U.S.C. § 332(c)(1) (2018).

⁷¹ 47 U.S.C. § 160(a) (2018).

⁷² U.S. Dep’t of Labor, *Occupational Safety and Health Administration (OSHA) Inspections*, OSHA, <https://www.osha.gov/dep/index.html>.

⁷³ U.S. Dep’t of Labor, *OSHA Field Operations Manual*, OSHA (Aug. 2, 2016), https://www.osha.gov/OshDoc/Directive_pdf/CPL_02-00-160.pdf.

ties, designed to use its resources most effectively to fulfill its mission. Presumably, many, if not all administrative agencies with enforcement powers have policies of this sort, although there is variance no doubt in their explicitness and availability to the public. Following such priorities will mean that some violations, deemed less serious, will effectively be ignored. Nonetheless, each agency's implicit rationale amounts to something like, "We're doing the best we can to achieve the specific objectives of this assignment with the funds Congress provided to achieve its objectives."⁷⁴

The same program-optimizing rationale may apply in certain contexts where the concern is not chiefly budgetary. For example, even policy sympathizers criticized the Obama Administration for failing in a number of respects to implement the Affordable Care Act (ACA) on the timetable or with the stringency that Act apparently dictated. The Administration never issued a thoroughgoing explanation for its policies, tending to refer only to the exercise of "prosecutorial discretion."⁷⁵ Because the ACA, however, represented the first Obama Administration's foremost political priority, it seems safe to assume that its partial nonexecution of the ACA—whether or not lawful—was likely motivated by an expectation that relaxing execution at least temporarily would ultimately make accomplishment of the program's overall objectives more, not less likely. As it happens, this kind of ambiguity can arise whenever any Administration casts a nonexecution policy under a regulatory regime as a matter of postponement.⁷⁶ Not implementing a statutory deadline may reflect less the necessity to accommodate resource constraints than a reflection of an agency's determination that regulatory action, if deliberated longer and implemented later, may turn out to be sounder and more effective.

In *Commonwealth of Pa. v. Lynn*,⁷⁷ the D.C. Circuit confronted an intriguing, if likely rare example in which an agency put a program on *permanent* hold because the agency thought Congress had authorized a tool inconsistent with its explicit statutory objectives. Specifically, the

⁷⁴ Of course, underfunding for some programs may be the consequence of presidential decisions not to seek greater resources for particular programs. See, e.g., Juliet Eilperin, Emma Brown & Darryl Fears, *Trump Administration Plans to Minimize Civil Rights Efforts in Agencies*, WASH. POST (May 29, 2017), https://www.washingtonpost.com/politics/trump-administration-plans-to-minimize-civil-rights-efforts-in-agencies/2017/05/29/922fc1b2-39a7-11e7-a058-ddbb23c75d82_story.html?utm_term=.373bd6f5c81a&wpisrc=nl_headlines&wppmm=1. The Faithful Execution implications of intentionally low-balling requests for resources are discussed in Part IV.

⁷⁵ Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1722 (2016).

⁷⁶ Cass R. Sunstein & Adrien Vermeule, *The Law of "Not Now": When Agencies Defer Decisions*, 103 GEO L.J. 157, 186 (2014).

⁷⁷ *Pennsylvania v. Lynn*, 501 F.2d 848 (D.C. Cir. 1974).

court overturned a grant of summary judgment that would have required the Secretary of the Department of Housing and Urban Development (HUD) to resume accepting, processing, and approving applications for federal subsidies under three different programs established under national housing laws—specifically, three programs the Secretary had suspended on the ground that they were not accomplishing Congress’s intended purposes.⁷⁸ It was undisputed that the Secretary had suspended the programs for reasons related to the feasibility of accomplishing their goals and not for reasons of policy extrinsic to the operation of the programs (such as political opposition to government intervention in the housing market).⁷⁹ The court’s canvass of a range of statutes that HUD administers, as well as the explicit purposes of the specific programs at issue, persuaded the court that Congress had implicitly granted the Secretary limited discretion to suspend the programs when he had adequate reason to believe that they were frustrating national housing policy and not serving Congress’s express statutory intent to aid low-income persons.⁸⁰ In sum, HUD’s non-implementation of the subsidies program was treated as faithfully executing the housing statutes in the sense that its nonexecution was intended to promote, not impede Congress’s goals, and the court inferred Congress delegated authority to the Secretary to make such a determination.⁸¹

5. *Optimizing the Accomplishment of Competing Missions.* When they have budgetary flexibility to do so, an agency’s nonexecution decisions may reflect a slightly different rationale—not to maximize the effectiveness of the program that is under-implemented, but to conserve resources for higher priority programs. One example is the Reagan Administration’s “passive enforcement” strategy after President Carter, pursuant to his authority under the Military Selective Service Act,⁸² had reinstated draft registration in the wake of the Soviet Union’s invasion of Afghanistan.⁸³ Between 1981 and 1983, despite “[g]overnment estimates of noncompliance with the Act in 1980 and 1981 [that] ranged

⁷⁸ *Id.* at 856.

⁷⁹ *Id.* at 852 (“While it may be doubted whether mere ‘concern about the equity and efficiency’ of a program duly established by Congress could, without more, support an executive decision to suspend its operation, it is clear that this is not the usual case of claimed authority ‘to defer approval for reasons totally collateral and remote’ to the purpose of the authorizing legislation.”).

⁸⁰ *Id.* at 851–56.

⁸¹ For a decision rejecting a similar assertion of administrative discretion not to implement a program, see, e.g., *Allison v. Block*, 723 F.2d 631 (8th Cir. 1983) (Secretary of Agriculture enjoined from foreclosing on farm property securing emergency and economic emergency farm loans until he fulfilled statutory duty to promulgate substantive and procedural regulations to govern requests for debt relief or dealt with individual applications in a reasoned fashion).

⁸² 50 U.S.C. § 3801 (2018).

⁸³ Proclamation No. 4771, 3 C.F.R. 82 (1980).

from just over half a million to one million men,”⁸⁴ the Justice Department decided to prosecute persons for failing to register with the Selective Service only if they themselves reported their nonregistration to the Federal government or were reported by unsolicited third parties.⁸⁵ This directly affected a very small number of young men who were legally required to register, but who instead wrote to the Selective Service System, providing their names and addresses, but refusing—as an expression of political protest—to put the same information on the prescribed registration form. As a result:

the so-called ‘passive enforcement’ policy resulted in the prosecution by 1985 of only seventeen draft resisters, sixteen of whom were self-declared nonregistrants. All seventeen were vocal opponents of the requirement for Selective Service registration, having protested that requirement through their inculpatory letters, statements to the general public, or both.⁸⁶

The “passive enforcement” policy could hardly have been intended by the Justice Department to represent an optimal level of Selective Service enforcement; on the contrary, “[a] memorandum from the then-assistant attorney general in charge of the Justice Department’s criminal division expressly recognized that any public awareness of the government’s policy would provide ‘a disincentive, until the last possible moment, to registration.’”⁸⁷ At most, with regard to the Selective Service System, the program of drastically limited law execution represented a way “to promote general deterrence, . . . since failing to proceed against publicly known offenders would encourage others to violate the law.”⁸⁸ The Supreme Court’s approval of the program⁸⁹ notwithstanding, the Department was not prioritizing the use of prosecutorial resources to have the maximum positive impact on Military Selective Service Act enforcement. It presumably was trying instead to focus its time and material resources on infractions of other criminal laws deemed to be targeting more serious social harms.

6. Promoting Non-Program Values. Whenever an agency decides not to pursue a particular class of cases, it can almost always characterize its decision as one of focusing resources as effectively as possible to

⁸⁴ Peter M. Shane, *Equal Protection, Free Speech, and the Selective Prosecution of Draft Nonregistrants*, 72 IOWA L. REV. 359, 361 (1987).

⁸⁵ *Id.* at 359.

⁸⁶ *Id.*

⁸⁷ *Id.* at 365 (quoting Memorandum from Assistant Attorney General D. Lowell Jensen to United States Attorneys on Prosecution of Selective Service Non-Registrants (July 9, 1982)).

⁸⁸ *Wayte v. United States*, 470 U.S. 598, 613 (1985).

⁸⁹ *Id.*

accomplish the objectives of one or another program within its purview. It sometimes appears, however, that the agency's nonexecution policy is motivated at least as significantly by other values—values that the agency may even regard as constitutionally embedded.

A well-known example is the Justice Department's longstanding policy on the federal prosecution of defendants who have already been subjected to state prosecution for substantially the same acts.⁹⁰ In essence, this so-called "*Petite Policy*"⁹¹ precludes a dual or successive federal prosecution unless the matter involves a distinct and substantial federal interest that the state prosecution leaves "demonstrably unvindicated."⁹² Because overlapping state and federal prosecutions do not violate the Double Jeopardy Clause,⁹³ the Department's nonexecution decisions under the policy are not constitutionally mandated. The policy lists "[p]romot[ing the] efficient utilization of Department resources" among its purposes.⁹⁴ But the policy is also intended "to protect persons charged with criminal conduct from the burdens associated with multiple prosecutions and punishments for substantially the same act(s) or transaction(s),"⁹⁵ a fairness value reflective of the double jeopardy concern, and "to promote coordination and cooperation between federal and state prosecutors,"⁹⁶ which is essentially a concern for values of federalism. A similar federalism concern presumably motivated the Obama Justice Department's policy regarding marijuana enforcement, which took into account the reality that contemporary state laws frequently authorize at least some marijuana cultivation and distribution, subject to effective state regulation.⁹⁷

7. Policy Resistance. A final category—and, by definition, the most problematic—comprises the non-implementation of any statutory duty because the Administration opposes the statute. The classic litigated case involved a failure of the former Department of Health, Education and Welfare (HEW) to pursue enforcement of Title VI of the Civil

⁹⁰ U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-2.031(1) [hereinafter *Petite Policy*], <https://www.justice.gov/usam/usam-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031>.

⁹¹ *Id.* The policy is also called the "*Petite Policy*" because an earlier version had resulted in the dismissal of a federal indictment challenged as a violation of the Double Jeopardy Clause with the consent of the Department of Justice. *See* *Petite v. United States*, 361 U.S. 529 (1960).

⁹² *Petite Policy*, *supra* note 90.

⁹³ *See* *Gamble v. United States*, 139 S. Ct. 1960, 1964 (2019); *Abbate v. United States*, 359 U.S. 187, 195 (1959).

⁹⁴ *Petite Policy*, *supra* note 90.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Memorandum from James M. Cole, Deputy Attorney Gen. on Guidance Regarding Marijuana Enforcement to all U.S. Attorneys (Aug. 29, 2013), available at <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

Rights Act of 1964⁹⁸ against federally funded school districts and institutions of higher education that remained racially segregated. HEW was ordered to commence enforcement proceedings or demand explanations of apparent noncompliance by roughly 200 school districts, as well to implement an enforcement program for vocational and special schools.⁹⁹

HEW had offered no official explanation of its behavior, offering only the claim of unreviewable prosecutorial discretion as its ultimately unsuccessful defense. It was generally understood, however, that the Nixon Administration favored voluntary desegregation, rather than government-enforced desegregation, especially if it involved mandatory student reassignments and busing to achieve racial balance.¹⁰⁰ The central import of the opinions rendered in the case lay in the implicit rejection of the notion that the Administration's policy agenda could overcome Congress's imposition of a mandatory duty.¹⁰¹

To a similar effect was the Supreme Court's 2007 decision taking EPA to task for failing under the Bush Administration to regulate greenhouse gas emissions from new automobiles.¹⁰² The EPA defended its inaction on two grounds. First, it denied that it had jurisdiction under the Clean Air Act to regulate carbon emissions from new motor vehicles.¹⁰³ Its fallback defense was the assertion that it had discretion to forbear from regulatory activity because the President thought such regulation imprudent.¹⁰⁴ The Supreme Court rejected both claims, interpreting the Clean Air Act as imposing a mandatory duty to regulate under certain prescribed circumstances.¹⁰⁵ The President's judgment as to the prudence of the potential regulation at issue was not legally relevant.¹⁰⁶

⁹⁸ 42 U.S.C. §§ 2000d–2000d-7 (2018).

⁹⁹ *Adams v. Richardson*, 480 F.2d 1159, 1161 (D.C. Cir. 1973).

¹⁰⁰ *See, e.g., Gerhard Peters & John T. Woolley, Statement About the Busing of Schoolchildren*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/node/240506> (“I am against busing as that term is commonly used in school desegregation cases. I have consistently opposed the busing of our Nation’s schoolchildren to achieve a racial balance, and I am opposed to the busing of children simply for the sake of busing.”) (quoting President Nixon on Aug. 3, 1971) (last visited Oct. 16, 2019).

¹⁰¹ *See Adams*, 480 F.2d at 1161.

¹⁰² *Massachusetts v. EPA*, 549 U.S. 497 (2007).

¹⁰³ *See id.* at 511 (“The Agency gave two reasons for its decision: (1) that contrary to the opinions of its former general counsels, the Clean Air Act does not authorize EPA to issue mandatory regulations to address global climate change . . . and (2) that even if the Agency had the authority to set greenhouse gas emission standards, it would be unwise to do so at this time . . .”).

¹⁰⁴ *See id.* at 513–14.

¹⁰⁵ *See id.* at 528.

¹⁰⁶ *See id.* at 522–23. (“The alternative basis for EPA’s decision—that even if it does have statutory authority to regulate greenhouse gases, it would be unwise to do so at this time—rests on reasoning divorced from the statutory text. While the statute does condition the exercise of EPA’s authority on its formation of a ‘judgment,’ 42 U.S.C. § 7521(a)(1), that judgment must relate to whether an air pollutant ‘cause[s], or contribute[s] to, air pollution

8. *Mixed Motives.* Of course, particular programs of nonexecution can easily spring from more than one motivation. A stark instance involved the Carter Administration's policy on the now mostly forgotten legal exclusion from the United States of gay and lesbian aliens. Under the Immigration and Nationality Act of 1952, Congress had required the exclusion from the United States of aliens "afflicted with psychopathic personality, epilepsy, or a mental defect[.]"¹⁰⁷ The legislative history of this provision indicated unambiguously Congress's intent to encompass homosexuality within the mental health category of "psychopathic personality,"¹⁰⁸ as did a 1965 amendment that substituted "sexual deviation" for "epilepsy."¹⁰⁹ In short, the statute precluded the lawful immigration of gay men and lesbians on putative grounds of mental health.

However, after the American Psychiatric Association in 1973 removed homosexuality from the list of psychiatric disorders in its Diagnostic and Statistical Manual,¹¹⁰ opponents of the exclusion provision urged the Surgeon General, as head of the Public Health Service, to stop certifying "homosexuality" as a mental defect,¹¹¹ which he agreed to do.¹¹² After intense consultations with the Justice Department,¹¹³ the latter issued a statement so limiting enforcement that the new process would likely exclude, if anyone, only a volunteer seeking purposely to challenge the law.¹¹⁴ Specifically, no questions about sexual orientation

which may reasonably be anticipated to endanger public health or welfare.' Put another way, the use of the word 'judgment' is not a roving license to ignore the statutory text. It is but a direction to exercise discretion within defined statutory limits.") (internal citation omitted).

¹⁰⁷ Immigration and Nationality Act of 1952, § 212(a)(4), Pub. L. No. 414, 66 Stat. 163, 182 (1952), *amended by* Act of Oct. 3, 1965, Pub. L. No. 89-236, § 15(b), 79 Stat. 911, 919 (codified as amended at 8 U.S.C. § 1182(a)(4) (1988) (repealed 1990)). The entire provision was eliminated by the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990).

¹⁰⁸ *Boutilier v. INS*, 387 U.S. 118, 120-21 (1967).

¹⁰⁹ The amendment is discussed in *In re Longstaff*, 716 F.2d 1439, 1445 (5th Cir. 1983).

¹¹⁰ See *In re Hill*, 775 F.2d 1037, 1039 (9th Cir. 1985).

¹¹¹ See Joseph B. Treaster, *Homosexuals Still Fight U.S. Immigration Limits*, N.Y. TIMES (Aug. 12, 1979), <https://www.nytimes.com/1979/08/12/archives/homosexuals-still-fight-us-immigration-limits-health-service-view.html>.

¹¹² Memorandum from Julius Richmond, Assistant Secretary for Health, United States Department of Health, Education, and Welfare, to William Foege, Director, CDC, and George Lythcott, Administrator, HSA (Aug. 2, 1979), *reprinted in* 56 INTERPRETER RELEASES 398-99 (1979).

¹¹³ Because I was serving as an Attorney-Adviser in the Office of Legal Counsel at the time, my characterizations of attitudes within the Department concerning this debate is based on my personal recollection. For a reflection by an OLC contemporary on the implications of this episode for statutory interpretation theory, see T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 21-61 (1988).

¹¹⁴ 57 INTERPRETER RELEASES 440 (1980). Such test cases presented themselves in short order, resulting in Ninth Circuit opinions holding that the exclusion could not be enforced without a PHS certificate. *Lesbian/Gay Freedom Day Comm., Inc. v. INS*, 541 F. Supp. 569 (N.D. Cal. 1982), *aff'd sub nom Hill v. INS*, 714 F.2d 1470 (9th Cir. 1983); *but see In re Longstaff*, 716 F.2d 1439 (5th Cir. 1983) (upholding an administrative decision to deny naturalization to resident alien determined, without PHS certification, to have been gay and thus

would be asked, and the exclusion would be enforced only against an individual who voluntarily self-identified as gay or lesbian or was so identified by a third party, but, in the latter case, only after the alien verified his or sexual orientation during a private “secondary inspection.”¹¹⁵ In an accompanying background paper, the Department justified its limited enforcement regime on four grounds: the asserted lack of any “generally agreed-upon definition of homosexuality,” the arbitrary enforcement pattern that could arise from “reliance upon subjective indicia (such as attire or mannerisms),” the invasion of personal privacy entailed in inquiring into sexual preference, and the lack of agency expertise in determining sexual orientation.¹¹⁶ Although the policy could be characterized as reflecting an administrative judgment that Congress’s immigration goals would be better served by redirecting elsewhere the resources of time and effort that might have been devoted to this particular exclusion, it is safe to say that the limits on execution also reflected a widespread administrative sentiment that the exclusion was an affront to values of human dignity and equality. Intriguingly, after the Ninth Circuit rejected the argument that the INS, without PHS certification, could exclude gay and lesbian aliens based on mental health,¹¹⁷ there is no indication of which I am aware that the Reagan Administration tried to compel PHS to reverse its nonenforcement stand. The Administration may have hoped for fairly prompt legislative repeal of the exclusion as part of a larger overhaul of the Immigration and Naturalization Act; the exclusion was not repealed, however, until the Immigration Act of 1990, enacted under the George H.W. Bush Administration.¹¹⁸

* * *

This cataloguing of nonexecution contexts is intended to show two things: It reminds us first that, however heated the political rhetoric specific episodes may generate and even deserve, some nonexecution of the laws is a commonplace—and inevitable—feature of ordinary administration. Further, what I have defined as nonexecution may be traced to dis-

properly excludable when he entered the U.S. in 1965). The Reagan Administration appears not to have pursued exclusions further, likely in anticipation of the exclusion’s repeal, which occurred in 1986.

¹¹⁵ Department of Justice Press Release of Sept. 9, 1980, *reprinted in* PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 591 (2d ed. 2005).

¹¹⁶ Justice Department Background Paper on Homosexual Exclusion Policy, *reprinted in* SHANE & BRUFF, *supra* note 115, at 591–92.

¹¹⁷ *Lesbian/Gay Freedom Day Comm., Inc.*, 541 F. Supp. at 588.

¹¹⁸ Immigration Act of 1990, § 601(a), Pub. L. 101-649, 104 Stat. 4978 (1990).

cernible motives or sources of possible justification. Reviewing reasons is what administrative law does.¹¹⁹

II. AVOIDING “FAITHFUL EXECUTION” AS A MEASURE OF STATUTORY COMPLIANCE

A. *The Unhelpfulness of Article II*

Given the variety exposed in Part I as to the possible forms of non-execution, life would plainly be easier, legally speaking, if there were bright-line rules to separate the permissible from the impermissible—rules perhaps rooted in one or another theory of constitutionally vested executive power. For example, adherents to full-blown Unitary Executive Theory—the notion that the Executive Power Vesting Clause or the Faithful Execution Clause authorizes the President to direct all executive branch law enforcement—might argue that executive branch prosecutorial discretion in both civil and criminal contexts gives presidents a plenary nonexecution power.¹²⁰ These grants of power, however, offer little of use in distinguishing permissible from impermissible non-execution initiatives.

I have written elsewhere at some length why Unitary Executive Theory as an interpretation of the Vesting Clause should be discarded, even as an originalist matter.¹²¹ Neither early government practice, nor an “original public understanding” of “executive power” squarely supports such a reading of Article II.¹²² And even if the originalist case were

¹¹⁹ For a deep account of the role of reasoned decision making in administrative law, see JERRY L. MASHAW, *REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT* (2018).

¹²⁰ Important sympathetic treatments of unitary executive theory include SAIKRISHNA B. PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* (2015), and STEVEN G. CALABRESI & CHRISTOPHER S. YOO, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* (2008). Critical treatments include PETER M. SHANE, *MADISON’S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 32–42 (2009), JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012), and Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696 (2007). For an argument that Unitary Executive Theory is indefensible on originalist grounds, but normatively attractive, see Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 *Colum. L. Rev.* 1 (1994).

¹²¹ Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 *U. Pa. J. Const. L.* 323, 361–62 (2016); Peter M. Shane, *Political Accountability in a System of Checks and Balances: The Case of Presidential Review of Rulemaking*, 48 *Ark. L. Rev.* 161, 212–13 (1995). William Wirt, who served as Attorney General under both Presidents Monroe and John Quincy Adams, famously insisted in a formal opinion that the Take Care Clause did not imply a presidential authority to take over tasks that Congress had assigned to other administrators. *President & Accounting Offices*, 1 *Op. Atty. Gen.* 624, 625–26 (1823).

¹²² Moreover, the distinction between civil and criminal offenses has hardly been a static one; many of today’s civil offenses were once considered crimes. Noah Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 *Buff. L. Rev.* 611, 687–88 (2016). It

more compelling, using originalist methods to uncover the scope of presidential law enforcement authority in the twenty-first century is an especially unappealing project.¹²³ In 1787, facing both the prospect of a federal civil establishment likely to employ at most a few thousand persons¹²⁴ and the certainty that the Chief Executive would be the venerated former Commander-in-Chief of the Continental Army, Americans might have found it plausible to institutionalize a hierarchical civil command structure with meaningful accountability effectively vested in a single human manager. In 2019, however, with a total civilian workforce of non-seasonal full-time permanent employees of nearly two million, not including the postal service,¹²⁵ the model is utterly fanciful. The corps of Administrative Law Judges serving the Social Security Administration alone¹²⁶ is over half the probable size of the entire federal government in 1800. The normative case for the unitary executive is weak, the organizational model is unrealistic, and it portends abuses that, no matter how serious, will never catalyze sufficient popular momentum to warrant formal amendment to the wording of Article II. In short—even putting aside the inherent and conspicuous tension between Unitary Executive Theory and the faithful execution obligation—a sound view of twenty-first century executive authority vested by Article II would not give presidents a plenary nonexecution power.

A somewhat less ambitious bright-line approach might deny to presidents comprehensive nonexecution power in civil contexts but grant it with regard to criminal law. After all, it is easy to find scholarly arguments, judicial opinions, and Justice Department memoranda asserting

is largely on this basis that the author argues for interpreting the pardon power to cover civil, as well as criminal offenses, which is not the conventional understanding. Despite the author's thoughtful arguments, based largely on pre-constitutional history and analogies between modern civil offenses and their criminal precursors, the fact remains that two centuries of consistent practice have more or less cemented the criminal-civil distinction vis-à-vis the pardon power. At this point, Congress and the public would undoubtedly view any presidential claim of an unprecedented civil pardon power as a claim of executive authority to rewrite, if not suspend civil statutes.

¹²³ Jon Michaels has argued more generally that vast differences in circumstances surrounding federal governance in the 18th and 21st centuries require we treat the original constitutional organization chart as less binding in its specifics than in its endorsement of a triangulation of powers to erect a checks-and-balances hedge against tyranny, and enable governance that is adequately “democratic, pluralistic, inclusive and deliberative” for a nation as diverse as ours. JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 6 (2017).

¹²⁴ See SOLOMON FABRICANT, *THE TREND OF GOVERNMENT ACTIVITY IN THE UNITED STATES SINCE 1900* 161–203 (1952).

¹²⁵ *Historical Federal Workforce Tables: Executive Branch Civilian Employment Since 1940*, OFF. OF PERS. MGMT., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> (last visited Sept. 30, 2019).

¹²⁶ *ALJs by Agency*, OFF. OF PERS. MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency> (last visited Sept. 30, 2019).

that criminal law enforcement discretion is rooted in Article II.¹²⁷ But a categorical distinction between the scope of permissible nonexecution in criminal law as opposed to civil administration would not be responsive to the argument that the Faithful Execution Clause bars executive branch rewrites of disfavored statutes.

Nonenforcement of the Alien and Sedition Acts and the *Petite* policy on dual and successive prosecution do not prove otherwise. It is true that these examples of longest standing in my catalogue of programmatic nonenforcement policies stand virtually unchallenged as legitimate exercises of prosecutorial discretion, and they do both involve criminal prosecution. But there is no real doubt that the Alien and Sedition Acts were unconstitutional, and the *Petite* policy—though programmatic—does not amount to the under-implementation of any particular substantive area of law. The policy does not amount to a prescription for change in the substantive law.

By way of contrast, the Obama Administration's policy of restraint with regard to marijuana prosecution, although on the criminal side of public administration, elicited protest no less strident than was heard in response to its civil administrative initiatives.¹²⁸ Like the *Petite* policy, the Administration's approach could be seen as respecting the value of federalism, but it did so with a specific substantive focus, namely, drug policy, that remains highly controversial. Moreover, unlike the *Petite* policy, it did not condition federal forbearance on a determination that state initiatives had already vindicated the relevant federal interests. State marijuana legalization would appear to do just the opposite. The Obama policy thus elicited critics' objection that the Administration, on a politically sensitive subject, was rewriting the law according to its own policy preferences.¹²⁹ The longstanding familiarity and acceptance of prosecutorial discretion in criminal law enforcement did not insulate the Obama Administration from a rule-of-law-based critique of its forbearance with regard to a controversial matter of social policy. The critique was identical to objections raised with reference to civil under-enforce-

¹²⁷ See, e.g., Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 516–17 (2017); Prosecution for Contempt of Cong. of an Exec. Branch Official who has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 125 (1984); *In re Aiken Cty.*, 725 F.3d 255, 262 (D.C. Cir. 2013).

¹²⁸ A typical example was a statement by then-Louisiana Governor Bobby Jindal, who told a radio interviewer: "I don't think you can ignore federal law. Federal law is still the law of the land. It still needs to be enforced." Seth McLaughlin, *GOP Hopefuls Criticize Obama Marijuana Policy but Hedge on Their Own*, WASH. TIMES (Apr. 1, 2015), <https://www.washingtontimes.com/news/2015/apr/1/gop-hopefuls-criticize-obama-marijuana-policy-but-/>. The policy was formally rescinded by the Trump Administration. Memorandum from Jefferson B. Sessions, Attorney Gen., U.S. Dep't of Justice, on Marijuana Enforcement (Jan. 4, 2018), available at <https://www.justice.gov/opa/press-release/file/1022196/download>.

¹²⁹ McLaughlin, *supra* note 128.

ment, for example, regarding the use of waivers to afford states flexibility in administering work requirements attached to federally funded public assistance programs.¹³⁰

It would not even make sense to view the Article II pardon power as giving the President comprehensive case-by-case, but not programmatic nonexecution discretion with regard to just the criminal law. The Framers anticipated the use of the pardon power on both an adjudicatory and programmatic basis. The latter, of course, is called “amnesty.” Alexander Hamilton cited potential amnesty as an especially important reason for reposing the pardon power in the chief executive: “[I]n seasons of insurrection or rebellion, there are often critical moments, when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth; and which, if suffered to pass unimproved, it may never be possible afterwards to recall.”¹³¹ And, of course, presidents have occasionally granted amnesty on a categorical basis.¹³² In short, if the pardon power signals the scope of permissible nonexecution of the laws, the President would be on solid ground in failing to execute criminal law on either a case-by-case or categorical basis. But because categorical nonexecution of the criminal law raises anxieties identical to programmatic civil nonexecution, it follows that the civil/criminal distinction cannot provide a sensible boundary for delimiting the President’s nonexecution powers. In adopting any program of less than comprehensive execution, the executive branch raises anxieties about whether law is being executed faithfully.¹³³ Whether the laws involved are civil or criminal is of no help in determining when that anxiety is well placed.

Even if the affirmative grants of power to the President in Article II do not provide a helpful measure for the scope of the executive branch’s nonexecution discretion, a converse question can be posed: Does the Faithful Execution Clause, viewed as a constraint on presidential power, provide a helpful guide to the limits on permissible nonexecution? For at least three reasons, however, courts should resist the temptation to search the Faithful Execution Clause for justiciable limits to nonexecution:

- Constitutionalizing the controversies over nonenforcement would likely intensify already partisan debates and risk unjustifiably undermining government legitimacy further.

¹³⁰ See, e.g., Robert Rector, *How Obama Has Guttled Welfare Reform*, WASH. POST (Sept. 6, 2012), https://www.washingtonpost.com/opinions/how-obama-has-guttled-welfare-reform/2012/09/06/885b0092-f835-11e1-8b93-c4f4ab1c8d13_story.html?utm_term=.46d817c22b48.

¹³¹ THE FEDERALIST No. 74 (Alexander Hamilton).

¹³² See Markowitz, *supra* note 127, at 498–502.

¹³³ Michael Sant’Ambrogio has argued that nonexecution can destabilize the legislative process because it is may be difficult for Congress to override. Michael Sant’Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 408 (2014).

- Encouraging the executive branch to police itself in “Faithful Execution” terms would risk the more aggressive use of the Faithful Execution Clause as a source of authority, rather than as a constraint.
- There is insufficient “interpretive content” surrounding the Faithful Execution Clause to handle the complexity of typical nonenforcement cases.¹³⁴

B. *The Costs of Unnecessary Constitutionalization*

Given how frequently laws are underenforced, the framing of non-execution challenges in Article II terms threatens to proliferate accusations of unconstitutional executive branch behavior. Deepening partisan tensions is all the more likely because, if anything, programmatic nonenforcement will surely increase over time as a significant policy making device. For one thing, the ever-increasing volume of law, unlikely to be matched by the enactment of commensurate resources for legal implementation, necessarily assures that more prioritization decisions will have to be made by the executive with the result being more instances of nonexecution.¹³⁵ Also, as congressional polarization makes it difficult for presidents to achieve legislative enactments that authorize their preferred policies directly, presidents are likely to rely on their agenda-setting discretion to persuade voters they are trying to fulfill campaign commitments.¹³⁶

If nonenforcement is a ubiquitous practice of long standing, it is simply not wise to gin up a theory of the Faithful Execution Clause that calls into question the legitimacy of so much routine government business.¹³⁷ To do so will inevitably invite the escalation of policy disputes into accusations of unconstitutionality, inviting political opponents to cast their debates as contests over legitimacy, rather than simply policy.

¹³⁴ For an excellent and entirely compatible analysis, see Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1936 (2016). Professor Walters’s analysis also emphasizes the practical flexibility available to federal courts in enforcing the APA, which allows them to be sensitive to factual context (as well as to separation of powers concerns more generally) and to avoid picking unnecessary battles with the executive branch.

¹³⁵ The Internal Revenue Service offers perhaps the classic example of an agency routinely asked to do more than its budget can plausibly be expected to handle. *See, e.g.*, David Voreacos, *IRS Criminal Cases Fall 12 Percent as Agents Head for Exits*, BLOOMBERG (Feb. 27, 2017), <https://www.bloomberg.com/news/articles/2017-02-27/irs-criminal-cases-fall-by-12-percent-as-agents-head-for-exits>.

¹³⁶ *See* Neal Devins, *Presidential Unilateralism and Political Polarization: Why Today’s Congress Lacks the Will and the Way to Stop Presidential Initiatives*, 45 WILLAMETTE L. REV. 395, 410 (2009).

¹³⁷ Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1289, 1291–92 (2015) (“It is not generally a virtue for a constitutional interpretation to stray . . . far from actual practice.”).

As Professor Richard Fallon has observed, most constitutional theories are at least partially descriptive; that is, they “claim to fit or explain what they characterize as the most fundamental features of the constitutional order.”¹³⁸ Underenforcement of law qualifies as not only a fundamental feature of our public law system, but as an inevitable one. Frequent invocation of the Faithful Execution Clause in challenges to ordinary administrative decision making is likely over time to intensify partisanship and further erode whatever public trust in government still exists.¹³⁹

C. *Turning a Restraint Into a Source of Power*

If the Faithful Execution Clause becomes a touchstone for evaluating the legality of discretionary executive acts, it is not only the courts that will develop a theory of what that clause means. Executive branch lawyers will do so, as well. After all, it is the routine business of the Justice Department’s Office of Legal Counsel to opine on the scope of executive statutory, as well as constitutional authorities. Instead of treating the Faithful Execution Clause as a significant constraint on presidential power, Justice Department lawyers may well be inclined both to minimize its limiting force and to find in “faithful execution” a license to go beyond the restrictive terms of statutes in order to find a new ground for innovative claims of presidential authority. It is not a good idea to proliferate occasions for such interpretation.

Professors Jack Goldsmith and John F. Manning have actually offered scholarly support for finding more presidential authority under the Faithful Execution Clause.¹⁴⁰ In *The President’s Completion Power*, they locate in the Faithful Execution Clause a presidential “authority to prescribe incidental details needed to carry into execution a legislative

¹³⁸ Richard H. Fallon, Jr., *How to Choose a Constitutional Theory*, 87 CALIF. L. REV. 535, 541 (1999).

¹³⁹ For a complex and highly nuanced discussion of the role of “good faith” and “bad faith” talk in constitutional law and advocacy, see David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885 (2016). Among the dangers of increased “bad faith” talk in constitutional discourse, Professor Pozen notes these:

First, charges of bad faith may lower the quality, if not also the quantity, of constitutional deliberation. . . . Second, charges of bad faith may compromise social trust and harmony. . . . Third, charges of bad faith may undermine prospects for welfare-enhancing cooperation and compromise.

Id. at 948–50. It is perhaps for similar reasons that the Supreme Court generally does not treat assertions that a President has exceeded his statutory powers as constitutional claims: “Our cases do not support the proposition that every action by the President, or by another executive official, in excess of his statutory authority is ipso facto in violation of the Constitution. On the contrary, we have often distinguished between claims of constitutional violations and claims that an official has acted in excess of his statutory authority.” *Dalton v. Specter*, 511 U.S. 462, 472 (1994).

¹⁴⁰ Jack Goldsmith & John F. Manning, *The President’s Completion Power*, 115 YALE L.J. 2280, 2282–83 (2006).

scheme, even in the absence of any congressional authorization to complete that scheme.”¹⁴¹ Although the suggestion is not altogether fanciful given a number of suggestive Supreme Court separation of powers opinions, one wonders about the necessity for resting such a power in the Constitution, as opposed to an implied statutory delegation by Congress.¹⁴²

In principle, it might be anticipated that the defense of an executive branch initiative under the rubric of a constitutionally based presidential “completion power” would not differ from a full-blown statutory defense. Professors Goldsmith and Manning describe the power explicitly as “defeasible”: “Congress can limit it, for example, by denying the President the authority to complete a statute through certain means or by specifying the manner in which a statute must be implemented.”¹⁴³ Note, however, that this formulation shifts the burden of persuasion with regard to defending a presidential initiative. Under the Goldsmith-Manning approach, any measure rationally calculated to implement a statutory mandate would be constitutionally within the President’s discretion unless Congress said otherwise. If this sounds like the canonical *Youngstown* case should have been decided differently, Goldsmith and Manning are sympathetic to that view; they interpret much of the Supreme Court’s post-*Youngstown* jurisprudence as vindicating the *Youngstown* dissent.¹⁴⁴ Perhaps especially in the hands of lawyers inclined toward textualism in statutory interpretation, the move to a “completion power” rooted in the Faithful Execution Clause portends sweeping expansion of a president’s implied authorities.

One also wonders how rigorously the idea of “defeasibility” would be preserved. Shifting legal analysis from the terrain on which a president must rely entirely on authority conferred explicitly or implicitly by statute into the “zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain,”¹⁴⁵ would likely have consequences. It would all but inevitably expand opportunities for a president’s lawyers to assert Article II claims that are colorably beyond congressional control.¹⁴⁶

¹⁴¹ *Id.* at 2282.

¹⁴² As a strong proponent of textualism in statutory interpretation, Professor Manning may well wish to avoid an “implied delegation” approach to the interpretation of administrative statutes that looks significantly beyond precise statutory text to determine the scope of Congress’s grant of authority. *See, e.g.*, John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001).

¹⁴³ Goldsmith & Manning, *supra* note 140, at 2282.

¹⁴⁴ *Id.* at 2282–83.

¹⁴⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

¹⁴⁶ Insofar as the Take Care Clause is understood to be an independent source of power, it is best not thought of as a source of executive discretion in the implementation of statutes, but

D. *The Vagueness of “Faithful Execution”*

In yet another thoughtful article on presidential discretion, Professors Goldsmith and Manning comment on a truly odd aspect of the career of the Faithful Execution Clause in the Supreme Court’s jurisprudence: “The Court’s decisions rely heavily on the Take Care Clause but almost never interpret it, at least not in any conventional way.”¹⁴⁷ They go on to explain:

The Court does not typically parse the text of the clause or try to situate it in the broader constitutional structure that gives it context. Nor does the Court typically examine the clause’s historical provenance (except to invoke an almost equally conclusory set of interpretations by members of the First Congress in the Decision of 1789).¹⁴⁸

In sum, “the Court treats the meaning of the clause as obvious when it is anything but that.”¹⁴⁹

The nonobviousness of the Clause stems from multiple sources: the vagueness of the “faithfulness” ideal,¹⁵⁰ the uncertainty as to whether the relevant “laws” include more than statutes, and the text’s seemingly Janus-faced quality of both being a source of power and a constraint on power. The clause was hardly discussed at the Philadelphia Convention, likely because something like it was already a staple of most state constitutions.¹⁵¹ In a study of the sixteen state constitutions drafted within

rather as the source of two more limited authorities. One is the duty implied by the Supreme Court to remove, or secure the removal of, any executive branch officer who is failing to execute the law faithfully. *Cf.* *Morrison v. Olson*, 487 U.S. 654, 696 (1988). The second is a limited prerogative or protective power to safeguard the operations of government “in cases where the instruments of civil government are under attack.” Such a power would rarely, if ever come into play in connection with the president’s day-to-day supervision of ordinary law execution. Matt Steilen, *How to Think Constitutionally About Prerogative: A Study of Early American Usage*, 66 *BUFF. L. REV.* 557, 657 (2018).

¹⁴⁷ Goldsmith & Manning, *supra* note 12, at 1838.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ There has recently emerged a thread of scholarship arguing that constitutional references to “faithful execution” draw on, and can derive meaning from, the use of such phrasing in private fiduciary instruments. For example, Professors Kent, Leib and Shugerman have argued that the obligation of faithfulness should be taken to imply a core presidential duty to be loyal to the public interest, which functions also as a limitation on any presidential entitlement to act in his own self-interest, e.g., by issuing self-pardons for alleged criminal offenses. Andrew Kent et al., *Faithful Execution and Article II*, 132 *HARV. L. REV.* 2111, 2188–89 (2019); Ethan J. Leib & Jed Handelsman Shugerman, *Fiduciary Constitutionalism: Implications for Self-Pardons and Non-Delegation*, 17 *GEO. J.L. & PUB. POL’Y* 463 (2019). One can thus imagine the Constitution as itself prohibiting any instance of nonenforcement motivated by the personal advantages thus conferred on the president. The authors do not argue, however, that such a limitation should necessarily be judicially enforceable.

¹⁵¹ Shane, *supra* note 121, at 341 n.62.

close temporal proximity—whether earlier or later—to the drafting of the federal Constitution, I identified thirteen state constitutions with provisions requiring faithful gubernatorial execution of the laws, forbidding the suspension of statutes, or both.¹⁵² Along with other scholars, I have viewed these various textual formulations as effectively incorporating into the fundamental law of each jurisdiction the English prohibition on the executive suspension of statutes, which was thought to be a necessary corollary of the separation of powers and of the exclusive power of the legislative branch to make law.¹⁵³

Despite the likely understanding that the Faithful Execution Clause was a limit on power, its most robust role in Supreme Court opinions has been to reinforce presidential authority. For example, because it is the President who must “take care” that the laws be faithfully executed, the Court has attributed to the President a constitutional entitlement to remove from office any official whose performance is inconsistent with that obligation.¹⁵⁴ It has reserved the question whether Article II should be read to limit Congress’s authority to vest “private attorney general” standing on plaintiffs who might themselves resort to litigation to help insure law is fully executed or to enlist state participation in the enforcement of federal law.¹⁵⁵

The primary scholarly dissenter from the conventional view of the clause as a limit on executive authority is Professor Saikrishna Prakash, who has argued that the Faithful Execution Clause should be understood not as a constraint, but rather as reinforcement for a supposed determination of the Framers to make the power of law enforcement exclusively presidential.¹⁵⁶ He argues that presidents are constitutionally entitled, should they prefer, to execute the law personally, even if Congress has formally vested law enforcement authority in a subordinate officer.¹⁵⁷ For evidence, he points out that the English Bill of Rights, which barred the royal suspension of statutes was enacted in 1689,¹⁵⁸ although the Pennsylvania Constitution of 1682 already included a “diligent execu-

¹⁵² *Id.* at 341–42.

¹⁵³ Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 613 (1989).

¹⁵⁴ *Cf. Morrison v. Olson*, 487 U.S. 654, 692 (1988) (“[B]ecause the independent counsel may be terminated for ‘good cause,’ the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”).

¹⁵⁵ *See* Vt. Agency of Nat. Res. v. United States *ex rel.* Stevens, 529 U.S. 765, 778 n.8 (2000); Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009).

¹⁵⁶ PRAKASH, *supra* note 120 at 93.

¹⁵⁷ *Id.* at 95.

¹⁵⁸ English Declaration of Rights, 1 W. & M., sess. 2, c. 2 (1689) (Eng.)

tion” provision.¹⁵⁹ A 1682 colonial constitution obviously could not have been derived from a 1689 parliamentary enactment. It is doubtful, however, that constitutional drafters requiring “faithful execution” in the late 18th century were taking their cue from the Pennsylvania text as opposed to the momentous developments of 1689, which were of undoubted import to the colonists in understanding their liberties as British subjects. Requiring “faithful” execution, as opposed to “du[e] and diligent[]” execution, repeats the wording not of the 1682 Pennsylvania Constitution, but of the New York Constitution of 1777.¹⁶⁰

The point for us here, however, is that the communicative content of the Faithful Execution Clause is simply too vague to provide a useful, judicially manageable standard against which to measure executive branch performance regarding the implementation of individual statutes.¹⁶¹ It is understandably tempting to view any underenforcement of the law as a threatened suspension, but—as revealed in Part I—what looks like underenforcement might simply be targeted enforcement to assure maximum program effectiveness given limited resources. Or it might reflect an agency’s plausible judgment that directing more resources to the enforcement of Statute A is a higher priority that devoting resources to the comprehensive enforcement of Statute B. It is hard to see how either sort of judgment could categorically be dismissed as being faithless to the law.

In his own insightful work on the Faithful Execution Clause, Professor Zachary Price has tried to deal creatively with the text’s Delphic quality by finding in it not a standard, but a presumption.¹⁶² Taking into account not only the Faithful Execution Clause, but also the president’s pardon power and “deeply rooted normative expectations about separation of powers,” he offers “dual presumptions” that provide a framework for assessing the legitimacy of nonenforcement decisions.¹⁶³ The first is a presumption that the executive branch may “declin[e] enforcement in particular cases where executive officials believe punishment is either

¹⁵⁹ PA. CONST. OF 1682, art. VIII (“That the Governor and provincial Council shall take care, that all laws, statutes and ordinances, which shall at any time be made within the said province, be duly and diligently executed.”).

¹⁶⁰ N.Y. CONST. OF 1777, art. XIX (“That it shall be the duty of the governor to . . . take care that the laws are faithfully executed to the best of his ability []”).

¹⁶¹ “[I]f the Court’s starting principles are both correct—if the Take Care Clause justifies prosecutorial discretion but also condemns executive dispensation or suspension—then there may be no principled metric for identifying when a valid exercise of prosecutorial discretion shades into an impermissible exercise of dispensation or suspension power.” Goldsmith & Manning, *supra* note 12, at 1863–64.

¹⁶² Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 689 (2014).

¹⁶³ *Id.* at 700.

factually or morally unwarranted.”¹⁶⁴ That presumption would be limited by the second, which is that “executive officials lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons.”¹⁶⁵ The direct impact of adopting the Price approach would thus be to cast “presumptive” doubt on the vast majority of episodes of programmatic nonenforcement.

Other scholars have criticized Price either for suggesting a constitutional doctrine likely to require overly subjective and insufficiently principled application¹⁶⁶ or a standard of such ubiquitous relevance as to tax judicial capacity.¹⁶⁷ My own view is that the scheme suffers a deeper conceptual flaw, namely, that Professor Price’s enumeration of constitutional principles “relevant to the scope of executive enforcement discretion”¹⁶⁸ is fundamentally incomplete. It omits the principle of due process.

Professor Price is on strong ground arguing that the executive’s case-by-case exercise of law enforcement discretion is consistent with the expectations of our founding generation. As Patricia Bellia has written: “Our constitutional system separates legislative and executive powers in part to guard against tyranny. If the Constitution required enforcement without discretion, then the separation of the executive and legislative powers would have little liberty-protective value.”¹⁶⁹ It must be remembered, however, that individualized discretion can itself appear as a threat to liberty and the rule of law to the extent case-by-case decision making allows similar cases to be treated differently without adequate justification. Individualized exercises of discretion typically have lower visibility, posing risks to both transparency and accountability. In short, the arbitrary exercise of government power is equally offensive to constitutional fairness values whether it takes the form of general rules applied with a rigor that is oblivious to individual circumstance or embodied in the exercise of case-by-case judgment deployed capriciously. As a matter of constitutional interpretation, Professor Price’s framework attends to these twin risks in too one-sided a fashion. Under his presumptions, an executive branch shift from quasi-adjudicative to programmatic underenforcement is cast as suspect because of its resemblance to statutory suspension, but the favoring of quasi-adjudicative over programmatic underenforcement is not deemed suspect even though it poses

¹⁶⁴ *Id.* at 704.

¹⁶⁵ *Id.*

¹⁶⁶ Goldsmith & Manning, *supra* note 12, at 1864.

¹⁶⁷ Walters, *supra* note 134, at 1923.

¹⁶⁸ Price, *supra* note 162, at 704.

¹⁶⁹ Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753, 1776 (2016).

significant risks to transparency, accountability, and equality—values we link to due process.¹⁷⁰

In sum, the Faithful Execution Clause simultaneously communicates too much and too little to be of great use in distinguishing between forms of nonexecution that are and are not offensive to the separation of powers. If enforced strictly or even as a matter of presumption regarding most episodes of programmatic nonenforcement, it is too blunt an instrument, pushing the executive to less visible and less accountable forms of executive discretion. If treated too generously as a source of reinforcement for presidential power, it threatens too great an incursion into Congress's lawmaking primacy. Taken literally and in light of eighteenth century usage, it might be understood simply "as an instruction to the President to ensure that the laws are implemented honestly, effectively, and without a failure of performance,"¹⁷¹ in other words, as "a general obligation of good faith, as measured by [a background set of] norms and expectations that governed the proper exercise of executive power"¹⁷² For judges, discerning the implications of "faithful execution" for ordinary administrative law controversies in light of so Delphic a clause runs obvious risks of excessive subjectivity and partisanship.¹⁷³

III. THE ORDINARY SUFFICIENCY OF CONVENTIONAL ADMINISTRATIVE LAW

A. *Programmatic Nonenforcement as a Statutory Problem*

The downsides of imputing justiciable limits on executive discretion to the Faithful Execution Clause might be worth risking if no good alternative existed for framing court challenges to nonexecution that is "arbitrary, capricious or an abuse of discretion." But there is—run-of-the-mill judicial review under the ordinary principles of administrative law. Resort to administrative law may appear counterintuitive given both existing doctrinal restraints on judicial review and the limited judicial capacity to remedy effectively whatever episodes of nonexecution cannot be justified under administrative law principles. However, nearly all the

¹⁷⁰ In Part III below, I argue on this basis that DAPA is actually truer to the rule of law than the exercise of wholly individuated case-by-case deferral discretion, which even the State of Texas conceded would be entirely constitutional.

¹⁷¹ Goldsmith & Manning, *supra* note 12, at 1857–58.

¹⁷² *Id.* at 1858.

¹⁷³ Apart from his article on the law governing agency nonexecution, Professor Price has also offered an insightful analysis of why maintaining a strong normative sense of the executive branch's obligation to enforce the law may be practically important for the sound operation of government. Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1143 (2015). I do not take issue with his analysis, except insofar as it would counsel a judicially enforceable categorical presumption against programmatic nonenforcement.

procedural limits to APA-style judicial review would also limit the availability and efficacy of constitutional review, while the framework for APA-style review on the merits is more clear-cut and less potentially destabilizing.

Congress has explicitly provided the authority necessary for such an approach. The Administrative Procedure Act creates a presumption in favor of judicial review¹⁷⁴ for all “agency action,” which would cover any nonexecution decision taking the form of “the whole or a part of an agency rule, order, . . . or the equivalent or denial thereof”¹⁷⁵ The presumption should not operate differently for a nonexecution decision viewed as a form of agency inaction because the APA also defines “agency action” to include “failure to act.”¹⁷⁶ In terms of remedy, the APA authorizes reviewing judges to “compel agency action unlawfully withheld or unreasonably delayed[,]” as well as to “hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”¹⁷⁷ Thus courts, in properly presented cases, have explicit statutory license to “set aside” arbitrary instances of nonexecution and to compel agency action as a remedy. There are, to be sure, a number of threshold hurdles for plaintiffs to jump before a court will reach the merits of an APA claim, including questions of standing, reviewability, and timing. But only one of these looms larger in the APA context than it might in a constitutional suit, namely, the requirement of “final agency action,”¹⁷⁸ and this hurdle is not insurmountable.

If the executive branch has discretion to execute law less than comprehensively, such discretion must come from somewhere. It is discretion that must be rooted in law. In most domestic contexts, the power of the executive branch to be involved at all in regulation or in the distribution of public benefits affecting the social and economic life of the nation comes entirely from Congress, which vests in the executive branch the authority to implement its statutory handiwork. That is, Article II itself gives no power to the executive branch, at least in peacetime, to protect the environment, improve worker safety, license broadcasters, subsidize public housing, or engage in nearly any of the categories of initiative we associate with the administrative state.¹⁷⁹ The logic of judicial review of

¹⁷⁴ 5 U.S.C. § 701 (2018).

¹⁷⁵ 5 U.S.C. § 551(13) (2018).

¹⁷⁶ *Id.*

¹⁷⁷ 5 U.S.C. § 706(1)–(2)(A) (2018).

¹⁷⁸ 5 U.S.C. § 704 (2018).

¹⁷⁹ Immigration law arguably complicates this assertion because “[t]he courts have never precisely delineated the relative powers of the political branches over immigration regulation.” Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 465 (2009). *Dicta* in *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542

agency action is thus rooted in the appropriateness of making sure agencies act within the zones of administrative discretion Congress has created, in ways that they can reasonably explain, based on a record, as fulfilling the missions Congress has established.

The availability of administrative law to address the problem of improper nonexecution becomes obvious once we stipulate that, again in ordinary domestic contexts, the source of discretion *not* to act should be rooted in the same place as the source of authority to act, namely, statutes. The Constitution vests no general authority to underenforce the law as enacted; the Faithful Execution Clause belies any such suggestion. But given that Congress enacts statutes with both the knowledge and expectation that sub-comprehensive execution of law is pervasive, it is entirely reasonable to attribute discretion for nonexecution authority to the same source of domestic authority that enables the executive branch to act in the first place, that is, in authorizing legislation. Such an inference is all the more reasonable because Congress is aware that comprehensive enforcement of all laws is impossible. It knows how to place express limits on administrative authority when it wants to,¹⁸⁰ and conversely, it knows how to convey discretion in all-but-limitless terms.¹⁸¹ Between the ends of the discretion spectrum, Congress presumably entertains a general expectation that forbearance from comprehensive law execution should be justifiable, to the extent it happens, in terms of rationally advancing and not undermining Congress's purposes. Thus viewed, the problems at the heart of nonexecution controversies are the precise problems at the heart of ordinary administrative law, namely, identifying the limits of executive discretion and reviewing its exercise.

(1950) cites *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936), as support for the proposition that the exclusion of aliens is "inherent in the executive power to control the foreign affairs of the nation." Given that the Supreme Court has recently rejected the idea that *Curtiss-Wright* is authority for the equivalent of law-making power in the executive branch in *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089–90 (2015), it is sensible to view the President's peacetime authorities regarding immigration as based in statutes, not Article II, especially because Congress, through its extensive and detailed statutory frameworks may well be said to have "occupied the field" of immigration lawmaking.

¹⁸⁰ See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 567-568 (1975) (holding that the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 481, sufficiently confines the discretion of the Secretary of Labor in deciding whether or not to bring a challenge to a union election to permit judicial review of the Secretary's reasons for failing to bring such a challenge); *Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013) (illustrating that the Food, Drug, and Cosmetic Act (FDCA) imposes duty on the FDA to (1) sample any drugs that have been manufactured, prepared, propagated, compounded, or processed in an unregistered establishment and (2) examine the samples and determine whether any appears to violate the prohibitions listed in the statutory section governing imports).

¹⁸¹ See, e.g., 47 U.S.C. § 307(a) (2018) ("The [Federal Communications] Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.").

The Administrative Procedure Act strongly implies Congress's own understanding that legislation is the source of executive branch enforcement, or nonenforcement, discretion. Section 701 of Title 5 provides that review is available "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."¹⁸² Clause (1) makes clear that whether agency action is reviewable is analytically not the same question as whether agency action (or inaction) is taken within the scope of discretion Congress has vested in the agency; Congress may decide explicitly to preclude judicial review even of administrative action it has channeled within fairly precise criteria. But Clause (2), the second of the two exemptions, explicitly connects reviewability with the scope of discretion afforded by law, implying that in the ordinary case, Congress's determination with regard to scope of agency discretion ultimately determines the reviewability of its exercise.¹⁸³ In most instances, if Congress has not vested discretion so broadly as to imply nonreviewability, agency action is reviewable under the statutes that authorize it—and there is no reason in principle why agency failures to act cannot be reviewed in the same way.¹⁸⁴

As in challenges to run-of-the-mill agency action, the first question in a nonexecution challenge will be whether, as a matter of law, the relevant statute authorizing administrative action precludes nonexecution of the kind being challenged. If the answer is negative, the follow-up in-

¹⁸² 5 U.S.C. § 701(a) (2018).

¹⁸³ As explained by the 1947 Attorney General's Manual on the Administrative Procedure Act, at 94–95, whether Clause (2) applies depends on the breadth of discretion Congress has conferred on the executive branch by statute. Although the Manual also states categorically that "the denial of a petition . . . for the issuance, amendment or repeal of a rule is not subject to judicial review" under what is now 5 U.S.C. § 701(a)(2), the Supreme Court has held to the contrary. U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 94–95 (1947); *Massachusetts v. E.P.A.*, 549 U.S. 497, 527–28 (2007).

¹⁸⁴ See *Heckler v. Chaney*, 470 U.S. 821, 854 (1985) (Marshall, J., concurring in the judgment) ("The problem of agency refusal to act is one of the pressing problems of the modern administrative state, given the enormous powers, for both good and ill, that agency inaction, like agency action, holds over citizens. As *Dunlop v. Bachowski*, 421 U.S. 560 (1975), recognized, the problems and dangers of agency inaction are too important, too prevalent, and too multifaceted to admit of a single facile solution under which 'enforcement' decisions are 'presumptively unreviewable.'").

Treating challenges to nonexecution as occasions for statutory interpretation will not, of course, eliminate all of the indeterminacy in the resolution of such challenges that I have asserted would likely arise if such challenges are deemed rooted in the Take Care Clause. Persistent controversies, for example, over the proper implementation of *Chevron*, *U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) in the course of reviewing agency statutory interpretation will no doubt insure some range of uncertainty (and accusations of partisanship) in the resolution of statutory cases. Yet courts called upon to interpret the scope of agency statutory authority have a deep trove of precedents and well-established tools on which to draw. Judicial decisions resting on Faithful Execution are likely to be cut from whole cloth and to make even muddier the question of whether the president has some discretionary powers that might or might not be subject to legislative control.

quiry is whether the challenged instance of nonenforcement is “arbitrary or capricious” as the courts have evolved that standard. Most importantly, “the [reviewing] court must consider whether the decision [not to enforce] was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁸⁵ All of this is just taking the APA to mean what it says, namely, that agencies’ failures to act still amount to “agency action.” Before analyzing recent nonenforcement controversies in some depth, however, it is worth contemplating generally how administrative law already does or potentially could address the types of nonexecution decisions catalogued in Part II, above.

With regard to the various categories I have identified of “programmatic nonenforcement,” each is potentially reviewable under a conventional administrative law rubric if (a) the issue is presented in a form capable of judicial resolution given Article III standing limitations, and (b) the fact of nonexecution is embodied in a discernible “final agency action.” That is because a categorical determination to forego legal implementation with relatively little regard to the nuance of any individual case must rest on a reason or reasons. That reason may be the executive branch’s interpretation of the Constitution or of the governing statute—for example, that the relevant statute actually does not authorize the disputed category of activity or that it effectively authorizes nonenforcement within the executive’s discretion. It may be that the executive is prioritizing its use of resources to maximize the impact of its enforcement strategy or to prevent one administrative program from undermining another. Assessing the quality of administrative reasoning, however, is the bread-and-butter task of federal courts in administrative law cases. If the reasons are reasons of law, courts would presumably deploy conventional methods of legal interpretation. If the reasons are reasons of policy—resource allocation, for example—where judgments are being made rationally and in good faith, one would expect judicial review to be conducted with a light touch.¹⁸⁶ But judicial review of this kind would hardly be an institutional anomaly. The questions available to a court seeking to discern whether executive action is “arbitrary and capricious” are familiar, well-elaborated in precedent,¹⁸⁷ and better focused than a search for “faithful execution,” which the courts have never defined.

¹⁸⁵ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁸⁶ “Review under the ‘arbitrary and capricious’ tag line, however, encompasses a range of levels of deference to the agency, . . . and *Chaney* surely reinforces our frequent statements that an agency’s refusal to institute rulemaking proceedings is at the high end of the range.” *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987) (citations omitted).

¹⁸⁷ *See, e.g., Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs

Assuming a party with standing to challenge programmatic nonenforcement, the one statutory hurdle to judicial review that would not exist for constitutional review is the APA requirement of “final agency action.”¹⁸⁸ A failure of execution falling into the category of outright policy resistance might not take the form of a single identifiable action, but rather a series of informal, but interrelated activities—some understaffing here, some sluggish paper flow there—that would be hard to prove form a coherent program of deliberate nonexecution.¹⁸⁹ It might be embodied in a kind of discretion-preserving policy statement that would also regard as nonreviewable for lack of finality.¹⁹⁰ This does not establish, however, that constitutional review in such cases would be more likely. The more inchoate the alleged policy of nonenforcement, the less likely it would be that any plaintiff could link to that policy a particularized injury that would sustain standing to challenge that policy in an Article III court, whether on statutory or constitutional grounds. On the other hand, finality would not be a hurdle in challenging many of the examples of programmatic nonenforcement highlighted in Part II above. Decisive agency action would be readily discernible in its grant of a statutory waiver or regulatory forbearance, the denial of a petition for rulemaking, the announced suspension of a benefits program, or a policy pronouncement that binds the agency to a stance of reduced enforcement.

It is true that administrative law is mostly hands-off with regard to “quasi-adjudicative nonexecution,” and so ordinary administrative litigation will not do much to discipline failures to execute that take the form of individual nonprosecution decisions. Though the bar to review in civil enforcement cases is not absolute—courts may require a complaint to be

counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”).

¹⁸⁸ “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.” 5 U.S.C. § 704 (2018).

¹⁸⁹ See *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990) (“The term ‘land withdrawal review program’ (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable ‘agency action’—much less a ‘final agency action’—than a ‘weapons procurement program’ of the Department of Defense or a ‘drug interdiction program’ of the Drug Enforcement Administration.”).

¹⁹⁰ See, e.g., *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 807–08 (D.C. Cir. 2006) (“[T]he 1998 policy guidelines cannot be viewed as ‘final agency action’ under § 704 of the APA unless they ‘mark the consummation of the agency’s decision making process’ and either determine ‘rights or obligations’ or result in ‘legal consequences.’ . . . The guidelines are nothing more than general policy statements with no legal force.”).

pursued if a statute imposes a mandatory duty of prosecution¹⁹¹—the Supreme Court has held that, in challenges to individualized exercises of enforcement discretion, the ordinary presumption in favor of review is reversed.¹⁹² Strong institutional reasons support the premise that Congress intends to keep courts away from case-by-case supervision. These reasons include the “complicated balancing” of factors entailed in agency agenda-setting, the recognition that comprehensive enforcement of the law is impossible, the typically non-coercive character of decisions not to prosecute individual offenders, and the expectation that there will often be no administrative record on which to focus review of a decision not to enforce the law against a particular target.¹⁹³ The bar to reviewing case-by-case nonenforcement in the criminal context is presumably even higher because of due process and separation of powers concerns that militate in favor of separating criminal charging decisions from the branch of government that ultimately adjudicates guilt.¹⁹⁴

Administrative law’s reluctance to second-guess individual examples of quasi-adjudicative nonexecution does not, however, imply any greater justification for testing such decisions under a “Faithful Execution” rubric. In both criminal cases and civil enforcement contexts in which Congress has left ordinary prosecutorial discretion intact, constitutional litigation could have the same disruptive effects the Supreme Court feared with regard to ordinary APA challenges. Moreover, the idea that some constitutional measure of “fidelity” to law provides an independent standard against which to measure the justification for any particular instance of prosecutorial discretion is odd. If decisions are not corrupt—not motivated, that is, by personal favoritism, partisanship, or outright bribery—the executive branch’s weighing of factors militating for or against prosecution would presumably represent just the kind of decisional exercise that Congress had in mind when it conveyed prosecutorial authority to the executive branch. By definition, the good faith exercise of discretion that Congress delegated to the executive branch could not be deemed “faithless,” even if reasonable policy makers

¹⁹¹ See *Dunlop v. Bachowski*, 421 U.S. 560, 568 (1975) (rejecting the Secretary of Labor’s reasoning that the statutory scheme surrounding the Labor-Management Reporting and Disclosure Act evinced a congressional intent to prohibit judicial review of their decision not to sue the United Steelworkers of America following contested election results).

¹⁹² See *Heckler v. Chaney*, 470 U.S. 821, 830 (1985) (“judicial review of an administrative agency’s decision is not to be had if the statute in question is drawn so that a court would have no meaningful standard against which to judge the agency’s exercise of discretion.”).

¹⁹³ See *id.* at 831–32.

¹⁹⁴ Concerns for due process do not categorically preclude courts, however, even from appointing criminal prosecutors in special circumstances. See, e.g., *Young v. United States ex rel. Vuitton*, 481 U.S. 787, 793 (1987) (“[C]ourts possess inherent authority to initiate contempt proceedings for disobedience to their orders, authority which necessarily encompasses the ability to appoint a private attorney to prosecute the contempt.”).

might reach contrary judgments about the wisdom of pursuing or not pursuing individual cases. On the other hand, if individual nonprosecution decisions are corrupt, remedies exist to protect the public interest. The appropriate legal responses, however, are presumably to discipline or penalize the prosecutor, not to compel prosecution. In the American version of checks and balances, judicial selection of a target for law enforcement, with perhaps the sole exception of criminal contempt prosecutions, would compromise the rule of law by undermining the separation of prosecutorial and adjudicatory functions. Thus, the likelihood that administrative law alone will lead to little second-guessing of individual nonprosecution decisions does not provide an argument for constitutionalizing challenges to nonprosecution.

B. *Deferred Action and Ordinary Administrative Law*

Under President Obama, the policies that no doubt elicited the greatest attention to the faithful execution obligation involved the provision of at least temporary relief to certain categories of undocumented immigrants from the prospect of deportation.¹⁹⁵ Presumably for a mix of strategic reasons, some legal and some political, both President Obama and opponents of his Administration's deferred action programs cast these initiatives as an executive response to interbranch conflict. The 2012 DACA program followed Congress's failure in 2010, because of a Senate filibuster, to enact a House-adopted version of legislation first introduced during the George W. Bush Administration—the so-called DREAM (Development, Relief and Education for Alien Minors) Act¹⁹⁶—which would have protected hundreds of thousands of undocumented individuals who had been brought to the U.S. illegally as children, but who had essentially lived their lives as Americans.¹⁹⁷ The 2014 DAPA program emerged after House Republicans, in 2012, refused to vote on a bipartisan comprehensive immigration reform bill¹⁹⁸ that passed the Senate after the 2012 election. As a matter of public perception, the earlier DACA program would inevitably be framed by the President's October 2011 general statement of determination not to be stymied by legislative inaction when it came to addressing public problems: “We can’t wait for Congress to do its job, so where they won’t act, I will.”¹⁹⁹ After the announcement of DAPA, Obama incautiously responded to hecklers critical of the many deportations occurring during

¹⁹⁵ See OLC DAPA Memorandum, *supra* note 14.

¹⁹⁶ S. 3992, 111th Cong. (2010).

¹⁹⁷ See PETER M. SHANE, HAROLD H. BRUFF & NEIL J. KINKOPF, *SEPARATION OF POWERS LAW: CASES AND MATERIALS* 635 (4th ed. 2018).

¹⁹⁸ S. 744, 113th Cong. (2013).

¹⁹⁹ *Obama: If Congress Won't Act I Will*, NEWSDAY (Oct. 31, 2011, 7:46 PM), <http://www.newsday.com/news/nation/obama-if-congress-won-t-act-i-will-1.3287261>.

his presidency: “[W]hat you’re not paying attention to is the fact that I just took action to change the law.”²⁰⁰ Although, in context, and in light of prior statements, President Obama undoubtedly meant that he had changed the way the law operated in practice—his press secretary described him as speaking “colloquially”²⁰¹—his rhetoric immediately fed his opponents’ narrative that he was acting beyond not only statutory, but constitutional bounds.

In a more subtle way, the Office of Legal Counsel (OLC) opinion released in support of DAPA also helped constitutionalize the debate over deferred action. The memo suggests DAPA was legitimated not only by statutory powers delegated to the Secretary of Homeland Security, but also by the President’s constitutionally based prosecutorial discretion.²⁰² OLC said DAPA was “rooted in the Secretary’s broad authority to enforce the immigration laws *and* the President’s duty to take care that the laws are faithfully executed”²⁰³ But OLC does not offer a precise explanation of where statutory power leaves off and constitutional authority kicks in,²⁰⁴ even as it concedes the absence of express statutory authorization.²⁰⁵

Although we cannot know whether a different Administration strategy would have produced different outcomes in court, a defense of DAPA framed by ordinary administrative law was certainly available. Administration rhetoric could have cast both DACA and DAPA not as in conflict with Congress, but as fulfilling the purposes of existing law. That such a strategy could have produced a different legal outcome is at least plausible. But to see this clearly, it is necessary to focus with some precision on the actual elements of DAPA and why the Fifth Circuit deemed DAPA beyond the Administration’s statutory authority.

Jeh Johnson, then Secretary of Homeland Security, instituted DAPA through a November 20, 2014 memorandum issued to the heads of the three sub-agencies within DHS that would have been critical to DAPA implementation.²⁰⁶ Secretary Johnson simultaneously released a second

²⁰⁰ *Remarks by the President on Immigration—Chicago, IL*, OBAMA WHITE HOUSE (Nov. 25, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/25/remarks-president-immigration-chicago-il>.

²⁰¹ See Tim Hains, *Josh Earnest: Obama Didn’t Mean It When He Said He “Changed The Law,”* REALCLEARPOLITICS (Dec. 2, 2014), https://www.realclearpolitics.com/video/2014/12/02/josh_earnest_obama_didnt_mean_it_when_he_said_he_changed_the_law.html.

²⁰² See OLC DAPA Memorandum, *supra* note 14, at 4.

²⁰³ *Id.* at 24 (emphasis added).

²⁰⁴ See *id.* The opinion did not discuss, and I am not here considering, nonexecution policies that implicate—if they ever do—the President’s powers in foreign, military or national security affairs, where Article II might be read as vesting some measure of administrative power beyond Congress’s control. The executive branch made no such claim for DACA or DAPA.

²⁰⁵ See *id.* at 13.

²⁰⁶ See DAPA Memorandum, *supra* note 2.

memorandum setting forth DHS enforcement priorities, intended to “inform enforcement and removal activity, detention decisions, budget requests and execution, and strategic planning.”²⁰⁷ The DAPA Memo directed the creation of a process by which undocumented immigrants who were not deemed enforcement priorities under the Priorities Memo could apply for deferred action if they met a series of qualifying criteria, including being the parent of a son or daughter who was either a U.S. citizen or permanent resident alien.²⁰⁸ The memo describes deferred action as “a form of prosecutorial discretion by which the Secretary de-prioritizes an individual’s case for humanitarian reasons, administrative convenience, or in the interest of the Department’s overall enforcement mission.”²⁰⁹ It characterizes deferred action as an exercise of “prosecutorial discretion,” which “is legally available so long as it is granted on a case-by-case basis, and [which] may be terminated at any time at the agency’s discretion.”²¹⁰ The memo is explicit that “[d]eferred action does not confer any form of legal status in this country,”²¹¹ although it would have beneficial collateral consequences as a result of other regulations. The memo signals those benefits as follows: “[F]or a specified period of time, an individual is permitted to be *lawfully present* in the United States.”²¹²

Both the Texas federal trial court that enjoined DAPA and the Fifth Circuit in upholding the injunction—and expanding on the lower court’s rationale for its issuance—seized on the sentence describing DAPA as “permitt[ing]” an alien “to be lawfully present” as affirmatively awarding the successful applicant a new administrative status, even though the same sentence explicitly denies any change in legal status is occurring.²¹³ The Fifth Circuit deemed DAPA an affirmative change in status because deferred action would “trigger [] eligibility for federal benefits—for example, under title II and XVIII of the Social Security Act—and state benefits—for example, driver’s licenses and unemployment insurance—that would not otherwise be available to illegal aliens.”²¹⁴ As the Administration repeatedly argued, however, the legal and policy determinations that recipients of deferred action should be eligible for other government

²⁰⁷ Memorandum from Jeh Charles Johnson, Sec’y, Dep’t of Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration and Customs Enf’t, et al., Policies for the Apprehension, Detention and Removal of Undocumented Immigrants (Nov. 20, 2014), https://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf.

²⁰⁸ See DAPA Memorandum, *supra* note 2, at 3.

²⁰⁹ *Id.* at 2.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* (emphasis added).

²¹³ *Texas v. United States*, 809 F.3d 134, 199 (5th Cir. 2015); *Texas v. United States*, 86 F. Supp. 3d 591, 660–61 (S.D. Tex. 2015).

²¹⁴ *Texas v. United States*, 787 F.3d 773, 757 (5th Cir. 2015).

benefits were not the result of DAPA, but of different statutory and regulatory initiatives.²¹⁵ For example, under a Justice Department regulation adopted pursuant to notice and comment in 1987, an alien “who has been granted deferred action” and desires to work in the United States must apply for work authorization, but may legally be employed if authority is granted.²¹⁶ Similarly, aliens with deferred action status are eligible to apply for Social Security benefits because of regulations adopted by the Social Security Administration.²¹⁷ DAPA makes no change in the conditions under which aliens with deferred action may apply for government benefits under programs implementing such independent legal authorities; instead, it establishes a mechanism for a large number of undocumented aliens to seek deferred action under predictable criteria. Had DAPA not been promulgated, but if the exact same beneficiaries received deferred action on an ad hoc, case-by-case basis, each deferred action recipient would be in the same position, without DAPA, to take advantage of these other government benefits. The precise legal question posed by DAPA was thus not whether, via such a policy document, the Secretary could award deferred action recipients “lawful presence” for the purpose of other administrative programs. The question is whether the relevant immigration statutes authorize the establishment of an administrative process for the potential grant of deferred action to undocumented immigrants whom the Secretary has determined to be of “low priority” for purposes of deportation.

The starting points for the analysis are the express terms by which Congress empowered the Secretary of Homeland Security to implement immigration law. The Immigration and Nationality Act places the Secretary in charge of “the administration and enforcement of . . . all . . . laws relating to the immigration and naturalization of aliens.”²¹⁸ It gives him or her a wide range of tools to carry out that authority: “He shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and *perform such other acts as he deems necessary for carrying out his authority* under the provisions of this chapter.”²¹⁹ And, in case the point needed reinforcement, the Homeland Security Act of 2002 includes among the Secretary’s authorities “[e]stablishing national immigration enforcement policies and priorities.”²²⁰ It would be to facile to assert that these clauses, standing alone, establish conclusively the Secretary’s authority to adopt DAPA, but they

²¹⁵ See Brief for Petitioners at 58–59, *Texas v. United States*, 787 F.3d 733 (5th Cir. 2015).

²¹⁶ Control of Employment of Aliens, 8 C.F.R. § 274a.12(c)(14) (2018).

²¹⁷ 8 C.F.R. § 103.12(a)(vi) (2011).

²¹⁸ 8 U.S.C. § 1103(a)(1) (2018).

²¹⁹ 8 U.S.C. § 1103(a)(3) (2018) (emphasis added).

²²⁰ 6 U.S.C. § 202(5) (2018).

frame the question helpfully. They also point to another factor in the Secretary's favor, which is that nothing in the INA or in the Homeland Security Act prohibits the creation of a deferred action program as a way of implementing the Secretary's enforcement priorities. Highlighting both the national security implications of the Secretary's implementation scheme and statutory text that is, at worst, ambiguous with regard to the scope of authority delegated to the Secretary, arguably situates any resulting legal controversy at a point where the executive branch would be entitled to considerable deference to its policy judgment.

A full-blown statutory defense of DAPA, like OLC's hybrid Article II-plus-statute defense, would look to the degree of substantive fit between DAPA and the governing immigration statute, but would try to establish that fit somewhat differently. OLC explored that fit in order to substantiate that the executive branch was not simply substituting its policy preferences for those of Congress or abdicating its enforcement responsibilities. Its primary analytic strategy was comparing DAPA to earlier programs of which Congress was aware and even ratified.²²¹ But such an orientation necessarily frames the analysis defensively. Once authority for a program of deferred action becomes a fully plausible inference from statutory text, the central legal task should be to show not that DAPA resembles past programs, but that the new program is a non-arbitrary, non-capricious way of carrying out the mission Congress delegated to the Secretary to carry out.²²²

Establishing the permissibility of DAPA under the "arbitrary and capricious" standard would begin, as did the OLC opinion, with acknowledging the mismatch between mission and resources:

DHS has informed us that there are approximately 11.3 million undocumented aliens in the country, but that Congress has appropriated sufficient resources for ICE to remove fewer than 400,000 aliens each year, a signifi-

²²¹ OLC DAPA Memorandum, *supra* note 14, at 15–20.

²²² Professors Cox and Rodriguez have argued that "[i]nterlocking historical, political, and legislative developments have opened a tremendous gap between the law on the books and the law on the ground," which precludes any "meaningful search for congressionally preferred screening criteria." Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 *YALE L.J.* 104, 104 (2015). The argument that a set of enforcement priorities implements immigration law in a non-"arbitrary and capricious" way, however, is not an argument that those priorities have been legislatively determined; it is an argument that the enforcement scheme takes into account all relevant and significant factors and, in light of the facts as known to the Administration, reasonably concludes from those factors that the chosen priorities advance the relevant statute's general aims. In any event, the challenge to DAPA was not a challenge to DHS's enforcement priorities, but rather to the institutionalization of those priorities through a particular bureaucratic process. As Professors Cox and Rodriguez explain: "These efforts to better organize the enforcement bureaucracy ultimately advance core rule-of-law values without undermining deterrence or legal compliance, as some critics have worried." *Id.*

cant percentage of whom are typically encountered at or near the border rather than in the interior of the country.²²³

Moreover, Congress has occasionally been explicit about its priority preferences, directing DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime,”²²⁴ which inevitably points in the direction of emphasizing resource-intensive enforcement efforts within the interior. In concrete terms, the mismatch between resources and mission poses a challenge to identify the best strategies for promoting Congress’s purposes with regard to the many millions of undocumented aliens who are not going to be involuntarily removed from the United States any time soon, if ever. The inevitability of less-than-complete enforcement magnifies the utility of written policies than can help produce a sound and coordinated pattern of enforcement activity across a fragmented bureaucracy with numerous individual actors at work.²²⁵

The complex tapestry of federal immigration law also reveals a series of purposes that DAPA advances, including strengthening local law enforcement, supporting the national economy, and preserving family unity. Although it is beyond the scope of this paper to elaborate in detail how a record might be made in defense of these linkages, the outlines of the argument are fairly clear and laid out to a significant extent in amicus briefs supporting the Obama Administration’s position. For example, a brief filed on behalf of the Major Cities Chiefs Association, the Police Executive Research Forum, the National Organization of Black Law Enforcement Executives, and individual sheriffs and police chiefs argued that DAPA would strengthen community policing by promoting trust and cooperation with local law enforcement, facilitating access to identification, and helping to protect a vulnerable population from crime and exploitation.²²⁶ A supportive brief filed on behalf of sixteen states and the District of Columbia stressed that removing the risk of deportation would prompt recipients of deferred action to “come out of the shadows,” apply for work authorization, and increase their earnings, thus simultaneously growing the states’ tax base.²²⁷ Immigrant employees who work legally are also less susceptible to wage exploitation, which should reduce the

²²³ OLC DAPA Memorandum, *supra* note 14, at 9.

²²⁴ Consolidated Appropriations Act of 2014, Pub. L. No. 113–76, 128 Stat. 5, 251 (2014).

²²⁵ See Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 382–412 (2017).

²²⁶ Brief of Major Cities Chiefs Association et al. as Amici Curiae Supporting Petitioners at 1–3, 7–9, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

²²⁷ Brief of the State of Washington et al. as Amici Curiae Supporting Petitioners at 9, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

downward pressure that undocumented immigrants working for low wages otherwise exert on the incomes of U.S. citizens and permanent resident aliens.²²⁸ DAPA would also reduce the economic, emotional, psychological, and educational harms that result from the persistent threat of splitting up families.²²⁹ Merely citing these positions does not establish that a well-documented record substantiating these claims would necessarily satisfy a reviewing court that DAPA was a permissible implementation of the Secretary's authority. But it does point to a wholly conventional path towards establishing DAPA's legality.

Had the Administration used this strategy, it might also have thought to address explicitly two other serious concerns. On the defensive side, it might have addressed the question whether DAPA or programs like it would undermine the deterrence impact of our immigration laws. A plausible defense, because it would not be available to newcomers, is that relative economic conditions and threats to personal safety will likely remain persistent causes of high immigration rates regardless of U.S. policy,²³⁰ and with over eleven million undocumented immigrants in the United States, would-be immigration violators already know that the odds favor them in avoiding deportation. Because the DAPA memo required applicants to have continuously resided in the United States since before January 1, 2010, it could rationally be expected to have little or no impact on the volume of new immigration violations. On the affirmative side, the Administration could also have stressed the importance to effective administration of relative consistency. With or without DAPA, deferred action would be available to its applicants on a case-by-case basis. What DAPA helps assure is that all parts of the immigration enforcement bureaucracy apply the same rules, so that adjudicative results are not random.

Even if a record had been created of the kind I am now hypothesizing, the Administration would no doubt have had to deal in litigation with two serious, interrelated arguments. One is that DAPA was simply too big a deal in terms of both policy making and human impact to rest on inferences from a broad, but ambiguous delegation of authority. Congress has regulated so many aspects of our immigration policy in such detail that it might be viewed as simply having preempted the field, so to speak, when it comes to creating major new programs of deferred action. Close on the heels of this argument is the question of limits: if the Secretary's rationales are sufficient to sustain DAPA, could he not come up

²²⁸ See Brief of Professional Economists and Scholars in Related Fields as Amici Curiae Supporting Petitioners at 19, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

²²⁹ See Brief of Educators & Children's Advocates as Amici Curiae in Support of Petitioners, *United States v. Texas*, 136 S. Ct. 2271 (2016) (No. 15-674).

²³⁰ See Ximena Clark, Timothy J. Hatton & Jeffrey G. Williamson, *Explaining U.S. Immigration, 1971–1998*, 89 REV. ECON. & STAT. 359, 369 (2007).

with similar justifications to put off the involuntary removal of virtually the entire undocumented population?

Administrative law would have provided the correct answer to the limits question. Given Congress's express directions to prioritize immigration enforcements against felons, gang members and national security risks, there would be no question of deferred action for all undocumented immigrants. Moreover, the Obama Administration's record of deportations would belie the suggestion that it was resisting serious immigration enforcement.²³¹ Whether a DAPA-like defense might be deployed with equal force to justify other programs of deferred action could not, I would argue, be answered in the abstract. Other programs would also have rested on a rigorously compiled and coherently explained administrative record, viewed against the current scale of our immigration enforcement predicament.

Critics of DAPA would no doubt point out that, even if the line of argument just adumbrated bore out, the program was significantly motivated by political and policy concerns not rooted in immigration law, but in the Obama Administration's view of equity and solicitousness for minority communities. But, again following ordinary administrative law principles, the presence of mixed motives would not, in and of itself, doom a program's legality.²³² So long as the Administration was doing nothing in violation of law and had a good faith rationale and supporting facts to provide a legally cogent defense of the Secretary's exercise of his statutory authority, that would be enough to uphold the program. And even if the Secretary ultimately lost in court, a good faith statutory interpretation rejected as unreasonable could not plausibly be dismissed as a violation of the President's duty of faithful execution.

C. *Finality and the Doctrinal Limits to an Administrative Law Strategy*

There is one doctrinal hurdle uniquely facing prospective conventional administrative law challenges to executive branch nonenforcement policies, namely, the APA requirement for "final agency action."²³³ The Act provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."²³⁴ As interpreted by the Supreme Court, in order to qualify as "final," an agency action "must mark the 'consumma-

²³¹ See Muzaffar Chishti, Sarah Pierce & Jessica Bolter, *The Obama Record on Deportations: Deporter in Chief or Not?*, MIGRATION POL'Y INST. (Jan 26, 2017), <https://www.migrationpolicy.org/article/obama-record-deportations-deporter-chief-or-not>.

²³² *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

²³³ 5 U.S.C. § 704 (2018).

²³⁴ *Id.*

tion’ of the agency’s decisionmaking process,” and be an action “by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow”²³⁵ It follows that, unless some statute other than the APA makes an agency’s nonenforcement reviewable, the only agency nonenforcement policies susceptible to APA challenge will be those that meet these criteria.

Unfortunately for challengers, however, nonenforcement policies, if explicit at all, are likely to be embodied in guidance documents that reviewing courts will regard as something short of “final.” In *Center for Auto Safety and Public Citizen, Inc. v. National Highway Traffic Safety Administration*, the D.C. Circuit took the position that policies reserving considerable discretion in their implementation did not count as final, even if they were likely to affect the responsive behavior of regulated parties: “[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purposes of judicial review’ under the APA.”²³⁶ In order to get review in the District Court of DAPA, Texas thus had to persuade the court that the policy document’s repeated reservations of case-by-case discretion were meaningless, if not pretextual. It succeeded. Comparing DAPA to its predecessor, DACA, the court said:

The States contend and have supplied evidence that the DHS employees who process DACA applications are required to issue deferred action status to any applicant who meets the criteria outlined in Secretary Napolitano’s memorandum, and are not allowed to use any real “discretion” when it comes to awarding deferred action status.²³⁷

The court concluded that DAPA amounted to “final agency action” in part because of what it found to be “the lack of any suggestion that DAPA will be implemented in a fashion different from DACA.”²³⁸

A good argument could be made that the District Court understated the genuineness of Secretary Johnson’s reservation of discretion to grant or deny DAPA status.²³⁹ It seems likely, however, that few nonenforcement policies will be altogether categorical—that they will instead reserve case-by-case discretion at least for high-level agency decision

²³⁵ *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997).

²³⁶ *Ctr. for Auto Safety v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 811 (D.C. Cir. 2006).

²³⁷ *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff’d*, 809 F.3d 134, 184 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016) (mem.) (per curiam).

²³⁸ *Id.* at 649.

²³⁹ *See Texas v. United States*, 809 F.3d 134, 203–14 (5th Cir. 2015) (King, J., dissenting).

makers, while setting a preferred direction for front-line decision makers implementing a particular statutory responsibility. Indeed, if they did not reserve discretion, such policies would not be “policy statements” for APA purposes, but instead substantive rules, which could not properly be implemented at all without following a notice-and-comment process.²⁴⁰ Thus if a genuine reservation of case-by-case discretion is sufficient to render any policy statement non-final, then challengers to nonenforcement policy statements, no matter how impactful in practice, will routinely run into the finality roadblock to APA review.

It is not clear, however, that the finality requirement of the APA leaves the administrative law strategy less helpful than a constitutionally based litigation strategy. To be sure, a suit based on the Faithful Execution Clause could both avoid the APA “finality” requirement and the further impediment that the President, if properly the target of the suit, is not an “agency” subject to APA review in any event. The policies underlying the finality requirement, however, also inform various other doctrines that might also lead a court to dodge review of nonenforcement. For example, uncertainty about how a nonenforcement policy will play out could easily lead a court to decide the challenge was premature in terms of timing.²⁴¹ It might also suggest that any alleged injury facing the challenger was too speculative or remote in time to support standing.²⁴² For these reasons, a policy that “genuinely [leaves] the agency and its decision makers free to exercise discretion[.]”²⁴³ may be no more susceptible to review on constitutional than on statutory grounds.²⁴⁴

²⁴⁰ “The APA exempts from notice and comment interpretative rules or general statements of policy. . . . The primary distinction between a substantive rule—really any rule—and a general statement of policy . . . turns on whether an agency intends to bind itself to a particular legal position.” *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 93–94 (D.C. Cir. 1997).

²⁴¹ “Justiciability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention.” *Renne v. Geary*, 501 U.S. 312, 320 (1991).

²⁴² “Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 n.2 (1992)).

²⁴³ *Ctr. for Auto Safety & Pub. Citizen v. Nat’l Highway Traffic Safety Admin.*, 452 F.3d 798, 806 (D.C. Cir. 2006).

²⁴⁴ Another dimension on which neither ordinary administrative law review, nor constitutional review has any apparent advantage is that of remedy. As Peter Strauss has observed: “[E]ven a court able to conclude that the limits of non-enforcement discretion had been crossed might find effective judicial relief impossible to construct[.]” Peter L. Strauss, *The President and Choices Not to Enforce*, 63 *LAW & CONTEMP. PROBS.* 107, 112–13 (2000). Eliciting timely positive action from a recalcitrant bureaucracy is a tougher judicial task than ordering a halt to initiatives found unlawful. The executive capacity for passive resistance, however, rests on the force of inertia, which presumably would operate identically no matter the legal basis for judicial review.

Whether the finality requirement should be relaxed in nonenforcement challenges presents a difficult question. Some loosening could be reconciled with the APA's reference to "final agency action" on the grounds that (a) an explicit nonenforcement policy is inevitably a culmination of the decision making process on whether there should be such a policy, and (b) legal consequences may be deemed to flow from a policy intended and likely to affect the behavior of affected parties, even if those consequences fall short of certainty and even if the impact results largely from practical incentives, not legal coercion. The harder issue is whether agencies engaged in publishing their nonenforcement policies should be put in the position of greater litigation risk simply because they have made their policies transparent.

As argued above, explicit nonenforcement policies like DAPA, if statutorily authorized, actually advance the constitutionally based value of due process. Such policies, even with a reservation of enforcement discretion, are likely to induce far greater consistency than might otherwise be the case in the handling of agency cases.²⁴⁵ Salutory impacts may be yet more likely if the agency is large and its law enforcers both numerous and geographically dispersed. If agencies explicitly announcing their nonenforcement policies are thereby rendered more susceptible to judicial review, the potential litigation burden may have the effect of disincentivizing transparency that would be useful to advance the public's interests in both consistent, nonarbitrary decision making and institutional accountability.

On the other hand, "rule of law" values—values embodied in the Faithful Execution Clause—militate in favor of judicial review. This seems the better route in large part because an agency's interests in making its nonenforcement stance public is often going to overwhelm any abstract fear of litigation risk. Initiatives like DAPA or the Obama Justice Department's stance on marijuana enforcement are so politically salient, it is hard to believe that the amenability of such policies to review played much of a role in their elaboration.

One way of re-balancing the incentives involved in agency decisions to issue policy statements, rather than substantive rules in order to

Conversely, the availability of sanctions for government disobedience of a judicial order would also not vary between constitutional and administrative law-based lawsuits. A recent pathbreaking study by Nicholas Parrillo finds that "even though contempt findings are practically devoid of sanctions, they have a shaming effect that gives them substantial if imperfect deterrent power." Nicholas R. Parrillo, *The Endgame of Administrative Law: Governmental Disobedience and the Judicial Contempt Power*, 131 HARV. L. REV. 685, 686 (2018).

²⁴⁵ For an outstanding analysis of the advantages and disadvantages of guidance, from the perspectives of both agencies and the affected public, see Nicholas R. Parrillo, *Federal Agency Guidance: An Institutional Perspective*, ADMIN. CONF. OF THE UNITED STATES (Oct. 12, 2017), <https://www.acus.gov/sites/default/files/documents/parrillo-agency-guidance-final-report.pdf>.

guide agency (and public) behavior would be to de-couple the issue of “binding-ness” from the question whether agencies should be required to follow notice-and-comment processes as prerequisite to issuing policy statements.²⁴⁶ Judicial invocation of the “practically binding” quality of a policy statement as a lever to impose notice-and-comment requirements stands in obvious tension with the text of the APA, which explicitly exempts policy statements from that process.²⁴⁷ But there is no such tension presented with the availability of judicial review; indeed, there is no statutory requirement that an agency action be coercive in order to be “final.”²⁴⁸ The institutional problem, if there is any, lies only in the degree to which judicial review may discourage agency publication of policies that the public would find useful. Courts might approach that problem with a sliding scale of review, deploying something like normal review for nonexecution policies that, like DAPA, truly portend a significant deployment of agency resources or the creation of significant new agency decision making processes, while reviewing only for minimal rationality those policy statements that agencies might credibly explain as mere resource prioritization. Although concededly not offering a bright-line standard, that kind of common law adjustment to reviewability doctrine would surely be more plausible under an administrative law, rather than a constitutional law rubric.

IV. ADMINISTRATIVE LAW, FAITHFUL EXECUTION AND THE TRUMP ADMINISTRATION

The Trump Administration’s explicit ambition to undo much of the federal regulatory policy making that preceded it has spawned no shortage of controversies about its commitment to faithful execution of the laws.²⁴⁹ Although it will not count to the Administration’s critics as much of a silver lining, the unprecedented volume of Administration efforts to undo the policies of predecessor presidents makes it possible to distinguish four different categories of initiative and the sources of potential legal challenge to which they are possibly vulnerable.

²⁴⁶ See Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 ADMIN. L. REV. 803 (2001).

²⁴⁷ See Cass R. Sunstein, “Practically Binding”: *General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV. 491 (2016).

²⁴⁸ See *Port of Bost. Marine Terminal Ass’n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Nat’l Automatic Laundry & Cleaning Council v. Shultz*, 443 F.2d 689, 698 (D.C. Cir. 1971).

²⁴⁹ See Lisa Heinzerling, *Unreasonable Delays: The Legal Problems (So Far) of Trump’s Deregulatory Binge*, 12 HARV. L. & POL’Y REV. 13 (2018).

A. *Explicit Policy Repeal*

On a variety of fronts—including immigration,²⁵⁰ the environment,²⁵¹ worker safety,²⁵² consumer protection,²⁵³ and health care²⁵⁴—the Administration is broadly and deeply opposed to the progressive agenda implemented by earlier administrations.²⁵⁵ On the regulatory side, many of these policies were authorized by progressive legislative majorities of bygone Congresses. Nonetheless, because many such statutes convey implementation authority in broad terms, more relaxed forms of regulation can potentially be defended as lawful, albeit less aggressive strategies for statutory enforcement. In other words, some amendment of prior progressive regulations can potentially be defended not as failures to enforce the law, but just as initiatives to enforce the law differently. Any lawful relaxation of rules protecting health, safety, the integrity of financial markets, or any other aspect of public welfare may be regrettable policy, but not “faithless” execution.

Whether any explicit repeal of prior policy is lawful, however, is precisely the sort of question to which administrative law responds. When the Administration moves to abandon pending rulemakings, amend or repeal existing rules, or delay various rules’ effective dates—such initiatives are susceptible to judicial review on wholly conventional, statutory grounds.²⁵⁶ For example, the Administration’s fall, 2018 regulatory agenda included proposals to delay the compliance date and ultimately to weaken an OSHA regulation requiring employers to track

²⁵⁰ See Kevin R. Johnson, *Immigration and Civil Rights in the Trump Administration: Law and Policy Making by Executive Order*, 57 SANTA CLARA L. REV. 611, 616 (2017).

²⁵¹ See AMERICAN BAR ASSOCIATION SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE & ENVIRONMENTAL LAW INSTITUTE, ENVIRONMENTAL PROTECTION IN THE TRUMP ERA (2d ed. 2018), https://www.eli.org/sites/default/files/docs/epinte_spring2018.pdf.

²⁵² See MICHAEL TANGLIS, SACRIFICING PUBLIC PROTECTIONS ON THE ALTAR OF DEREGULATION 24–27 (2017), <https://www.citizen.org/wp-content/uploads/Sacrificing-Public-Protections-on-the-Altar-of-Deregulation.pdf>.

²⁵³ See Ken Sweet, *Under Trump, A Voice for the American Consumer Goes Silent*, AP NEWS (Apr. 10, 2018), <https://apnews.com/c80a20db4a5942e7af9632b0cbf75700>.

²⁵⁴ See Promoting Healthcare Choice and Competition Across the United States, Exec. Order 13,813, 82 Fed. Reg. 48385 (Oct. 12, 2017); Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, Exec. Order 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017).

²⁵⁵ The nonpartisan Brookings Institution maintains an invaluable interactive web site for tracking the Trump Administration’s deregulatory ambitions. Nicholas W. Zeppos & Philip A. Wallach, *Tracking Deregulation in the Trump Era*, BROOKINGS INST. (Dec. 5, 2017), <https://www.brookings.edu/blog/fixgov/2017/12/05/tracking-deregulation-in-the-trump-era/>.

²⁵⁶ See Nat. Res. Def. Council v. Nat’l Highway Traffic Safety Admin., 894 F.3d 95, 115 (2d Cir. 2018) (NHTSA’s failure to undertake notice and comment rulemaking prior to implementing decision delaying rule increasing civil penalties violated APA).

workplace injuries and illnesses.²⁵⁷ OSHA is similarly reconsidering a rule for crane operator qualifications and delaying the deadline for employers to ensure that crane operators are competent and certified.²⁵⁸ It has plans to weaken a 2017 standard for worker exposure to beryllium, a gray metal which, unfortunately, poses risks for debilitating lung diseases, including lung cancer, when inhaled.²⁵⁹ Assuming parties with standing, measures like these are all subject to ordinary judicial review because proposals to amend or repeal rules are themselves rules.²⁶⁰ Challengers will likely assert that the new regulatory approaches are either precluded by the terms of the statute they purport to implement or “arbitrary and capricious” based on the record available to the agency in its rulemaking; the Administration will say the opposite. Such disagreements may be of enormous policy significance, but they are not of constitutional dimension.

Even abandoning a proposed rule that never became a final rule can be challenged if its promulgation was in fulfillment of a statutory mandate. A November 2017 Public Citizen report states that twenty-six pending Obama Administration rules that the Trump Administration suspended were subject to associated statutory deadlines.²⁶¹ Trump Administration failures to meet such deadlines would pose straightforward, but non-constitutional issues that courts may address. Courts can also remedy administrative foot-dragging if and when agencies fail to meet statutory deadlines for specific rulemakings²⁶² or impermissible delays in responding to public requests for administrative action.²⁶³

Even an administrative order that would delay the effective date of a rule already published as final amounts to amending or revoking the rule and, like any other regulatory amendment or revocation, can be set aside if unlawful.²⁶⁴ The Trump Administration suffered some early losses on this score. For example, environmental groups successfully sued to stop an EPA decision to stay, pending an Obama rule’s reconsideration, implementation of portions of a final rule establishing new source perform-

²⁵⁷ See Katie Tracy, *Trump’s OSHA to Roll Back More Worker Safeguards, Slow Walk Others*, CPRBlog (May 14, 2018), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=2AA65C59-D026-3D02-6624CFFB84827C9E>.

²⁵⁸ See *id.*

²⁵⁹ See *id.*

²⁶⁰ 5 U.S.C. § 551 (2018).

²⁶¹ TANGNIS, *supra* note 252, at 5.

²⁶² See *Blue Ridge Env’tl. Def. League v. Pruitt*, 261 F. Supp. 3d 53, 55 (D.D.C. 2017); *Cal. Cmty. Against Toxics v. Pruitt*, 241 F. Supp. 3d 199, 200 (D.D.C. 2017).

²⁶³ See *Sierra Club v. Pruitt*, 280 F. Supp. 3d 1, 1 (D.D.C. 2017) (D.D.C. Nov. 17, 2017) (compelling the EPA to respond to Sierra Club’s administrative petition objecting to a proposed operating permit for a power plant).

²⁶⁴ See *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017). See also *Complaint at 17*, *Nat. Resources Def. Council v. Perry*, 302 F. Supp. 3d 1094 (N.D. Cal. 2017) (No. 4:17-cv-03404).

ance standards for fugitive emissions of methane and other pollutants by the oil and natural gas industries.²⁶⁵ The key points, however, whether or not particular challenges to explicit policy repeals succeed, are that such challenges appear as conventional statutorily-based lawsuits against administrative agencies, and administrative law provides the appropriate framework for their resolution.²⁶⁶

B. “Nonexecution Proper”: Explicitly Repudiating Law Enforcement

Explicit Administration policies to cut back on the enforcement of laws on the books—classic nonexecution, so to speak—are much rarer. On his first day in office, President Trump issued an executive order ordering executive agencies, in essence, to enforce the Affordable Care Act (ACA) as lightly as possible, to the extent the ACA would permit.²⁶⁷ Section 2 of the Order is the most comprehensive, directing all executive agency heads to exercise all of their legal discretion to “waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the Act” that increase ACA costs or regulatory burdens for anyone.²⁶⁸

Although the Order had no direct effect itself on ACA implementation, there were significant agency responses, including an announcement by the Internal Revenue Service that it would henceforth accept and process income tax returns even if taxpayers failed to indicate whether they had insurance coverage, qualified for an ACA exemption or were paying the penalty for going without insurance.²⁶⁹ Although the December 2017 legislation reduced the tax penalty to zero for not having health insurance,²⁷⁰ it is conceivable that insurance companies potentially harmed by the IRS’s stance of willful ignorance could have challenged the policy as an abuse of discretion. Again, the measure of the policy’s lawfulness would have been its rationality in light of IRS responsibilities under the Internal Revenue Code, not the Faithful Execution Clause.

²⁶⁵ *Clean Air Council*, 862 F.3d at 13.

²⁶⁶ For a synthesis of ten administrative law principles the author sees as emerging from successful challenges to Trump Administration attempts to delay or weaken regulations, see Lisa Heinzerling, *Laying Down the Law on Rule Delays*, REG. REV. (June 4, 2018), <https://www.theregreview.org/2018/06/04/heinzerling-laying-down-law-rule-delays/>.

²⁶⁷ Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal, Exec. Order 13,765, 82 Fed. Reg. 8351 (Jan. 20, 2017).

²⁶⁸ *Id.*

²⁶⁹ See Susan Tompor, *IRS Tweaks One Process with Affordable Care Act*, DETROIT FREE PRESS (Feb. 25, 2017, 11:14 PM), <https://www.freep.com/story/money/personal-finance/susan-tompor/2017/02/25/taxes-affordable-care-act/98190714/>.

²⁷⁰ Tax Cuts and Jobs Act, Pub. L. No. 115-97, § 11081, 131 Stat. 2054, 2092 (2017) (codified as amended at 26 U.S.C. § 5000A(c) (2017)).

C. *The Unilateral Presidential Order*

The Trump Administration has assayed at least one significant initiative to undo the regulatory state that is formal, but not plausibly based on any statutory authority whatsoever, namely, Executive Order No. 13,771, entitled “Reducing Regulation and Controlling Regulatory Costs.”²⁷¹ This is the order, issued just ten days into the new Administration, which purports to demand that agencies proposing new regulations identify two others for elimination.²⁷² Further, and perhaps more consequentially, it purports to authorize the Office of Management and Budget to assign to every regulatory agency a ceiling on the net economic costs that its combined regulatory and deregulatory initiatives may impose on an annual basis.²⁷³ Although the order and its implementation are obviously “action,” not “inaction,” it is easy to imagine how the order might also be viewed as a form of programmatic nonexecution to the extent OMB prevents the implementation of statute-implementing rules that would result in costs in excess of whatever caps OMB has imposed. In any event, a strong argument exists that it is not a form of faithful execution of the laws to order agencies to weigh in their regulatory decision-making considerations that Congress has nowhere authorized.

To be sure, the Order does cite two statutes as possible authority: the Budget and Accounting Act of 1921, as amended,²⁷⁴ and Section 301 of Title 3 of the United States Code, which authorizes the President to subdelegate to any official appointed by the President with Senate advice and consent “(1) any function which is vested in the President by law, or (2) any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the President.”²⁷⁵ The Budget and Accounting Act, however, provides no support for either of the functions that Executive Order 13,771 assigns to OMB. Neither does any other statute vest such authority in the President directly or in some other official subject to presidential approval. The presidential subdelegation statute is simply irrelevant. As a result, Executive Order 13,771 is lawful only if it rests soundly on authority vested in the President by Article II of the Constitution. The Order does not do so, however, any more than, say, the Truman Administration’s seizure of the steel mills deemed unconstitutional in *Youngstown*.

The Supreme Court famously held in *Citizens to Preserve Overton Park, Inc. v. Volpe*, that an administrative decision avoids being “arbi-

²⁷¹ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

²⁷² *Id.* § 1.

²⁷³ *Id.* §§ 2–3.

²⁷⁴ 31 U.S.C. § 1101 (2018).

²⁷⁵ 3 U.S.C. § 301 (2018).

trary, capricious, an abuse of discretion, or otherwise not in accordance with law,” only if “the decision [is] based on a consideration of . . . relevant factors and . . . there has been [no] clear error of judgment.”²⁷⁶ Yet there does not appear to be any federal statute that makes it relevant to any individual regulatory decision (a) whether there exist other agency regulations deserving of repeal or (b) the total costs imposed by the aggregate of an agency’s regulatory activity. Confirming this conundrum is that bills to authorize the very measures Executive Order 13,771 adopts have been proposed in Congress, but continue to languish.²⁷⁷ Yet the lack of statutory authority has not stopped the Office of Information and Regulatory Affairs from issuing elaborate guidance for implementing the executive order, both with regard to the two-for-one requirement and the so-called regulatory budget.²⁷⁸

One can imagine an argument that Executive Order 13,771 is not properly targeted for legal challenge unless an injured plaintiff can identify a specific regulatory action that an agency has foregone or adopted in desiccated form because of the constraints that arise from the Order. Indeed, such was the conclusion of the one district court so far to consider the challenge.²⁷⁹ Showings of specific injury and causality may be yet harder to assert given that Section 5 of the Order insists that “[n]othing in this order shall be construed to impair or otherwise affect: (i) the authority granted by law to an executive department or agency, or the head thereof[,]” and that the “order shall be implemented consistent with applicable law”²⁸⁰ If the analysis is correct that agencies cannot lawfully comply with 13,771 in deciding whether and how to regulate, then the Order, one could argue, is merely nugatory. The order might thus raise “the puzzling question whether a presidential command, in effect, to ignore the law ‘unless prohibited by law’ is lawful.”²⁸¹

Although a judicial ruling on the question would depend on the availability of plaintiffs with standing to mount a challenge,²⁸² the an-

²⁷⁶ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414–16 (1971).

²⁷⁷ See Regulations from the Executive in Need of Scrutiny Act of 2017, H.R. 5, 115th Cong. § 3 (1st Sess. 2017); Lessening Regulatory Costs and Establishing a Federal Regulatory Budget Act of 2017, 115th Cong., §§ 6–7 (1st Sess. 2017).

²⁷⁸ See Memorandum from Dominic J. Mancini, Acting Administrator, Off. of Info. & Reg. Affairs, Guidance Implementing Exec. Order 13771 Titled “Reducing Regulation and Controlling Regulatory Costs” (Apr. 5, 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-21-OMB.pdf>.

²⁷⁹ *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6 (D.D.C. 2018).

²⁸⁰ Reducing Regulation and Controlling Regulatory Costs, Exec. Order No. 13,771, 82 Fed. Reg. 9339 (Feb. 3, 2017).

²⁸¹ Peter M. Shane *The GOP’s Radical Assault on Regulations Has Already Begun*, WASH. MONTHLY (Feb. 27, 2017), <https://washingtonmonthly.com/2017/02/27/the-gops-radical-assault-on-regulations-has-already-begun/>.

²⁸² Public Citizen, the Natural Resources Defense Council, and the Communications Workers of America sued on the ground that, if implemented, the Executive Order would

swer should be negative. It cannot count as a faithful execution of the laws for the President, based on no plausible legal argument at all, to command administrative agencies to consider as part of their regulatory decision-making factors that are wholly irrelevant to the statutory missions they have been assigned. This is inevitably a constitutional question because the Constitution represents the only well from which the President could hope to draw any authority for his initiative, and that well is dry.

D. *Undermining Effective Administration Informally*

In contrast to explicit forms of policy repudiation, the Trump Administration has also been accused of acting faithlessly through a variety of moves intended to cripple the Executive's very capacity to implement law. These strategies include leaving important administrative posts unfilled²⁸³ (or nominating and appointing administrators with no obvious qualifications for their tasks),²⁸⁴ proposing to eliminate funding necessary for successful administration,²⁸⁵ threatening to paralyze decision

reduce their ability to advocate for new rules in areas such as public health, worker safety, and environmental protection because the "cost" of any such rules will be the elimination of other rules for which these groups have already campaigned successfully. Their complaint cited ten different statutes to demonstrate why rulemaking processes based on a regulatory budget or the two-for-one mandate would take into account considerations that agencies, under current law, are simply not permitted to consider. The District Court dismissed for lack of standing, however, concluding: "[A]s to some . . . regulatory actions, they fail to identify particular members who will be harmed. As to others, they fail to allege facts sufficient to show that the relevant agency would have issued the rule absent the Executive Order. And, as to yet others, they fail plausibly to allege or otherwise to show that any delay of the regulatory action attributable to the Executive Order will substantially increase the risk that any of their members will be harmed or that any of their members will face a substantial probability of harm once such an increase in risk is taken into account." *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 12 (D.D.C. 2018). The court acknowledged, however, that the current record did not necessarily foredoom any future challenge: "This is not to say that a plaintiff—or, indeed, that the present Plaintiffs—will never be able to establish standing to challenge the Executive Order." *Id.* at 13.

²⁸³ As of June 18, 2018, a Washington Post and Partnership for Public Service initiative found that, with regard to 667 key positions requiring Senate confirmation, 194 had no designated nominee, 8 designated individuals were awaiting formal nomination, 134 were formally nominated, and 331 had confirmed appointees. *Tracking How Many Key Positions Trump Has Filled So Far*, WASH. POST, <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/> (last visited June 18, 2019).

²⁸⁴ Examples include neurosurgeon Dr. Ben Carson, appointed Secretary of Housing and Urban Development, Alec MacGillis, *Is Anyone Home at HUD?*, PROPUBLICA (Aug. 22, 2017, 8:00 AM), <https://www.propublica.org/article/is-anybody-home-at-hud-secretary-ben-carson>, and Dr. Ronny Jackson, nominated to be Secretary of Veterans Affairs – but who withdrew from consideration, Matthew Yglesias, *Ronny Jackson Is Flagrantly Unqualified, Even If All the Allegations Against Him Are False*, VOX (Apr. 25, 2018, 11:26 AM), <https://www.vox.com/2018/4/25/17279436/ronnie-jackson-flagrantly-unqualified>.

²⁸⁵ See Joe Davidson, *IRS Chief Says Trump's Budget Would Sharply Cut Taxpayer Service*, WASH. POST (June 1, 2018, 7:00 AM), https://www.washingtonpost.com/news/powerpost/wp/2018/06/01/irs-chief-says-trumps-budget-would-sharply-cut-taxpayer-service/?utm_

making through prolonged discussion,²⁸⁶ and simple foot-dragging.²⁸⁷ In the case of Affordable Care Act enforcement, the Administration seemed intent on discouraging public enrollment by cutting publicity, defunding ACA counseling, and limiting the availability of the online federal exchange for purchasing insurance.²⁸⁸

To the extent such measures are intentional self-sabotage, they would be impossible to square with the President's constitutional obligations. Except where it can be shown, however, that the executive branch is failing to fulfill a duty specifically imposed by a particular statute—in other words, where there is a statute as a measure for legal compliance—disputes over discretionary management strategy are best left out of the courts.

Professor Gillian Metzger has written that the constitutional necessity of delegating administrative authority to the executive branch should be understood to imply a congressional duty to “to provide the resources necessary for the executive branch to adequately fulfill its constitutional functions.”²⁸⁹ Yet important as this claim is, Professor Metzger does not believe it is judicially enforceable:

Judicially manageable standards for determining what counts as adequate supervision, staffing, and resources to fulfill delegated responsibilities will often be lacking, and a severe risk exists that courts would intrude on the constitutional responsibilities of the other branches were they to seek to play an enforcement role.²⁹⁰

Precisely the same lack of judicially manageable standards would bedevil disputes governing executive diligence in the filling of administrative posts, the internal allocation of budgetary resources, the formulation of appropriations requests, or the efficient resolution of policy debates—even assuming one could imagine a case presented for judicial review

term=.37d8a4a5cfab; Nancy J. Altman, *Republicans Are Killing Social Security One Tiny Service Cut at a Time*, SLATE (Jan. 22, 2018, 3:14 PM), <https://slate.com/human-interest/2018/01/social-security-faces-death-by-a-thousand-service-cuts.html>; Brady Dennis & Juliet Eilperin, *Trump's Budget Takes a Sledgehammer to the EPA*, WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/national/health-science/budget-reflects-trumps-vow-to-cut-epa-in-almost-every-form/2017/03/15/0611db20-09a5-11e7-a15f-a58d4a988474_story.html.

²⁸⁶ See Brad Plumer & Coral Davenport, *E.P.A. to Give Dissenters a Voice on Climate, No Matter the Consensus*, N.Y. TIMES (June 30, 2017), <https://www.nytimes.com/2017/06/30/climate/scott-pruitt-climate-change-red-team.html>.

²⁸⁷ See, e.g., *Cal. v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054 (N.D. Cal. 2018).

²⁸⁸ See Abbe Gluck, *President Trump Admits He's Trying to Kill Obamacare. That's Illegal.*, VOX, <https://www.vox.com/the-big-idea/2017/10/17/16489526/take-care-clause-obamacare-trump-sabotage-aca-illegal> (last updated Aug. 3, 2018).

²⁸⁹ Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 90 (2017).

²⁹⁰ *Id.*

that would overcome the threshold barriers of standing, ripeness and reviewability that would likely be all but ever-present.

Moreover, keeping disputes over alleged practices of maladministration out of the courts would, perhaps ironically, have the beneficial effect of keeping Congress, civil society, and the voting public at large more engaged in debates over the duty of faithful execution. Like Professor Metzger, I do not think the existence of a constitutional duty depends on the availability of courts for enforcement. As I have written in another context, the existence of a constitutional duty does not depend on judicial compulsion; any president, legislator or judge who works to undermine their constitutionally assigned function violates the oath every government officer must swear to support the Constitution.²⁹¹ But it is the realm of political contestation that is going to provide whatever meaningful redress is possible for a pattern-or-practice of presidential incompetence, inefficiency, or outright mendacity in public administration, especially when the whole of such sabotage is more threatening than the sum of its individual components. We should not want the judiciary to become authoritative on the scope of the faithful execution duty if to do so would marginalize constitutional conversation outside the courts, where the more powerful remedies for maladministration are to be found.

CONCLUSION

In any self-professed rule of law system, there is no value more important than the obligation of executive fidelity to law. Faithfulness is underscored twice in Article II of the Constitution, first in the President's oath to faithfully execute the office and then again, in the duty to take care that the laws be faithfully executed. As a consequence, when we see federal law being underenforced—being executed, that is, in a less-than-comprehensive way—it seems natural to wonder whether such nonexecution can be deemed faithful or whether it signals presidential abdication of a critical constitutional obligation.

Yet underenforcement of law is not an exceptional phenomenon.²⁹² Its most familiar version is case-by-case nonprosecution, a phenomenon that historically has lived comfortably with the Constitution's distribution of powers to the three branches of government. An unbroken tradition of presuming implicit authority for case-by-case prosecutorial discretion exists for both criminal and civil law. Yet programmatic non-enforcement appears in significant tension with the constitutional design

²⁹¹ Peter Shane, *The Constitution as a Code of Honor*, WASH. MONTHLY (Apr. 4, 2016), <https://washingtonmonthly.com/2016/04/04/the-constitution-as-a-code-of-honor/>.

²⁹² On the contrary, intentional "maximalist enforcement tactics" may sometimes be better characterized as attempts to disrupt a prevailing legal regime. See Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 COLUM. L. REV. 809, 831 (2015).

because executive branch decisions to forego entire categories of potential enforcement bear a resemblance to rewriting or even suspending law, powers presumably reserved to the legislative branch.

The fact remains, however, that what I am calling programmatic nonenforcement is also a governmental commonplace, and there are costs to treating the phenomenon as automatically raising constitutional concerns. Where an agency adopts a policy like DAPA, the policy should be viewed not as executive inaction, but rather as an affirmative strategy for how an agency should use its administrative energies. The measure of any such initiative's legality can and should be the statute that the agency is arguably underenforcing, and programs like DAPA should rise or fall on whether they represent arbitrary or capricious efforts to exercise authority that Congress has delegated to the administrative agency. If they do not—if an agency has misconstrued its lawful discretion or implemented it in a way that cannot be justified on a record—then the agency has violated the statute, to be sure, but the executive has not violated the Constitution.

There remain to be considered, however, two other varieties of non-execution. One, exemplified by the Trump executive order on relieving regulatory burdens, would comprise presidential initiatives not plausibly rooted in statutory authority, but that nonetheless purport to change the substantive reach of statutory law. Should a President sally forth onto the field of constitutional innovation with such an initiative, then, of course, any resulting legal errors must be mistakes of constitutional dimension. Fortunately, so far at least, cases of this sort have been rare.

The other way in which presidents may depart from the faithful execution detail is through executive branch self-sabotage. Moves assertedly of this kind—leaving vacancies open, appointing administrators with no obvious qualifications (but arguably conflicts of interest), cutting implementation budgets, dragging out decision making—have generated a good deal of the criticism launched against the Trump Administration in “faithful execution” terms. Although it is healthy for the public to perceive threats of this kind as threats of constitutional dimension, courts should ordinarily resist the invitation to create a justiciable standard of faithful execution by which to measure their legality. Such litigation is less likely to lead to more effective governance than to the further erosion of opportunities for political cooperation and compromise in an already polarized nation. The Trump Administration may be stress-testing the capacity of both Congress and civil society to hold the President accountable to the Take Care Clause and to his oath, but disciplining a constitutionally faithless president is preeminently a political, not judicial task.