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# Prosecutorial Discretion Power at its Zenith: The Power to Protect Liberty

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# PROSECUTORIAL DISCRETION POWER AT ITS ZENITH: THE POWER TO PROTECT LIBERTY

PETER L. MARKOWITZ\*

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*On November 20, 2014, President Obama, frustrated by congressional inaction on immigration, announced an ambitious and potentially transformative prosecutorial discretion policy to forestall the deportations of millions of undocumented immigrants. The announcement immediately sparked legal challenges, which quickly wound their way to the Supreme Court, as well as a nationwide debate about the limits of the President's prosecutorial discretion authority. President Obama's actions are part of a larger trend*

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\* Professor of Law at Benjamin N. Cardozo School of Law. I owe a debt of gratitude to Kate Andrias, Rachel E. Barkow, Myriam Gilles, Michael Herz, Deborah Pearlstein, Alex Reinert, Kate Shaw, Colin Starger, Stewart Sterk, Ellen Taylor, and the members of the Cardozo Junior Faculty Workshop for their invaluable insights and thoughtful comments on earlier drafts of this Article. I must especially acknowledge my wife, Amy Taylor, who spent countless hours discussing this Article and commenting on drafts and who played a critical role in the development of my thinking. I am also grateful to Michael Bernstein and Aya Tasaki for their superb research assistance.

whereby modern presidents have increasingly used robust assertions of prosecutorial discretion powers to achieve policy goals that they could not realize through legislation.

There are clear dangers in allowing a president to wield excessive prosecutorial discretion power. Taken to an extreme, in the context of the vast modern administrative state, a president could significantly undermine the will of Congress across a wide array of subject areas and thereby upset the separation of powers enshrined in the Constitution. This legitimate concern has led some to argue that a president should not be permitted to exercise prosecutorial discretion categorically or based on her own normative view of the public interest. Categorical normative prosecutorial discretion policies pose the greatest risk of infringing on Congress's primary policy-making role; however, excising agency-wide policies and normative judgments is entirely unworkable. The core purposes of prosecutorial discretion—justice, mercy, and societal utility—all necessarily require the President to make independent judgments about the wisdom of prosecution. Limiting prosecutorial discretion to case-by-case determinations would be at odds with historic and modern practice and would significantly undermine the institutional design goals of transparency, uniformity, and accountability.

This Article suggests a new way to think about the boundaries of the President's prosecutorial discretion authority. Specifically, I propose that the nature of prosecutorial discretion power is dependent on the context of enforcement, and that the power is at its zenith when a president exercises her discretion to protect physical liberty. It is in the liberty deprivation context where historical precedent, the Constitution's structural bias against liberty deprivation, and the textual sources of prosecutorial discretion powers all militate in favor of robust presidential powers as a necessary check against excessively punitive statutory schemes.

## INTRODUCTION

Prosecutorial discretion refers to the power of the Executive to determine how, when, and whether to initiate and pursue enforcement proceedings.<sup>1</sup> Prosecutorial discretion is most commonly conceived of in the criminal context, wherein prosecutors routinely make determinations about which cases to bring, how vigorously to pursue them, and if and when to abandon a prosecution. However, in the modern era, prosecutorial discretion authority has been applied to a vast array of federal administrative enforcement proceedings beyond the criminal context. Modern presidents have asserted increasingly robust visions of

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<sup>1</sup> See generally U.S. DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, U.S. ATTORNEY'S MANUAL § 9-27.001 (1997) (discussing the appropriate role of prosecutorial discretion); U.S. DEP'T OF JUSTICE, IMMIGRATION & NATURALIZATION SERV., PROSECUTORIAL DISCRETION GUIDELINES (2000) (same); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010) (same). The precise boundaries of prosecutorial discretion are discussed *infra* at notes 21-23, 258-260 and accompanying text.

the scope of their own prosecutorial discretion power—at times using prosecutorial discretion policies to achieve goals that they could not otherwise realize through the legislative process.

The most prominent recent example is President Obama's programs to forego deportation proceedings against certain undocumented immigrants who came to the United States as children, Deferred Action for Childhood Arrivals ("DACA"), or who are parents of U.S. citizens or permanent residents, Deferred Action for Parents of Americans ("DAPA").<sup>2</sup> These programs were instituted in direct response to Congress's failure to pass comprehensive immigration reform and the Development, Relief, and Education for Alien Minors ("DREAM") Act.<sup>3</sup> Both DACA and DAPA have been the focus of intense litigation, and the latter program is currently the subject of a preliminary injunction.<sup>4</sup>

But immigration is only the latest arena for bold assertions of prosecutorial discretion authority. President George W. Bush, for example, asserted his prosecutorial discretion authority to decline to initiate enforcement actions under the Clean Air Act against a category of coal-fired electrical plants even after the Court of Appeals for the D.C. Circuit had struck down a regulation protecting precisely the same category of plants.<sup>5</sup> President Bush also put in place similar robust nonenforcement policies regarding civil rights, antitrust, labor, and securities enforcement, to name a few.<sup>6</sup>

These aggressive assertions of presidential<sup>7</sup> nonenforcement power raise a serious constitutional question: What limiting principle on prosecutorial

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<sup>2</sup> Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. (Nov. 20, 2014) [hereinafter DAPA Memorandum], [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/6V58-LMTB>]; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enf't (June 15, 2012) [hereinafter DACA Memorandum], <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/D8LN-JCJH>].

<sup>3</sup> Elahé Izadi, *The Strategy to Hold Off on Deportation Changes Wins Out*, NAT'L J. (May 28, 2014) (noting that President Obama initially delayed this action to give Congress a chance to pass an immigration bill).

<sup>4</sup> *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (upholding the preliminary injunction upon a determination that plaintiffs were likely to succeed on the merits of the claim that the President's order violated the Administrative Procedure Act), *aff'd mem.*, 136 S. Ct. 2271 (2016).

<sup>5</sup> *New Jersey v. EPA*, 517 F.3d 574, 577 (D.C. Cir. 2008).

<sup>6</sup> See *infra* notes 68-74 and accompanying text.

<sup>7</sup> I use the terms "President" and "Executive" interchangeably throughout this Article to refer to the branch of government that wields the power conferred by Article II of the Constitution. I take no position herein on the robust debate regarding the precise boundaries of the President's control over agency actions. Compare Steven G. Calabresi & Saikrishna B.

discretion authority is necessary to preserve the separation of powers enshrined in our Constitution? Put another way: At what point does a nonenforcement policy cross the line between the executive discretion properly vested in the President and instead become violative of the President's constitutional duty to "take care that the laws be faithfully executed"?<sup>8</sup> Taken to its extreme, the power not to enforce could act as a constitutionally suspect second veto for a broad swath of legislation. It would be odd indeed for the Framers to have constructed a mechanism for overriding presidential vetoes only to have such mechanism rendered meaningless by a president's unchecked power to refuse to enforce laws based solely on divergent views about a law's political wisdom.

With the well-documented escalating reach of federal criminal law,<sup>9</sup> and the enormous breadth of civil regulatory schemes embodied in modern federal legislation,<sup>10</sup> there is hardly a person or business in the United States that could not theoretically become subject to a federal enforcement action of one kind or another. The breadth of regulated conduct coupled with the reality of limited enforcement resources necessarily means that prosecutorial discretion is a central feature of modern federal law enforcement. In the immigration context, for example, there are estimated to be eleven million undocumented individuals potentially subject to deportation proceedings in the United States.<sup>11</sup> However, notwithstanding a historically unprecedented national investment in immigration enforcement, the Department of Homeland Security has explained the annual enforcement budget can support a maximum of 400,000 deportations per year.<sup>12</sup> The same story of vast regulatory schemes and limited enforcement resources can be told about nearly every federal enforcement system. Thus, resource constraints alone are a substantial justification for prosecutorial discretion. But the issue becomes more difficult when prosecutorial discretion

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Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 594-96 (1994) (arguing for a robust version of presidential control over agency actions), with Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that the President lacks the authority to dictate substantive decisions entrusted to agencies by law).

<sup>8</sup> U.S. CONST. art. II, § 3, cl. 5.

<sup>9</sup> See Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 HARV. L. REV. 904, 909 (1962).

<sup>10</sup> See generally RANDALL G. HOLCOMBE, FROM LIBERTY TO DEMOCRACY: THE TRANSFORMATION OF AMERICAN GOVERNMENT 210-49 (2002).

<sup>11</sup> Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att'y Gen. 1 (Nov. 19, 2014) [hereinafter OLC Opinion], <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [<https://perma.cc/F7U4-KW2Q>] (detailing the constitutional and statutory bases for presidential discretion in immigration enforcement).

<sup>12</sup> *Id.*; see also DORIS MEISSNER ET AL., MIGRATION POLICY INST., IMMIGRATION ENFORCEMENT IN THE UNITED STATES: THE RISE OF A FORMIDABLE MACHINERY 2-3 (2013) (documenting that the U.S. government spends more on federal immigration enforcement than on all other principal federal criminal law enforcement agencies combined, with nearly \$18 billion spent in fiscal year 2012).

policies are driven less by resource constraints and more by a President's normative judgment regarding the public interest, or lack thereof, in enforcement.

The Supreme Court has yet to provide significant guidance on the constitutional limits of executive discretion in this context. In *United States v. Texas*<sup>13</sup>—the litigation challenging President Obama's DAPA program—the Court recently had the opportunity to offer such guidance. Instead, with one seat on the Court unfilled, it deadlocked 4-4, leaving in place the preliminary injunction issued by the lower courts with a one-sentence-decision that established no precedent.<sup>14</sup> Thus, for now, the law remains unsettled.

In recent years, a growing body of scholarship has emerged focusing on the phenomenon of prosecutorial discretion. Scholars have struggled to construct a constitutional limiting principle that takes realistic account of the ubiquitous and necessary role that prosecutorial discretion plays in the modern era.<sup>15</sup> Much of the relevant scholarship has focused not on the constitutional dimensions of the phenomenon, but rather on the functional discretion left to the Executive through statutory schemes and the normative merits of greater transparency and accountability.<sup>16</sup>

This Article proposes a new way to think about the constitutional limits of prosecutorial discretion.<sup>17</sup> While others who have grappled with the

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<sup>13</sup> 136 S. Ct. 2271 (2016) (mem.), *reh'g denied*, 137 S. Ct. 285 (2016).

<sup>14</sup> *Id.* at 2271.

<sup>15</sup> See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783 (2013); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 717 (2014).

<sup>16</sup> See, e.g., Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 464 (2009) [hereinafter Cox & Rodríguez, *President and Immigration Law*]; Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 113 (2015) [hereinafter Cox & Rodríguez, *Redux*]; Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 614 (2006); Michael Sant' Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 411 (2014); Wadhia, *supra* note 1, at 264.

<sup>17</sup> There is a robust body of scholarship focused on a number of related inquiries that this Article will not seek to address. Others have done exceptional work regarding the justiciability of executive nonenforcement decisions. See, e.g., Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 469-84 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1694-96 (2004); Mary M. Cheh, *When Congress Commands a Thing To Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 255 (2003). In the criminal context, many scholars have examined the problematic intersection between expansive criminal codes and unchecked prosecutorial discretion. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 871 (2009); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 19 (1998); James Vorenberg, *Decent*

constitutional issue have treated prosecutorial discretion across administrative contexts as a monolith,<sup>18</sup> I suggest that context matters. While it is clear that the Executive enjoys broad prosecutorial discretion in all enforcement contexts, the difficult issue is when, if ever, the President may categorically decline to initiate some set of enforcement proceedings based solely on the President's assessment that full (or any) enforcement is against the public interest. This is prosecutorial discretion in its most robust iteration. I refer to such polices as "categorical prosecutorial discretion policies" throughout this Article. Categorical prosecutorial discretion policies most clearly raise the specter of the President usurping Congress' primary policy-making function.

I propose that the dividing line between traditional administrative enforcement proceedings and those that can potentially result in a deprivation of physical liberty can offer a workable and well-founded constitutional limiting principle—with categorical prosecutorial discretion power being permissible only in the latter context.<sup>19</sup> History is replete with examples of presidents issuing mass amnesties in both the criminal and immigration contexts—where physical liberty is at stake—but virtually devoid, until very recent times, of similar categorical nonenforcement policies in traditional administrative contexts.<sup>20</sup> The historical practice reflects structural features of our Constitution, which place a premium on the protection of physical liberty as a necessary countermajoritarian check protecting disfavored minorities against the most coercive powers of the federal government. The structural bias in favor of liberty protection is further illuminated by the Pardon Clause's origins and jurisprudence, which also places a thumb on the scale in favor of the presidential power to exercise

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*Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1522 (1981). Finally, there is extensive literature regarding both the scope of the President's power to refuse to enforce or defend laws the Executive deems unconstitutional and the general aggrandizement of presidential power in the modern era. See, e.g., Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029, 1029 (2004); Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 533 (2012); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 125 (1994); Daniel J. Meltzer, Lecture, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1186 (2012). The analysis in this Article draws upon these important bodies of scholarship but focuses on distinct issues.

<sup>18</sup> See generally Delahunty & Yoo, *supra* note 15; Price, *supra* note 15.

<sup>19</sup> A deprivation of "physical liberty," as used in this Article, is a restriction on an individual's physical freedom of movement on par with physical incarceration. The question of whether deportation satisfies this definition is complex and is discussed at length in Section III.C. See *infra* notes 298-302. In short, I conclude that deportation is a restraint of physical liberty on par with incarceration based on the universally present potential for physical incarceration, the Supreme Court's pronouncements regarding the gravity of the liberty deprivation associated with deportation, and the Court's habeas jurisprudence which recognizes that individuals in deportation proceedings satisfy the custody requirement for habeas corpus purposes. While the application of my thesis to the DACA and DAPA framework turns on this conclusion, the larger conclusion, that prosecutorial discretion power is at its height in the liberty deprivation context, operates independently.

<sup>20</sup> See *infra* Part I.

nonenforcement discretion in the liberty-deprivation context. Historical practice, the constitutional text and structure, and participatory democratic theory all militate in favor of a conception of the Executive's prosecutorial discretion power that is at its zenith when individuals' physical liberty is at stake. This analysis dictates that categorical prosecutorial discretion policies are only permissible as a one-way ratchet in favor of liberty protection.

This Article proceeds in three parts. Part I surveys the early and modern history of prosecutorial discretion observing that, from the earliest days, executive discretion has included equitable categorical determinations to forego enforcement proceedings that could deprive individuals of their physical liberty. However, only in the modern era have such categorical prosecutorial discretion policies arisen in other administrative contexts. Part II investigates the boundaries of prosecutorial discretion authority by assessing the relevant constitutional provisions and the structural role of liberty protection within the constitutional scheme. I conclude that the enhanced prosecutorial discretion power was derived from the Pardon Clause, the Constitution's structural bias against liberty deprivation, and the dynamics of democratic participatory theory, which collectively suggest that the Executive's prosecutorial discretion power is at its zenith when physical liberty is at stake. Finally, Part III examines the outer boundaries of executive prosecutorial discretion authority in the liberty deprivation context, focusing on: (1) the boundary between modern prosecutorial discretion and the repudiated common law dispensing power; and (2) constitutional limiting principles, and what power, if any, Congress has to cabin executive discretion in the liberty context.

### I. THE HISTORY OF PROSECUTORIAL DISCRETION

There are several types of executive nonenforcement. At times, the President has refused to spend money appropriated by Congress,<sup>21</sup> or to promulgate regulations required by statute,<sup>22</sup> or to carry into force specific provisions of a legislative scheme directing agency action. None of these suspect types of nonenforcement, however, can be conceived of as prosecutorial discretion. Prosecutorial discretion is a distinct subset of executive nonenforcement. The concept of prosecutorial discretion only comes into play when Congress has enacted a statutory scheme that regulates private conduct and proscribes penalties for misconduct that can only be triggered by executive prosecution. The discretion of the Executive to determine when and whether to bring or abandon such enforcement actions, and how vigorously to pursue them, is prosecutorial discretion.

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<sup>21</sup> See, e.g., *Train v. City of New York*, 420 U.S. 35, 41 (1975); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1236 (2014).

<sup>22</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 500-01 (2007); Cheh, *supra* note 17, at 276.



There are many potential purposes served by prosecutorial discretion.<sup>23</sup> Prosecutorial discretion can be aimed at achieving justice when the strict application of the law or full enforcement of the proscribed penalties is disproportionate to the specific circumstances of the offense committed. Riding a bicycle on the sidewalks of New York City, for example, is an offense punishable by up to twenty days in jail.<sup>24</sup> Based on justice considerations, prosecutors nearly universally decline to seek the full penalties warranted under law. At other times, an offense could be severe and warrant full punishment, but mercy and humanitarian concerns may warrant an exercise of prosecutorial discretion if, for example the offender is particularly old, young, or infirm. Prosecutorial discretion decisions are sometimes less connected to the facts and circumstances related to the individual offense or offender and instead justified on utilitarian grounds related to larger societal interests.<sup>25</sup> The decisions not to pursue prosecution against President Nixon, for example, was presumably not driven by a sense that the prescribed penalties for his offenses were too harsh or by any sense of mercy for him personally. Rather, it seems, the prosecution was not initiated because President Ford decided that the national interest would be better served by moving as quickly as possible past that episode in history. Separate from justice, mercy, and societal utility, prosecutorial discretion is perhaps most commonly described as serving a purpose related to the efficient allocation of limited enforcement resources.<sup>26</sup> In the modern era, there are never sufficient resources to prosecute all offenses in any enforcement scheme, and thus choices must be made about which prosecutions to pursue and which to forego. Prosecutors, whether they be administrative or criminal, the theory goes, are in a better position than Congress and the judiciary to assess how to most efficiently utilize the available enforcement resources. For example, prosecutors are undeniably in the best position to assess the necessary resources a prosecution will require and, based upon the available evidence, the chances of success.

With these purposes in mind, below I examine the early and modern history of prosecutorial discretion as an aid in the search for a workable constitutional theory of the boundaries of that power.<sup>27</sup>

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<sup>23</sup> See generally Molly Clayton, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 756 (2013); Cara H. Drinan, *Clemency in a Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1133 (2012).

<sup>24</sup> Bicycle Operation on Sidewalks Prohibited, N.Y.C., N.Y., Admin. Code § 19-176 (2016).

<sup>25</sup> See, e.g., U.S. DEP'T OF JUSTICE, *supra* note 1, § 9-27.001 ("A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances . . .").

<sup>26</sup> See, e.g., Wadhia, *supra* note 1, at 244-45.

<sup>27</sup> Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 414 (2012) (critically examining the proper role of historical practice in interpreting the separation of powers).

A. *The Early History of Prosecutorial Discretion Practices*

There is limited evidence of the Framers' conception of the reach of prosecutorial discretion power. Alexander Hamilton explained the rationale for the pardon power. Much of that rationale can be applied equally to other forms of prosecutorial discretion, though the generalization was not made explicit:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.<sup>28</sup>

While there was no direct conversation about the general power of prosecutorial discretion in the record of the framing of the Constitution, prosecutorial discretion was an uncontroversial power of the President from the start. President George Washington personally directed that numerous criminal and civil prosecutions be initiated and that others be halted.<sup>29</sup> It has been observed that President Washington's control over "prosecutions was wide-ranging, largely uncontested by Congress, and acknowledged—even expected—by the Supreme Court."<sup>30</sup> In the earliest days of the Union, future Chief Justice John Marshall had the opportunity to opine on the nature of the President's prosecutorial discretion authority in discussing the decision of the President to interrupt a prosecution of an individual accused of murder on board a British vessel and to instead deliver that person to British authorities. On the floor of Congress, then-Representative Marshall described the President's prosecutorial discretion power as "an indubitable and a Constitutional power" which permitted him alone to determine the "will of the nation" in making decisions about when to pursue and when to forego prosecutions.<sup>31</sup> This issue of the President's power to cease a prosecution was first formally presented to the Attorney General in 1821. The resulting Attorney General opinion determined that "[t]here can be no doubt of the power of the President to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States. . . . The question appeals to [the President's] discretion; [the President's] power I think indubitable."<sup>32</sup>

Early assertions of prosecutorial discretion were not limited to the criminal context. Two of the early canonical cases establishing the President's prosecutorial discretion authority arose in the civil arena. In 1831, Attorney General and later Supreme Court Justice Roger Taney was called upon to determine whether the President had the authority to order an attorney for the United States to halt a forfeiture action seeking to condemn jewels which had been stolen from the Dutch Princess of Orange and illegally brought to the

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<sup>28</sup> THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>29</sup> Andrias, *supra* note 16, at 1053.

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

<sup>31</sup> 10 ANNALS OF CONG. 596, 615 (1800).

<sup>32</sup> Power to Order a Nolle Prosequi, 5 Op. Att'y Gen. 729, 729 (1821).

United States.<sup>33</sup> The Secretary of State sought to return the jewels to the Princess without requiring her to engage in a lengthy legal proceeding in the United States.<sup>34</sup> Taney determined that the President was empowered to exercise such prosecutorial discretion in the civil context by virtue of his authority to “take care that the laws be faithfully executed.”<sup>35</sup>

In 1868, in consolidated cases also pertaining to civil forfeiture actions initiated by the United States, the Supreme Court had the opportunity to consider the Executive’s prosecutorial discretion authority in civil cases.<sup>36</sup> In these post-Civil War cases—*The Confiscation Cases*—the United States had instituted forfeiture proceedings under a statute that allowed the seizure of property that had been used to aid the rebellion. Before the Supreme Court, the United States moved to dismiss the actions, seeking to abandon its claim to the property.<sup>37</sup> An “informer,” who had originally brought the property and its illegal use to the attention of the authorities, and who was thus entitled to half of the seized property under the statute, opposed the government’s motion.<sup>38</sup> Holding that the rights of the informer were conditional and that only the United States could initiate the forfeiture actions, the Court held that the motions must be granted because the Executive alone had the authority to determine whether to pursue the enforcement actions.<sup>39</sup> These early cases clarify that the Executive’s prosecutorial discretion powers were not historically limited to the criminal realm.

Neither was prosecutorial discretion power, in these early years, limited to individual case-by-case determinations. Broad categorical prosecutorial discretion policies were implemented by a number of early presidents. Presidents Washington, Adams, Jefferson, Madison, Lincoln, and Johnson all granted amnesty from prosecution to a broad class of individuals.<sup>40</sup> Most of these amnesties were granted following some armed domestic conflict and protected the defeated combatants from subsequent prosecution as a means to restore civil order. President Jefferson, however, granted a categorical pardon to all persons convicted under the Sedition Act and ordered his district attorneys to enter *nolle prosequis* for all ongoing Sedition Act prosecutions, not because of any armed conflict but because he viewed the Sedition Act as violative of the First

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<sup>33</sup> *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482, 487 (1831).

<sup>34</sup> *Id.* at 483.

<sup>35</sup> U.S. CONST., art. II, § 3; *see also* *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. at 486; *see also* Andrias, *supra* note 16, at 1052-53.

<sup>36</sup> *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 454 (1868).

<sup>37</sup> *Id.* at 456.

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

<sup>39</sup> *Id.* at 457-62.

<sup>40</sup> *See* W.H. HUMBERT, *THE PARDONING POWER OF THE PRESIDENT*, 39-40 (1941); Saikrishna Bangalore Prakash, *The Executive’s Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1664-65 (2008).

Amendment.<sup>41</sup> In *Armstrong v. United States*,<sup>42</sup> the Supreme Court assessed the validity of President Lincoln's categorical amnesty following the Civil War.<sup>43</sup> The Court held that it was squarely within the President's constitutional powers to grant amnesty to all former supporters of the Confederate States and that no legislative authorization was required.<sup>44</sup>

Thus, from the founding through the Civil War, presidents repeatedly invoked prosecutorial discretion authority in both civil and criminal contexts, and repeatedly enacted categorical prosecutorial discretion policies. Moreover, the Supreme Court recognized and affirmed these practices. The early examples of broad amnesties from prosecution were justified not on the grounds of resource constraints, but rather on the President's unilateral assessment of the best interests of the nation.<sup>45</sup>

In contrast to these early accepted examples of the President's prosecutorial discretion powers, it is well established that the Framers intended to deprive the President of the arguably related "dispensing" and "suspending" powers enjoyed by the Kings of England before the Glorious Revolution.<sup>46</sup> Through these powers, English kings asserted the ability to license conduct that was otherwise proscribed by parliamentary law.<sup>47</sup> The record of the Constitutional Convention demonstrates that the delegates unanimously rejected an effort to grant

<sup>41</sup> Prakash, *supra* note 40, at 1664-65. Technically, the Sedition Act pardons were a series of individual pardons but, collectively, they can be viewed as a categorical pardon.

<sup>42</sup> 80 U.S. (13 Wall.) 154 (1871).

<sup>43</sup> *Id.* at 156.

<sup>44</sup> *Id.*; *cf.* *Knote v. United States*, 95 U.S. 149, 153 (1877) ("[T]he distinction between [pardon and amnesty] is one rather of philological interest than of legal importance."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("Pardon includes amnesty.").

<sup>45</sup> President Jefferson's action stands as an exception, insofar as he acted based upon his view that the Sedition Act was unconstitutional. Justice and mercy considerations also drove some early presidents' prosecutorial discretion decisions. *See, e.g.*, Letter from President John Adams to the Attorney General and the District Attorney of Pennsylvania (May 16, 1800), in 9 THE WORKS OF JOHN ADAMS 56, 56 (Charles Francis Adams ed., 1850-1856) (directing nonenforcement based on justice and mercy considerations); Letter from Secretary Alexander Hamilton, U.S. Department of the Treasury, to Jeremiah Olney (Sept. 24, 1791), in 9 THE PAPERS OF ALEXANDER HAMILTON 236, 236 (Harold C. Syrett ed., 1962) (same); Letter from President Thomas Jefferson to George Hay, U.S. District Attorney for Virginia (May 20, 1807), in 10 THE WORKS OF THOMAS JEFFERSON 394, 394-401 (Paul Leicester Ford ed., 1905) (same).

<sup>46</sup> JACK N. RAKOVE, ORIGINAL MEANINGS 20 (1996).

<sup>47</sup> The distinction between suspending and dispensing powers was often blurred. JACQUELINE ROSE, GODLY KINGSHIP IN RESTORATION ENGLAND: THE POLITICS OF THE ROYAL SUPREMACY, 1660-1688, at 91 (2011); Delahunty & Yoo, *supra* note 15, at 857. The distinction, however, lay in the sweep of the license. Insofar as the King abrogated a statute across the board, it was referred to as "suspending"; when the King granted individuals permission to act outside the law, it was referred to as "dispensing." CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 4 (1998); Delahunty & Yoo, *supra* note 15, at 804 n.135.

“suspending” powers to the President.<sup>48</sup> Some have misread the Framers’ emphatic rejection of the dispensing and suspending powers as a repudiation of the power of the President to exercise prosecutorial discretion based upon justice, mercy, or utilitarian societal considerations.<sup>49</sup> Opponents of President Obama’s DAPA program have specifically accused the President of attempting to “dispense” with the nation’s deportation laws.<sup>50</sup>

There is, however, a critical distinction between prosecutorial discretion and the repudiated suspending and dispensing powers. The distinction is primarily temporal. No one today would claim that the President could *ex ante* grant permission for an individual to violate an act of Congress. That is distinct, however, from the Executive’s *ex post* determination not to prosecute. The DACA and DAPA programs, for example, are explicitly backward looking; they only apply to individuals who unlawfully entered the country years before the programs were announced.<sup>51</sup> As Sir Matthew Hale explained in the latter half of the seventeenth century, this key difference is what distinguished the common law pardon power, which was carried forward in our Constitution, and the dispensing power, which was not. As he explained, a pardon “dispenseth with the penalty, not the obligation” to comply with the law but a dispensation from the King “dispenseth both with the penalty and obligation of a law and is precedent.”<sup>52</sup>

The elimination of the dispensing and suspending powers in England did nothing to disrupt the King’s broad pardon power—referred to as the King’s prerogative. Indeed pardons were in fact used with great frequency following the elimination of the dispensing and suspending powers.<sup>53</sup> One critical reason for the distinction is that an *ex ante* license to violate the law completely eliminates the law’s deterrent effect. In addition to being limited to *ex post* usage, the King’s prerogative, unlike the suspending and dispensing powers, could only be invoked in relation to offenses against the state and, thus, could

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<sup>48</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 103-04 (Max Farrand ed., 1966) [hereinafter RECORDS]; see also Price, *supra* note 15, at 693.

<sup>49</sup> See, e.g., Delahunty & Yoo, *supra* note 15, 798-808.

<sup>50</sup> Plaintiff’s Motion for Preliminary Injunction & Memorandum in Support at 5, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 15-00674).

<sup>51</sup> See *infra* notes 305-07 and accompanying text.

<sup>52</sup> MATTHEW HALE, *THE PREROGATIVES OF THE KING 177* (D.E.C. Yale ed., 1976); see also William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 495-96 (1977) (“There is a technical distinction between pardon and suspension: pardon frees the guilty party from the effect of a violation of the law; suspension makes legal a formerly illegal act.”).

<sup>53</sup> See Duker, *supra* note 52, at 495-96; David D. Friedman, *Making Sense of English Law Enforcement in the Eighteenth Century*, 2 U. CHI. L. SCH. ROUNDTABLE 475, 496-98 (1995) (noting the “extensive use of pardons” in England between 1660 and 1800 when only about forty percent of those convicted of capital felonies were actually executed and the rest pardoned though, especially after 1718, a pardon was often conditional on transportation to American colonies).

not be used to interfere in private law disputes or to unsettle privately held rights.<sup>54</sup>

Indeed, the incident that is credited with leading to the elimination of the dispensing power demonstrates the distinction between prosecutorial discretion and dispensing. King James II invoked his dispensing power to appoint fellow Roman Catholics to various public positions, relieving these individuals of the operation of the parliamentary Test Act requirements that public officials denounce certain Roman Catholic doctrine and receive the Anglican sacrament.<sup>55</sup> It was this use of the dispensing power that is largely credited with leading to the Glorious Revolution and the elimination of the King's dispensing and suspending powers.<sup>56</sup> King James II's use of dispensing is unrecognizable as an act of prosecutorial discretion. By dispensing with the requirements of the Test Act, he bestowed an affirmative benefit prohibited by law. As such, it was completely unrelated to any decision to forego an enforcement action. Based upon the distinctions in their nature and the history of their use, it is difficult to read the Framers' rejection of the suspending and dispensing powers as a limit on the President's power to make equitable prosecutorial discretion determinations.

#### B. *Modern Categorical Prosecutorial Discretion Policies*

In the modern era, prosecutorial discretion is a ubiquitous phenomenon. The explosion in scope of prohibited conduct, in both criminal and administrative contexts, and the inability or unwillingness of the nation to authorize sufficient enforcement resources to keep pace with the expansion have cemented prosecutorial discretion as a critical and prominent feature in modern federal law enforcement. It is now widely accepted that federal administrative and criminal prosecutors routinely make individualized prosecutorial discretion determinations. Prosecutorial discretion only becomes controversial when the Executive puts in place categorical or rule-based policies. This is particularly true insofar as those policies appear to be driven less by justice, mercy, or efficiency considerations and more by the Executive's independent normative judgment regarding the societal interest or utility of nonenforcement. Accordingly, I examine below such categorical prosecutorial discretion policies of modern presidents.

In the criminal context, as discussed above, such categorical grants of prosecutorial discretion have been utilized since the founding of the nation.<sup>57</sup>

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<sup>54</sup> *Ex parte Grossman*, 267 U.S. 87, 111 (1925); see also Duker, *supra* note 52, at 486 (explaining how the King's pardon power was limited to offenses against the state and did not extend to matters that directly implicated the rights of third parties).

<sup>55</sup> Delahunty & Yoo, *supra* note 15, at 805-06; Dennis Dixon, *Godden v Hales Revisited—James II and the Dispensing Power*, 27 J. LEGAL HIST. 129, 129-37 (2006).

<sup>56</sup> Delahunty & Yoo, *supra* note 15, at 805.

<sup>57</sup> See discussion *supra* notes 40-44 and accompanying text.

That practice has been carried forward by modern presidents.<sup>58</sup> President Carter, for example, on his very first day in office, issued a categorical unconditional pardon to approximately a half million men who had violated draft laws to avoid military service in Vietnam, most of whom had never been formally charged, because he sought to “heal the war’s [psychic] wounds.”<sup>59</sup> Carter’s action was modeled on special boards which Presidents Truman and Ford had used to grant clemency to tens of thousands of individuals who had avoided military service in World War II and Vietnam, respectively.<sup>60</sup>

More recently, under President Clinton, the Department of Justice (“DOJ”) enacted a “Corporate Leniency Policy”—which the DOJ describes as an “amnesty or corporate immunity program”—that grants effective immunity from criminal prosecution to corporations, as well as their directors, officers, and employees, if the corporation is the first to come forward and report illegal antitrust activity and take certain other designated remedial steps.<sup>61</sup> Notably, the DOJ has made clear that “the grant of amnesty is certain and is not subject to the

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<sup>58</sup> The same pattern is visible in state-level criminal prosecutorial discretion policies. In recent years, several governors have granted categorical clemency to all inmates on death row. See *Capital Punishment Clemency*, ACLU, <https://www.aclu.org/issues/mass-incarceration/clemency-and-pardons/capital-punishment-clemency> [<https://perma.cc/E2KJ-GN9H>] (last visited Nov. 10, 2016) (detailing how Pat Quinn of Illinois in 2011, Jon Corzine of New Jersey in 2007, George Ryan of Illinois 2003, and Toney Anaya of New Mexico in 1986 granted clemency to all death-row inmates). Categorical nonenforcement on the state level has also been a mechanism used when criminal statutes fall out of touch with evolving social norms. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (“In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.”); *Poe v. Ullman*, 367 U.S. 497, 498, 507-08 (1961) (holding that, without a showing of a real enforcement threat, there is insufficient grounds to adjudicate the constitutionality of a uniformly unenforced statute that prohibited the use of contraceptive devices); see also Stephanie Clifford & Joseph Goldstein, *Prosecutor Limits When He’ll Target Marijuana*, N.Y. TIMES, July 9, 2014, at A17 (“[T]he Brooklyn district attorney’s office announced on Tuesday that it would immediately carry out its plan to stop prosecuting most low-level marijuana cases.”).

<sup>59</sup> Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 24, 1977) (authorizing a full, complete, and unconditional pardon to those who violated the Military Selective Service Act during the Vietnam War); Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO, (Jan. 21, 2008, 3:56 AM), <http://www.politico.com/story/2008/01/carter-pardons-draft-dodgers-jan-21-1977-007974> [<https://perma.cc/8SJA-AVB9>].

<sup>60</sup> Exec. Order No. 9814, 11 Fed. Reg. 14,645 (Dec. 25, 1946) (creating the President’s Amnesty Board to review convictions of persons under the Selective Training and Service Act of 1940); U.S. PRESIDENTIAL CLEMENCY BOARD, REPORT TO THE PRESIDENT, at xi-xii (1975); Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT’G. REP. 139, 142 (2001).

<sup>61</sup> See U.S. DEP’T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), <http://www.usdoj.gov/atr/public/guidelines/0091.htm> [<https://perma.cc/V5VS-MKZX>].

exercise of [individualized] prosecutorial discretion.”<sup>62</sup> Most recently, President Obama also announced broad nonenforcement guidelines related to marijuana offenses in states that have legalized various aspects of marijuana use and sale.<sup>63</sup>

By one count, at least one third of all United States presidents have issued categorical prosecutorial discretion policies of one kind or another in the criminal context.<sup>64</sup> Moreover, the Supreme Court has been clear about the constitutional nature of the Executive’s “*absolute discretion* to decide whether to prosecute a [criminal] case,”<sup>65</sup> including the power to grant broad categorical amnesties from criminal prosecution.<sup>66</sup> All of this, however, only begs the question of whether broad executive power in the criminal realm reflects a criminal exceptionalism or, rather, whether it illuminates something about the role prosecutorial discretion plays in the constitutional structure. I will return to this issue in Part II.

In the administrative arena, however, presidential policy making has, until recently, focused much more on the rulemaking process than on enforcement.<sup>67</sup> The significant use of nonenforcement policies in the administrative realm, at least outside the immigration realm discussed below, is a relatively recent phenomenon. President George W. Bush was the first<sup>68</sup> to use categorical

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<sup>62</sup> Gary R. Spratling, Deputy Assistant Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, *The Corporate Leniency Policy: Answers to Recurring Questions*, Remarks at the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), <http://www.usdoj.gov/atr/public/speeches/1626.htm> [<https://perma.cc/CNZ6-HNBK>].

<sup>63</sup> The Obama marijuana policy, unlike the Carter pardons and the Corporate Leniency Policy, are styled more as guidelines than categorical rules. See Memorandum from James M. Cole, Deputy Att’y Gen., U.S. Dep’t of Justice, to All U.S. Att’ys (Aug. 29, 2013), <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/V6FR-FVGX>]; Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Selected U.S. Attorneys (Oct. 19, 2009), <https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states> [<https://perma.cc/MF4Z-8NZ3>].

<sup>64</sup> Shanor & Miller, *supra* note 60, at 139.

<sup>65</sup> *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869)); *United States v. I.D.P.*, 102 F.3d 507, 511 (11th Cir. 1996) (noting that prosecutorial discretion does not lend itself to judicial intervention); *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967) (describing the power as “absolute” and “required in all cases”); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965).

<sup>66</sup> *Armstrong v. United States*, 80 U.S. (1 Wall.) 154, 155-56 (1871).

<sup>67</sup> Andrias, *supra* note 16, at 1055-60 (discussing the development of the President’s influence over the administrative state, from rulemaking to specific enforcement actions).

<sup>68</sup> While President Bush brought it to scale, President Reagan pioneered the use of categorical nonenforcement in the administrative realm with systemic resistance to enforcing the Comprehensive Environmental Response Liability Act, otherwise known as the “Superfund Law.” See Joel A. Mintz, *EPA Enforcement of CERCLA: Historical Overview and Recent Trends*, 41 SW. L. REV. 645, 646-57 (2012). President Reagan also sought to drive down enforcement to achieve policy goals in other realms, but did so more by seeking reductions in the budgets of enforcement agencies he disfavored. Andrias, *supra* note 16, at



nonenforcement as a significant feature of his administrative policy-making efforts.<sup>69</sup>

In the environmental context, President Bush sought to ramp down enforcement actions related to provisions of the Clean Air Act that imposed heightened pollution control requirements for coal-fired power plants that undergo modifications.<sup>70</sup> After promulgating a rule to that effect and having the rule struck down by the D.C. Circuit,<sup>71</sup> the Bush Administration issued an internal Environmental Protection Agency (“EPA”) enforcement policy, which directed agency officials not to initiate enforcement actions against the category of power plants that would have been protected by the nullified rule.<sup>72</sup> In several other arenas, including the Food and Drug Administration (“FDA”), the Department of Labor (“DOL”), the Securities and Exchange Commission (“SEC”), civil rights, and voting rights,<sup>73</sup> while no explicit policy was ever made

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1058-59.

<sup>69</sup> Price, *supra* note 15, at 686 (“The George W. Bush Administration apparently underenforced certain environmental, product safety, and civil rights laws as a matter of policy; in one case the Environmental Protection Agency stopped enforcing certain air pollution restrictions after the D.C. Circuit declared its regulatory standards too permissive.”); *see also* Andrias, *supra* note 16, at 1061 (“In general, Bush exercised more extensive control over enforcement than did many of his predecessors. Across agencies, there was a significant trend toward deregulation through nonenforcement and a shift toward different enforcement priorities, consistent with the Administration’s articulated policy goals.”); Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807-15 (2010) (providing examples of informal enforcement policies in the Bush Administration that essentially created a “category-wide determination not to prosecute certain crimes altogether”).

<sup>70</sup> Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1678-79 (2007).

<sup>71</sup> *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006) (holding that the newly enacted Equipment Replacement Provision rule violated the Clean Air Act).

<sup>72</sup> Andrias, *supra* note 16, at 1062-63; *see also* Joel A. Mintz, “Treading Water”: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL. L. REP. 10,933, 10,939 (2004) (noting a statement by EPA’s Assistant Administrator “that the goal of the NSR reform was to prevent any enforcement cases from going forward”).

<sup>73</sup> *See* MINORITY STAFF OF H. COMM. ON GOV’T REFORM, 109TH CONG., PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY 7 (2006) (documenting fifty percent reduction in FDA warning letters); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-75, U.S. DEPARTMENT OF JUSTICE: INFORMATION ON ENFORCEMENT EFFORTS FROM FISCAL YEARS 2001 THROUGH 2007, at 23-37, 57-83 (2009), <http://www.gao.gov/assets/300/297337.pdf> [<https://perma.cc/BZ7Y-PT4W>] (documenting the Bush Administration’s reduction in enforcement of employment and voting rights laws); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL’Y 77, 81 (2009) (same); *see also* Andrias, *supra* note 16, at 1062-63 (documenting the Bush Administration’s nonenforcement of securities and civil rights laws); Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP. FIN. & COM. L. 289, 309-17 (2009) (detailing the SEC’s enforcement failures under the Bush Administration).

public, dramatic reductions in enforcement consistent with the public political position of the Administration evince a widespread use of categorical prosecutorial discretion as a policy-making tool.<sup>74</sup>

President Obama carried forward the Bush Administration's use of categorical prosecutorial discretion policies as a policy-making tool; though, the new administration, unlike the Bush Administration, tended to announce their policies in public policy memoranda. While the recent immigration programs are surely the most prominent example, President Obama's Treasury Department and Department of Health and Human Services ("HHS") have also publicly announced categorical prosecutorial discretion policies related to certain enforcement mechanisms for noncompliant insurance plans under the Affordable Care Act ("ACA"). The ACA set a statutory deadline for insurance plans to meet certain minimum substantive coverage requirements.<sup>75</sup> The statute empowered HHS to initiate civil enforcement action for noncompliant plans.<sup>76</sup> When individuals began having their health insurance preemptively canceled due to the looming deadline, and the President's pledge that those who like their health insurance would not have to change plans began being called into question, the Administration announced that it would, for a period of time, not bring any enforcement action related to certain provisions of the statutory scheme.<sup>77</sup> The President could not, of course, change the statutory deadline; however, because he viewed the implementation timeline as counter to the public interest, he used his purported enforcement discretion to categorically refuse to initiate any enforcement actions during, what he deemed, a "transitional period."<sup>78</sup>

There is extremely limited case law evaluating the scope of prosecutorial discretion authority in the modern administrative era. The leading case, and indeed one of the only cases, regarding the scope of prosecutorial discretion authority in the administrative context is *Heckler v. Chaney*.<sup>79</sup> In *Heckler*, the

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<sup>74</sup> See Andrias, *supra* note 16, at 1062 (observing that President Bush's nonenforcement policies were often not made public or memorialized).

<sup>75</sup> See 42 U.S.C. § 300gg to -21 (2012) (limiting instances in which issuers may impose preexisting condition exclusions).

<sup>76</sup> *Id.* § 300gg-22(a)(2), (b).

<sup>77</sup> Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs., to State Ins. Comm'rs (Nov. 14, 2013), <https://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf> [<http://perma.cc/T3VW-66DZ>]; I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013) (notifying employers and other reporting entities of the transition relief provided for 2014 from certain reporting requirements under sections 6055 and 6056 of the Internal Revenue Code); see also Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014); Robert Pear, *Rules for Equal Coverage by Employers Remain Elusive Under Health Law*, N.Y. TIMES, Jan. 18, 2014, at A18 (discussing delays in the enforcement of certain provisions of the ACA).

<sup>78</sup> Letter from Gary Cohen, *supra* note 77, at 1.

<sup>79</sup> 470 U.S. 821, 823 (1985).

Court was called upon to review the FDA's decision not to initiate enforcement actions against states for administering certain allegedly "unsafe" drugs to persons whom the state had sentenced to death by lethal injection.<sup>80</sup> While the decision ultimately rested on statutory grounds, the case provides a rare glimpse into the Court's view of the historic scope and constitutional dimensions of administrative prosecutorial discretion authority. In declining to initiate such enforcement proceedings, the FDA specifically cited its "inherent discretion to decline to pursue certain enforcement matters."<sup>81</sup> In the course of its analysis, the Court was clear regarding its view that an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion," though the Court did recognize mechanisms by which Congress could exert some control over agency enforcement decisions.<sup>82</sup> The Court also noted the agency's power to set its own enforcement priorities as well as that "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights."<sup>83</sup> Finally, the Court specifically drew the connection between the "agency's refusal to institute proceedings" and the "decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch."<sup>84</sup>

In the end, however, the primary rationale for rejecting the challenge in *Heckler* was the Court's conclusion that nonenforcement decisions are generally unsuitable for judicial review.<sup>85</sup> In cases that have followed *Heckler* in the administrative law context, the only clear principle to be discerned from the Court's jurisprudence is the general unwillingness of courts to review agency nonenforcement decisions.<sup>86</sup> While the case law is extremely limited, practice in the modern era evinces the pervasive role that prosecutorial discretion plays generally in all federal enforcement schemes, as well as examples of presidents carrying forward the historical use of categorical prosecutorial discretion policies in the criminal realm. Outside the immigration context, however, the use of similar policies in civil administrative arenas is a relatively recent

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 824.

<sup>82</sup> *Id.* at 831, 833 (emphasis added).

<sup>83</sup> *Id.* at 832.

<sup>84</sup> *Id.* In addition, three of the four cases that the Court relied upon in *Heckler* to establish the principle that administrative nonenforcement decisions are presumptively nonreviewable involved prosecutorial discretion to decline to enforce criminal laws. *Id.* at 845 (Marshall, J., concurring) ("The other three cases—*Batchelder*, *Nixon*, and the *Confiscation Cases*—all involve prosecutorial discretion to enforce the criminal law.") .

<sup>85</sup> *Id.* at 832 (majority opinion) ("[A]n agency's decision not to take enforcement action should be presumed immune from judicial review . . . .").

<sup>86</sup> See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (reaffirming general nonreviewability of nonenforcement decisions); *Lincoln v. Vigil*, 508 U.S. 182, 183 (1993) (same); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967) (noting that the NLRB's General Counsel "has unreviewable discretion to refuse to institute an unfair labor practice complaint").

innovation—with Presidents Bush and Obama being the first to utilize such policies on any significant scale.

### C. *The History of Prosecutorial Discretion in the Immigration Arena*

It makes sense to consider the use of prosecutorial discretion in the immigration arena separately, both because the practice in this arena stands in stark contrast to the practice in other civil administrative contexts, and because context is particularly important and timely given the active debate and litigation related to the DACA and DAPA programs. Similar to other administrative realms, the Court has had only limited opportunities in recent years to opine on the breadth of prosecutorial discretion authority in the context of immigration enforcement and has never articulated the constitutional limits of such authority.<sup>87</sup> In regard to historical practice in the immigration arena, others have exhaustively cataloged the history of immigration prosecutorial discretion practices, and a full recitation of that history is unnecessary.<sup>88</sup> A brief review is, however, important to the analysis that follows.

There are estimated to be approximately eleven million undocumented immigrants in the United States.<sup>89</sup> The population of lawfully present immigrants, who can also be subject to deportation proceedings,<sup>90</sup> is estimated to be over thirteen million.<sup>91</sup> While appropriations for immigration enforcement operations now exceed \$18 billion annually<sup>92</sup>—more than the combined budgets of the FBI, Drug Enforcement Administration, Secret Service, U.S. Marshals Service, and Bureau of Alcohol, Tobacco, Firearms and Explosives<sup>93</sup>—under

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<sup>87</sup> *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012); *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). In *Arizona v. United States*, the Court struck down a state law permitting local authorities to make federal immigration arrests because it held that the state law infringed on the prosecutorial discretion that Congress had delegated to the federal agencies. 132 S. Ct. at 2505. In *Reno v. American-Arab Anti-Discrimination Committee*, the Court determined that federal courts lacked jurisdiction to hear a selective prosecution challenge from a group of immigrants facing deportation. However, in the course of its analysis, the Court did analogize prosecutorial discretion power in the criminal and immigration context to emphasize that “exercising [] discretion for humanitarian reasons or simply for [the Executive’s] own convenience” is the “special province of the Executive.” 525 U.S. at 484, 489.

<sup>88</sup> See, e.g., SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES 14-32* (2015); Cox & Rodríguez, *President and Immigration Law*, *supra* note 16, at 458; Neuman, *supra* note 16, at 611; Wadhia, *supra* note 1, at 244.

<sup>89</sup> OLC Opinion, *supra* note 11, at 1.

<sup>90</sup> See generally 8 U.S.C. § 1227(a) (2012).

<sup>91</sup> DEP’T OF HOMELAND SEC., OFFICE OF IMMIGRATION STATISTICS, *ESTIMATES OF THE LEGAL PERMANENT RESIDENT POPULATION IN 2012*, [https://www.dhs.gov/sites/default/files/publications/ois\\_lpr\\_pe\\_2012.pdf](https://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf) [<https://perma.cc/8Q43-LEKN>].

<sup>92</sup> DORIS MEISSNER ET AL., *supra* note 12, at 2-3.

<sup>93</sup> *Id.*

current appropriations, DHS can deport, at most, a few hundred thousand individuals per year.<sup>94</sup> With almost twenty-five million individuals potentially subject to deportation and a capacity to target only a few hundred thousand people per year, prosecutorial discretion is necessarily a prominent feature of the immigration enforcement scheme.<sup>95</sup>

Since 1975, the Immigration and Naturalization Service (“INS”) and later its successor agency, the Immigration and Customs Enforcement (“ICE”) agency, have issued a series of prosecutorial discretion memoranda that set forth basic guidelines for agency lawyers and agents to follow in making prosecutorial discretion determinations.<sup>96</sup> The memoranda direct agents to consider various equitable factors.<sup>97</sup> The more recent memoranda, however, also set forth enforcement priorities—detailing not only the humanitarian factors to be considered in deciding when to forego enforcement but also the aggravating factors to be considered in deciding who to target for enforcement.<sup>98</sup> The current policy targets primarily individuals who have criminal convictions, including in some cases a single misdemeanor conviction, and individuals who have recently unlawfully entered the United States.<sup>99</sup>

The current priorities memorandum was announced in November 2014 on the same day that the DHS announced its DAPA program. However, the priorities memorandum’s targeting criteria were only a modest revision to publicly announced priorities that had been in place since 2011.<sup>100</sup> Under both the new and old priorities, the vast majority of the millions of potentially removable immigrants in the United States were designated as nonpriorities for removal.

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<sup>94</sup> OLC Opinion, *supra* note 11, at 1.

<sup>95</sup> See Cox & Rodríguez, *President and Immigration Law*, *supra* note 16, at 463.

<sup>96</sup> Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t, et al. 3-4 (Nov. 20, 2014) [hereinafter Johnson Priorities Memorandum], [http://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_prosecutorial\\_discretion.pdf](http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf) [<https://perma.cc/RU68-EMYC>]; Memorandum from John Morton, Dir., Immigration & Customs Enf’t, to Field Office Dirs., Special Agents in Charge, & Chief Counsel 2 (June 17, 2011) [hereinafter Morton Priorities Memorandum], <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/8DBM-973D>]; Memorandum from Julie L. Myers, Assistant Sec’y, Immigration & Customs Enf’t, to Field Office Dirs. & Special Agents in Charge (Nov. 7, 2007); Memorandum from Bo Cooper, Gen. Counsel, U.S. Immigration & Naturalization Serv., to Comm’r Through the Deputy Comm’r, 1 INS & DOJ LEGAL OPINIONS §99-5 (2006); Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigration & Customs Enf’t, to OPLA Chief Counsel 2 (Oct. 24, 2005); Memorandum from Doris Meissner, Comm’r of Immigration & Naturalization Serv., to Reg’l Dirs. et al. 1 (Nov. 17, 2000); Memorandum from Paul W. Virtue, Acting Exec. Assoc. Comm’r, Immigration & Naturalization Serv., to Reg’l Dirs. (June 27, 1997); (LEGACY) IMMIGRATION & NATURALIZATION SERVICE, OPERATIONS INSTRUCTIONS, OI § 103.1(a)(1)(ii) (1975).

<sup>97</sup> See *supra* note 96 and accompanying text.

<sup>98</sup> See, e.g., Morton Priorities Memorandum *supra* note 96, at 5.

<sup>99</sup> Johnson Priorities Memorandum, *supra* note 96, at 3-4.

<sup>100</sup> Compare *id.*, with Morton Priorities Memorandum, *supra* note 96, at 5.

Thus a sweeping public prosecutorial discretion policy had been in place for several years at the time of the DAPA announcement. The policy was plainly based upon the Obama Administration's normative judgments about the national interests served, or not served, in deporting various categories of immigrants. However, notwithstanding the breadth of these policies and the Executive's policy-making judgment in announcing these policies, neither prompted lawsuits or even calls that the President had exceeded the boundaries of his prosecutorial discretion authority.

It was instead the announcements of the President's DACA and DAPA programs that prompted some to call into question the boundaries of the President's prosecutorial discretion policies. The DACA program, which was originally announced on June 15, 2012, dictated that any person who (1) came to the United States before the age of sixteen, (2) had been present in the United States for at least five years on the date of the announcement, (3) was engaged in or had completed certain educational programs or military service, and (4) was under the age of thirty could be "considered for an exercise of prosecutorial discretion" if that person had not committed certain criminal offenses.<sup>101</sup> The memorandum announcing the program stated that decisions about prosecutorial discretion under the DACA program are to be made on a "case-by-case basis" and that the memorandum does not ensure that all persons meeting the *prima facie* eligibility criteria will be granted prosecutorial discretion.<sup>102</sup> When discretion was exercised under the program, however, the memorandum made clear that individuals would be granted "deferred action status" and that they could apply for work authorization.<sup>103</sup>

Deferred action, along with a variety of other nonstatutory formal prosecutorial discretion designations, has been utilized by federal immigration authorities for decades and has been recognized by both the Supreme Court and Congress.<sup>104</sup> As the DACA memorandum makes explicit, deferred action is not an immigration status and does not create any substantive right or any pathway to citizenship.<sup>105</sup> Rather, it is a formal statement from DHS that it has, for a temporary period, decided to forego the initiation of any enforcement actions.<sup>106</sup> The recipients of DACA are young people deemed worthy of mercy because they lack culpability for their own unauthorized entry into the United States.<sup>107</sup> According to the Obama Administration, DACA also would increase

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<sup>101</sup> DACA Memorandum, *supra* note 2, at 1.

<sup>102</sup> *Id.* at 2.

<sup>103</sup> *Id.* at 3.

<sup>104</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (recognizing deferred action status as a longstanding practice of the INS's executive discretion); 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (2012) (stating that qualifying individuals may be "eligible for deferred action and work authorization").

<sup>105</sup> DACA Memorandum, *supra* note 2, at 3.

<sup>106</sup> *See id.* at 2-3.

<sup>107</sup> *Id.* at 1 (stating that DACA recipients were generally individuals "who were brought to this country as children" and thus "lacked the intent to violate the law").

enforcement efficiency by shrinking the haystack of unauthorized immigrants, thus allowing ICE to focus on its intended targets.<sup>108</sup> Finally, in the Administration's view, DACA recipients contribute more to society and pose a lesser danger than the individuals identified as targets by the priorities memorandum.<sup>109</sup>

The DAPA program, announced on November 20, 2014, extended deferred action, on the same terms as the DACA program, to "adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities."<sup>110</sup> While the DACA program was significant, and benefited hundreds of thousands of young people, the DAPA program was vast by comparison.<sup>111</sup> It was estimated that over five million of the nation's estimated eleven million undocumented individuals could qualify for DAPA.<sup>112</sup> Again, the Obama Administration justified the program by explaining that the people who would benefit are "hard-working people" who do not pose a danger to public safety and bringing these people "out of the shadows" would be in the country's "security and economic interests."<sup>113</sup>

Notably, the reach of the highly controversial DACA and DAPA programs was dramatically smaller than the reach of the relatively uncontroversial enforcement priorities memoranda that had been in place for years.<sup>114</sup> Thus, the size of the program alone cannot explain the outcry. Three factors have been identified at various times to distinguish the exercise of prosecutorial discretion

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<sup>108</sup> See *id.* (noting that young people brought to the country as children were "low priority cases" and DACA allowed ICE to "appropriately focus[] on people who meet [its] enforcement priorities").

<sup>109</sup> *Id.* at 1-2 ("[M]any of these young people have already contributed to our country in significant ways."). See generally OLC Opinion, *supra* note 11 (identifying certain categories of undocumented individuals for prioritized removal and other categories for deferred action).

<sup>110</sup> DAPA Memorandum, *supra* note 2, at 3. The DAPA Memorandum also relaxed certain requirements of the original DACA program, expanding eligibility to that program as well. *Id.*

<sup>111</sup> See U.S. CITIZENSHIP & IMMIGRATION SERVS., DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (THROUGH FISCAL YEAR 2016, 4TH QTR) (2016), <https://www.uscis.gov/tools/reports-studies/immigration-forms-data/data-set-form-i-821d-deferred-action-childhood-arrivals> [<https://perma.cc/NRR3-ZGN4>] (recording the total number of initial deferred action applications approved through September 30, 2016 at 752,154).

<sup>112</sup> See Press Release, White House, Office of the Press Sec'y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action> [<https://perma.cc/U9WH-QZVL>].

<sup>113</sup> DAPA Memorandum, *supra* note 2, at 3.

<sup>114</sup> See MARC R. ROSENBLUM, UNDERSTANDING THE POTENTIAL IMPACT OF EXECUTIVE ACTION ON IMMIGRATION ENFORCEMENT 1 (2015) (estimating that about eight million immigrants are protected by the priorities memoranda, while approximately five million immigrants are protected by the DACA and DAPA programs).

under the priorities memoranda from the exercise of such discretion under the DACA and DAPA programs. First, under the latter but not the former, individuals are given a formal designation noting they have been the subject of prosecutorial discretion.<sup>115</sup> Thus, the theory goes, the programs may undermine any incentive that the ongoing risk of enforcement may create for individuals to “self-deport.”<sup>116</sup> Second, the DACA and DAPA programs, unlike prosecutorial discretion under the priorities memoranda, carry with them a significant affirmative benefit: work authorization.<sup>117</sup> Finally, unlike the priorities memoranda, the particular context of the DACA and DAPA programs create, at minimum, the impression that the President was using prosecutorial discretion to achieve an end-run around Congress.<sup>118</sup>

As to the first distinction, putting aside the well-documented skepticism of the “self-deportation” theory, the presence of a formal grant of prosecutorial discretion in the DACA and DAPA programs does not set the programs apart from a wide array of other broad nonstatutory prosecutorial discretion programs that have been a staple of immigration enforcement schemes for decades.<sup>119</sup> Several mechanisms have been developed that allow the Executive to exercise an enormous amount of unilateral power to enact formal categorical prosecutorial discretion designations.<sup>120</sup> Under a program called Extended Voluntary Departure (“EVD”), similar in effect to deferred action, Presidents Kennedy, Johnson, Nixon, Ford, and Reagan all temporarily halted deportation efforts against certain nationalities at various times.<sup>121</sup> Similarly, in 1990, President Bush used his discretion to defer the deportation of Chinese immigrants through an executive order.<sup>122</sup> In perhaps the most analogous precursor to DACA and DAPA, in 1990, the INS implemented the “family

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<sup>115</sup> See DACA Memorandum, *supra* note 2, at 2-3; DAPA Memorandum, *supra* note 2, at 3-5.

<sup>116</sup> Josh Blackman, *DAPA and Self-Deportation*, JOSH BLACKMAN’S BLOG (Nov. 20, 2015), <http://joshblackman.com/blog/2015/11/20/dapa-and-self-deportation/> [<https://perma.cc/ED52-Y3C5>] (arguing that DAPA undermined Congress’s intent to make it harder for undocumented individuals to find employment to pressure them to “self-deport”).

<sup>117</sup> See DACA Memorandum, *supra* note 2, at 3; DAPA Memorandum, *supra* note 2, at 4.

<sup>118</sup> See Delahunty & Yoo, *supra* note 15, at 835.

<sup>119</sup> See generally Adam Serwer, “Self-Deportation”: *It’s a Real Thing, and It Isn’t Pretty*, MOTHER JONES (Jan. 23, 2012, 10:59 PM), <http://www.motherjones.com/mojo/2012/01/romneys-self-deportation-just-another-term-alabama-style-immigration-enforcement> [<https://perma.cc/F886-BCYQ>] (criticizing “self-deportation” as an immigration policy for its “complete lack of discretion and flexibility”).

<sup>120</sup> Some of the text below explaining examples of such programs is drawn from a petition for rulemaking submitted to DHS by the National Day Labor Organizing Network, which was coauthored by the author of this Article.

<sup>121</sup> See Lynda J. Oswald, *Extended Voluntary Departure: Limiting the Attorney General’s Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 157-60 (1986); Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 310 n.92. (1985).

<sup>122</sup> Exec. Order No. 12,711, 55 Fed. Reg. 13,897 (Apr. 11, 1990).



fairness policy,” which granted EVD to approximately 1.5 million immigrants who were excluded from the 1986 statutory amnesty program but whose spouses or parents were beneficiaries.<sup>123</sup> There have also been broad deferred action programs implemented to benefit victims of domestic violence, human trafficking, and other crimes; foreign students affected by Hurricane Katrina; and widows and widowers of U.S. citizens.<sup>124</sup> There is simply nothing novel about a broad, nonstatutory formal prosecutorial discretion program in the immigration context.

The second distinction—that the programs do more than exercise prosecutorial discretion but also grant an affirmative benefit—certainly takes these programs out of the traditional exercise of prosecutorial discretion. However, notwithstanding the rhetoric around this issue, the Administration never justified its granting of work authorization to DACA and DAPA recipients on its constitutional prosecutorial discretion powers.<sup>125</sup> Rather, the Administration is able to grant these individuals work authorization only because Congress has explicitly empowered the Attorney General to determine which classes of immigrants are eligible for such authorization.<sup>126</sup> Affirmative benefits, such as work authorization, cannot be and have not been justified by the President’s constitutional prosecutorial discretion authority.

It is the third factor that truly distinguishes the DACA and DAPA programs from the exercise of prosecutorial discretion under the priorities memoranda. DACA was only announced after the President tried and failed to convince Congress to pass the DREAM Act, which would have granted residency and a path to citizenship to the class of individuals now eligible for DACA.<sup>127</sup> The DAPA program, meanwhile, was only announced after the President tried and failed to convince Congress to pass comprehensive immigration reform, which would have granted residency and a path to citizenship for a similar class of the

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<sup>123</sup> Memorandum from Gene McNary, Comm’r, Immigration & Naturalization Serv., to Reg’l Comm’rs, Immigration & Naturalization Serv. (Feb. 2, 1990) [hereinafter Family Fairness Memorandum]; *Reagan-Bush Family Fairness: A Chronological History*, AM. IMMIGR. COUNS. (Dec. 9, 2014), <https://www.americanimmigrationcouncil.org/research/reagan-bush-family-fairness-chronological-history> [<https://perma.cc/DT75-G7X7>]; see also Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

<sup>124</sup> OLC Opinion, *supra* note 11, at 15-17.

<sup>125</sup> See DACA Memorandum, *supra* note 2, at 3 (noting that “the memorandum confers no substantive right” and that only Congress can confer such rights “through its legislative authority”); DAPA Memorandum, *supra* note 2, at 5 (stating that the deferred action and work authorization program were “within the framework of existing law” and conferred no new substantive right).

<sup>126</sup> 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3) (2012); 8 C.F.R. § 274a.12(c)(14) (2016).

<sup>127</sup> Delahunty & Yoo, *supra* note 15, at 787-91 (discussing how President Obama effectively enacted the DREAM Act through deferred action, starting with the priorities memoranda and culminating with the DACA program that “mapped closely” on to the criteria specified in the DREAM Act).

undocumented population as those who have benefited from the DAPA program.<sup>128</sup> These dynamics create, at minimum, the appearance that the President is attempting to use his prosecutorial discretion power to make an end-run around Congress. Notably, neither program bestows the benefits—residency and a path to citizenship—that the contemplated legislation would have provided.<sup>129</sup> The appearance of gamesmanship is, however, undeniable. Interestingly, the Office of Legal Counsel (“OLC”) specifically relied upon the fact that the programs are “consonant with congressional policy.”<sup>130</sup> But assuming *arguendo* that the DACA and DAPA programs do create some dissonance with the statutory scheme, the familiar *Youngstown Sheet & Tube Co. v. Sawyer*<sup>131</sup> framework certainly requires a serious analysis of the nature of the President’s prosecutorial discretion power in the face of active congressional resistance.<sup>132</sup> The Article returns to this issue in Section III.C.

Thus, history demonstrates that prosecutorial discretion, in both the criminal and civil contexts, has been an established, and virtually unquestioned, constitutional power of the President from the earliest days of the nation.<sup>133</sup> In the criminal context, broad categorical prosecutorial discretion policies have been enacted by presidents and affirmed by the Supreme Court throughout the nation’s history.<sup>134</sup> Notably, in the administrative context, immigration stands alone as the only administrative arena where categorical prosecutorial discretion programs have been a regular feature of the enforcement landscape for decades—ever since the government’s deportation programs became a significant feature of federal law enforcement.<sup>135</sup> In other administrative

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<sup>128</sup> See Seung Min Kim & Jennifer Epstein, *Obama to Take Action on Immigration*, POLITICO (July 1, 2014, 08:28 AM), <http://www.politico.com/story/2014/06/obama-immigration-reform-108447> [<https://perma.cc/KRL4-J627>] (discussing how President Obama planned to take administrative action after comprehensive immigration reform failed to pass).

<sup>129</sup> DACA Memorandum, *supra* note 2, at 3 (stating that the memorandum provides no “immigration status or pathway to citizenship”); DAPA Memorandum, *supra* note 2, at 5 (same).

<sup>130</sup> OLC Opinion, *supra* note 11, at 24. *But see Cox & Rodríguez, Redux*, *supra* note 16, at 151 (arguing that congressional intent and priorities cannot provide a meaningful limitation on the President’s discretion in the immigration context).

<sup>131</sup> 343 U.S. 579 (1952).

<sup>132</sup> *Id.* at 635-38 (Jackson, J., concurring) (establishing the three-part framework for analyzing the constitutionality of presidential action and stating that “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb”).

<sup>133</sup> See *supra* Section I.A.

<sup>134</sup> See *supra* Section I.A.

<sup>135</sup> Over the last decade, the annual number of deportations has hovered between 300,000 and 400,000. DEP’T OF HOMELAND SEC., 2012 YEARBOOK OF IMMIGRATION STATISTICS tbl.39 (2012), [https://www.dhs.gov/sites/default/files/publications/Yearbook\\_Immigration\\_Statistics\\_2012.pdf](https://www.dhs.gov/sites/default/files/publications/Yearbook_Immigration_Statistics_2012.pdf) [<https://perma.cc/5QJV-KF98>]. Prior to 1992, however, the total annual number of deportations never exceeded 40,000 and often dipped below 10,000. *Id.*

contexts, the use of categorical nonenforcement as a policy-making tool is a relatively recent phenomenon.<sup>136</sup>

## II. THE CONSTITUTIONAL FRAMEWORK FOR PROSECUTORIAL DISCRETION POWER AND THE ROLE OF LIBERTY

A central tension in our constitutional framework is the purposefully designed struggle for power between the political branches of the federal government. As James Madison explained, it is “essential to the preservation of liberty” that “[a]mbition must be made to counteract ambition.”<sup>137</sup> Through this lens, the exercise of prosecutorial discretion can be understood, in part, as an important countermajoritarian structural check on the power of the legislature. Prosecutorial discretion can play a critical role in mitigating the dangers of overly punitive legislative schemes that target minority communities in ways that are counter to justice or to the public interest.<sup>138</sup>

Taken to its extreme, however, prosecutorial discretion could place too great a thumb on the scale of presidential power, fundamentally undermining Congress’s primary policy-making role. In the modern administrative state, executive branch enforcement is a necessary and critical component of a vast array of federal policy implementation.<sup>139</sup> Unchecked, a president could use purported prosecutorial discretion authority to unilaterally halt or substantially undermine agency enforcement actions across a broad range of subject areas.<sup>140</sup> This abuse of executive discretion could include not only Department of Homeland Security’s enforcement of immigration laws, but also the SEC’s enforcement of securities laws, the Internal Revenue Service’s enforcement of

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<sup>136</sup> See *supra* notes 68-74 and accompanying text.

<sup>137</sup> THE FEDERALIST NO. 51, at 321-22 (James Madison) (Clinton Rossiter ed., 1961) (“But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition.”).

<sup>138</sup> See *id.* at 323 (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.”); see also *Fletcher v. Graham*, 192 S.W.3d 350, 368 (Ky. 2006) (“Once called the executive’s ‘benign prerogative of mercy,’ the pardon/amnesty power has evolved to serve as a mechanism which simultaneously checks and balances the powers of the legislature (that make the laws), [and] the judiciary (that interprets/enforces the laws) . . . .” (internal citation omitted)).

<sup>139</sup> See generally Andrias, *supra* note 16 (arguing that executive oversight over the coordination and enforcement of federal programs increases the efficiency, efficacy, and accountability of the administrative state).

<sup>140</sup> See OLC Opinion, *supra* note 11, at 24 (stating that the Executive cannot “effectively rewrite the laws to match the Executive’s policy preferences” and “cannot abdicate . . . statutory responsibilities under the guise of exercising enforcement discretion”).

tax laws, the EPA's enforcement of environmental laws, the DOJ's enforcement of civil rights laws, the DOL's enforcement of labor laws, and the list goes on. Accordingly, a limiting principle to the President's prosecutorial discretion power is necessary.

Some have leapt from this sound observation to the unwarranted conclusion that the President should not ever be permitted to exercise enforcement discretion based on an independent assessment of the wisdom and public interest in enforcement.<sup>141</sup> Indeed, a few commentators have taken the extreme position that the Take Care Clause requires full enforcement and does not permit executive nonenforcement discretion.<sup>142</sup> The majority of commentators, however, agree that the executive power includes, at minimum, the ability to decline to prosecute violations of federal law on a case-by-case basis relying upon judgments about, inter alia, efficient allocation of limited resources and an assessment of the strength of available evidence.<sup>143</sup> Some recent commentators, however, question the authority of the Executive to rely upon his or her own normative judgment regarding the public interest in prosecution and to institute categorical prosecutorial discretion policies.<sup>144</sup> The attraction of these limits is clear: categorical prosecutorial discretion policies most clearly raise the specter of the President effectively usurping Congress's primary policy-making function.<sup>145</sup> Yet upon closer scrutiny, neither limit is workable in all circumstances.

It is not practically viable, legally defensible, or otherwise desirable to excise independent normative judgments from prosecutorial discretion determinations.<sup>146</sup> To be sure, normative judgments regarding the wisdom, equity, or public interest in enforcing a law can overlap significantly with the legislature's judgment in framing and enacting the law. However, the idea that the Executive's independent assessment of the public interest in prosecution can or should be eliminated is at odds with both contemporary and historical practice and cannot be supported by the legal foundations of prosecutorial discretion authority.<sup>147</sup> In deciding whether to initiate deportation proceedings against a

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<sup>141</sup> See, e.g., Delahunty & Yoo, *supra* note 15, at 784-85; Love & Garg, *supra* note 21, at 1206.

<sup>142</sup> See, e.g., Delahunty & Yoo, *supra* note 15, at 785 (arguing that the "Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases").

<sup>143</sup> See Andrias, *supra* note 16, at 1044; Delahunty & Yoo, *supra* note 15, at 846; Love & Garg, *supra* note 21, at 1216-17; Price *supra* note 15, at 706.

<sup>144</sup> See, e.g., Delahunty & Yoo, *supra* note 15, at 846; Love & Garg, *supra* note 21, at 1212; Price *supra* note 15, at 675.

<sup>145</sup> See THE FEDERALIST NO. 51 (James Madison), *supra* note 137, at 322 ("In republican government, the legislative authority necessarily predominates.").

<sup>146</sup> See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1662 (2010) (arguing that equitable prosecutorial discretion decisions are inevitable and desirable).

<sup>147</sup> See *supra* Part I.

single parent, for example, few would take issue with a prosecutor's consideration of the impact of deportation on the individual's children who are U.S. citizens. Likewise, when prosecutors decide to forego prosecution of certain marijuana cases to preserve resources for more prosecutions of methamphetamines cases—presumably because they see the latter as more dangerous to the public than the former—they exercise exactly the type of public interest assessment that the public expects from prosecutors.

Similarly, the idea that prosecutorial discretion determinations must be made solely on a case-by-case basis is in significant tension with the historical practice of prosecutorial discretion.<sup>148</sup> Moreover, a prohibition on categorical prosecutorial discretion policies would significantly undermine the institutional design goals of transparency, political accountability, and uniformity.<sup>149</sup> As a society, we expect top prosecutors to establish priorities and guidelines that control the discretion of line-level prosecutors.<sup>150</sup> Only through transparent public policies can we achieve consistent enforcement and political accountability.

Thus, the Executive's normative judgment and power to enact categorical policies cannot and should not be excised from prosecutorial discretion decisions. This Article explores an alternative limiting principle that is based upon the nature of the enforcement proceedings. Specifically, this Article proposes that where proceedings can result in persons being taken into the physical custody of the government and deprived of their freedom of movement, the President enjoys the greatest power to decline to initiate enforcement proceedings. Section III.C considers whether deportation proceedings fit within this category.

As the Supreme Court's jurisprudence in this realm is significantly underdeveloped, there is little judicial guidance on the constitutional boundaries of prosecutorial discretion power beyond the criminal context.<sup>151</sup> In the absence of useful guidance from the courts, I return to the source to evaluate the limiting principle proposed. The discussion begins with an examination of the textual sources of prosecutorial discretion authority, and then attempts to contextualize the various provisions through a structural analysis of the role of liberty protection and prosecutorial discretion authority in the constitutional scheme.

#### A. *Textual Sources of Prosecutorial Discretion Authority*

The words "prosecutorial discretion" do not appear in the Constitution and no single provision in the Constitution can be identified as the sole source of such power. Instead, the power emanates from a variety of provisions, including

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<sup>148</sup> See *supra* notes 40-47, 57-64, 120-24 and accompanying text.

<sup>149</sup> See Andrias, *supra* note 16, at 1038; Cox & Rodríguez, *Redux*, *supra* note 16, at 197.

<sup>150</sup> Even those who generally argue against policy-based prosecutorial discretion concede that "[s]ome degree of top-down direction . . . seems appropriate." Price, *supra* note 16, at 758.

<sup>151</sup> See *supra* notes 58-60, 68-88 and accompanying text.

Article II's Take Care Clause,<sup>152</sup> Executive Vesting Clause,<sup>153</sup> and Pardon Clause.<sup>154</sup> An analysis of each of these provisions is, therefore, a useful starting point for the constitutional inquiry into the breadth of prosecutorial discretion power.

### 1. The Take Care Clause

The Constitution states that the President "shall take Care that the Laws be faithfully executed."<sup>155</sup> This Clause is generally understood to stand for the most basic premise taught in grade school civics classes: while it is Congress's function to make the law and the Supreme Court's function to interpret that law, it is the President's function to enforce the law. That is the constitutional system of separation of powers at its most basic level.

Scholars and courts alike have observed that the language of the Take Care Clause reads more naturally as a command than a grant of power and, thus, it is counterintuitive to read the provision as a broad source of prosecutorial discretion authority.<sup>156</sup> However, the Take Care Clause is nevertheless the provision courts and scholars most commonly cite as a source of the President's power to exercise prosecutorial discretion.<sup>157</sup> As the Supreme Court explained in *Heckler*, "an agency's refusal to institute proceedings . . . [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"<sup>158</sup>

In *Buckley v. Valeo*,<sup>159</sup> the Court had the opportunity to opine on the connection between the Take Care Clause and prosecutorial discretion authority in evaluating a wide-ranging challenge to the Federal Election Campaign Act.<sup>160</sup> While the case is most well-known as part of the Court's jurisprudence on campaign finance laws, one challenged provision of the Act related to the enforcement authority of the Federal Election Commission.<sup>161</sup> A majority of the

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<sup>152</sup> U.S. CONST. art. II, § 3.

<sup>153</sup> *Id.* art. II, § 1.

<sup>154</sup> *Id.* art. II, § 2. *See generally In re Aiken Cty.*, 725 F.3d 255, 262 (D.C. Cir. 2013) (citing all three clauses as sources of prosecutorial discretion authority).

<sup>155</sup> U.S. CONST. art. II, § 3.

<sup>156</sup> *See, e.g., Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838); WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 147-50 (2d ed. 1829); Cheh, *supra* note 17, at 282; Delahunty & Yoo, *supra* note 15, at 799.

<sup>157</sup> *E.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976); Andrias, *supra* note 16, at 1052-53; Price, *supra* note 15, at 697-98; *see also* The Jewels of the Princess of Orange, 2 Op. Att'y Gen. 482, 486 (1831) (citing the Take Care Clause as a source of prosecutorial discretion "to save a party admitted to be innocent, from a harassing and expensive litigation").

<sup>158</sup> *Heckler*, 470 U.S. at 832 (quoting U.S. CONST. art. II, § 3).

<sup>159</sup> 424 U.S. 1 (1976).

<sup>160</sup> *Id.* at 109.

<sup>161</sup> *Id.* at 109-42.

Commission's members were appointed by Congress; however, the statute authorized the Commission to initiate civil enforcement proceedings and required the Attorney General, upon the Commission's request, to initiate criminal enforcement proceedings—both traditional executive functions.<sup>162</sup> Likewise, “the decision *not* to seek judicial relief . . . rest[ed] solely with the Commission.”<sup>163</sup> The Court held that the delegation of this executive enforcement discretion—including the power to *decline* to initiate proceedings—to a congressionally controlled commission was impermissible; the Court explained that “it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>164</sup>

The history surrounding the drafting of the Take Care Clause adds some limited additional guidance for identifying the constitutional limiting principle I seek.<sup>165</sup> The earliest iteration of the Take Care Clause can be found in The Virginia Plan authored by Madison at the inception of the Constitutional Convention. Therein, Madison described an “Executive” with the “power to carry into effect the national laws.”<sup>166</sup> A later draft of the Clause introduced at the Convention stated that “[i]t shall be [the Executive’s] *duty* to provide for the due & faithful exec—of the Laws.”<sup>167</sup> The Committee of Detail and the Committee of Style refined the wording to arrive at the final text.<sup>168</sup> While there is no clear explanation for the transition from the “general authority” construction originally proposed by Madison to the “duty” construction in the final text, one of the authors of the revised duty language, future Supreme Court Justice James Wilson, was clear in his vision that the Clause was intended to impose a limit on presidential power. He explained that the President has “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”<sup>169</sup>

Thus, while the Take Care Clause is generally understood as a source of prosecutorial discretion power, the text, jurisprudence, and framing history do little to define the boundaries of that power. It is clear that the Clause empowers the President to exercise enforcement discretion, but it also imposes an

<sup>162</sup> *Id.* at 111-12.

<sup>163</sup> *Id.* at 111.

<sup>164</sup> *Id.* at 138 (quoting U.S. CONST. art. II, § 3).

<sup>165</sup> See generally Price, *supra* note 15, at 692-94 (reciting the history of the Take Care Clause and its relation to the English suspension and dispensing powers).

<sup>166</sup> MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES app. at 226 (1913) (emphasis added).

<sup>167</sup> RECORDS, *supra* note 48, at 171 (emphasis added).

<sup>168</sup> See Delahunty & Yoo, *supra* note 15, at 802 (quoting RECORDS, *supra* note 48, at 185, 600).

<sup>169</sup> 2 JAMES WILSON, Lectures on Law Part 2, in COLLECTED WORKS OF JAMES WILSON 827, 878 (Kermit L. Hall & Mark David Hall eds., 2007); see also Delahunty & Yoo, *supra* note 15, at 802; Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 64-66 (1994).

obligation to see that laws, as a general matter, are executed consistent with Congress's dictates. Given these considerations, an appropriate constitutional limiting principle must take full account of both the enforcement discretion authority the Clause bestows on the President, and the limit the Clause imposes on the President to prevent usurpation of the legislative function.

## 2. The Executive Vesting Clause

The very first sentence of Article II of the U.S. Constitution declares that “[t]he executive Power shall be vested in a President of the United States of America.”<sup>170</sup> However, the Constitution provides no precise definition of the executive power. Nevertheless, like the Take Care Clause, the Executive Vesting Clause has also been cited as a source of the President’s authority to exercise enforcement discretion.<sup>171</sup>

There is, however, a robust debate in the literature about whether the Executive Vesting Clause is a source of implied powers at all.<sup>172</sup> Some scholars have argued that the Clause does not convey any implied powers but rather is intended to frame Article II and make clear that the powers enumerated therein shall be wielded by a unitary executive: the President.<sup>173</sup> Others see the Clause as the source of significant implied powers that reach beyond those otherwise enumerated.<sup>174</sup> Entry into this developed debate is well beyond the scope of this Article. Whether or not the Clause conveys *implied* powers, the Clause is, if nothing more, an *explicit* source of the President’s power to execute or enforce the law.<sup>175</sup> As the Supreme Court has explained, “[t]he vesting of the executive

<sup>170</sup> U.S. CONST. art. II, § 1.

<sup>171</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); *Buckley v. Valeo*, 424 U.S. 1, 120-43 (1976); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 695 (1952) (Vinson, C.J., dissenting).

<sup>172</sup> For an excellent survey of this debate, see Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545, 546-49 (2004).

<sup>173</sup> See, e.g., Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 599-601 (1974); Bradley & Flaherty, *supra* note 172, at 551; Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 14-15 (1993).

<sup>174</sup> See, e.g., Delahunty & Yoo, *supra* note 15, at 800 (“The Vesting Clause is, indeed, a broad grant of power, comparable to those for Congress and the federal judiciary.”); Saikrishna B. Prakash & Michael D. Ramsey, *Foreign Affairs and the Jeffersonian Executive: A Defense*, 89 MINN. L. REV. 1591, 1685-87 (2005) (asserting that the Founding Fathers intended all executive power not explicitly granted to other branches to reside in the Executive); Michael D. Ramsey, *Executive Agreements and the (Non)Treaty Power*, 77 N.C. L. REV. 133, 210-19 (1998) (arguing that an expansive understanding of the Vesting Clause resolves the Constitution’s failure to allocate certain foreign policy powers).

<sup>175</sup> Bradley & Flaherty, *supra* note 172, at 553 (“Indeed, to the extent that there are any Founding statements ascribing substantive content to the Article II Vesting Clause, they are all statements equating executive power with the power to execute the laws.”); see also *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) (“Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the



power in the President was essentially a grant of the power to execute the laws."<sup>176</sup> As discussed below, an important component of that power is the authority to exercise discretion regarding when to initiate and when to forego enforcement action.

Courts have had the opportunity to expound on the nature of the executive power to enforce the laws in situations where Congress has attempted to insert itself into enforcement functions or vest enforcement functions in an entity outside of the control of the President.<sup>177</sup> In *Morrison v. Olson*, the Court considered a challenge to the enforcement authority of an independent counsel appointed pursuant to the provisions of the Ethics and Government Act.<sup>178</sup> Under the Act, the Attorney General, and through her, the President, had control over the decision to seek the appointment of an independent counsel, determine the scope of her appointment, and effect her removal for good cause. However, once appointed, the independent counsel exercised significant autonomy of prosecutorial discretion.<sup>179</sup> The question thus arose whether, in depriving the President of full control over prosecutorial-discretion decisions, the Act "violate[d] the principle of separation of powers by unduly interfering with the role of the Executive Branch."<sup>180</sup> Ultimately, the Court held that because Congress was not assuming for itself control over prosecutorial discretion and because the President, through the Attorney General, exercised a significant "degree of control over the power to initiate an investigation by the independent counsel," the Act did not impermissibly divest the President of his executive power.<sup>181</sup> *Morrison* is important for our inquiry, however, because the Court was clear in its vision that prosecutorial discretion authority falls squarely within the executive power.<sup>182</sup> Justice Scalia made this point explicitly in his dissent, though he pointed out that he was in agreement with the majority on this point.<sup>183</sup> In evaluating the scope of the "executive power," specifically in reference to the

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agents charged with the duty of such enforcement. The latter are executive functions."). As James Madison explained on the floor of the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 ANNALS OF CONG. 463 (1789) (emphasis added).

<sup>176</sup> *Myers v. United States*, 272 U.S. 52, 117 (1926). *But see* Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers' Intent*, 99 YALE L.J. 1069, 1070 (1990) ("[T]he Framers did not intend prosecution to be a core executive function . . .").

<sup>177</sup> *See, e.g.*, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010); *Morrison v. Olson*, 487 U.S. 654, 670-77 (1988); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976).

<sup>178</sup> *Morrison*, 487 U.S. at 659 ("This case presents us with a challenge to the independent counsel provisions of the Ethics in Government Act of 1978. . . .").

<sup>179</sup> *Id.* at 662-63.

<sup>180</sup> *Id.* at 693.

<sup>181</sup> *Id.* at 695-96.

<sup>182</sup> *Id.* at 691.

<sup>183</sup> *Id.* at 702 n.1 (Scalia, J., dissenting).

Executive Vesting Clause, he explained that a core component of that power is “prosecutorial discretion,” which he described as “the balancing of innumerable legal and practical considerations.”<sup>184</sup>

Similarly in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court considered a provision of the Sarbanes-Oxley Act of 2002,<sup>185</sup> which vested certain prosecutorial discretion functions in a board responsible for creating and enforcing rules for the accounting industry.<sup>186</sup> The board was a nonprofit corporation, with members who were not considered government officers or employees.<sup>187</sup> Because the board members could not be removed by the President, or even by anyone directly accountable to the President, the Court held the Act impermissibly infringed on the President’s constitutional enforcement discretion and was thus “contrary to Article II’s vesting of the executive power in the President.”<sup>188</sup>

Ultimately, the Vesting Clause language, history, and jurisprudence are useful to supplement our understanding of the Take Care Clause, insofar as the Vesting Clause unequivocally is phrased in terms of an affirmative power grant, which has been interpreted to include the power to exercise enforcement discretion. Again, however, the boundaries of that discretion are difficult to discern through the Vesting or Take Care Clauses alone.

### 3. The Pardon Clause

The Pardon Clause states that the President “shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.”<sup>189</sup> A “pardon” is generally understood to excuse an offender’s crime, while a “reprieve” delays or mitigates the punishment for a criminal offense.<sup>190</sup> A pardon is a greater benefit than a grant of prosecutorial discretion; the former is permanent and relieves an offender of punishment and the future threat thereof, while the latter is wholly revocable. Nevertheless, the greater pardon power has been construed to include the lesser prosecutorial discretion power.<sup>191</sup>

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<sup>184</sup> *Id.* at 708.

<sup>185</sup> Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 750-71 (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

<sup>186</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

<sup>187</sup> *Id.* at 484.

<sup>188</sup> *Id.* at 492, 496.

<sup>189</sup> U.S. CONST. art II, § 2.

<sup>190</sup> Price, *supra* note 15, at 698.

<sup>191</sup> See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (indicating that the President’s pardon power “may be exercised at any time after [a crime’s] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment”); *In re Aiken Cty.*, 725 F.3d 225, 265 (D.C. Cir. 2013) (“But the President has clear constitutional authority to exercise prosecutorial discretion to decline to prosecute violators of such laws, just as the President indisputably has clear constitutional authority to pardon violators of such laws.”); *The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482, 486 (1831) (“[T]he

Courts and scholars have generally taken an expansive view of the President's pardon power.<sup>192</sup> Under the Pardon Clause, courts have held that the President has the power to act "at any time after [a crime's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."<sup>193</sup> The pardon power has been interpreted to include the power to commute sentences and to impose conditions on a pardon or commutation, even when such conditions are not contemplated by statute.<sup>194</sup> The Court has also been clear that the pardon power "cannot be modified, abridged, or diminished by the Congress."<sup>195</sup> The broad pardon power is both reflective of and a source of the absolute prosecutorial discretion afforded to the President in criminal cases.<sup>196</sup>

Notably for our purposes, the pardon power has been consistently interpreted since the early days of the Union to include the power to grant broad categorical amnesties from prosecution upon the President's unilateral determination that such amnesties were in the public interest.<sup>197</sup> The Supreme Court has been consistent and apparently untroubled by the extension of the pardon power to categorical amnesties.<sup>198</sup> Scholars have likewise recognized that the pardon power encompasses the power to grant broad amnesties.<sup>199</sup> The power is far from

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power to grant a *nolle prosequi* in such a case, is necessarily embraced in the power to pardon an offender."); Cheh, *supra* note 17, at 282 ("The idea is that, because the president has unbounded constitutional discretion to grant pardons . . . he may exercise unbounded prosecutorial discretion not to bring a case since the same result could be achieved via the pardon power.").

<sup>192</sup> See, e.g., Price, *supra* note 15, at 698; see also KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 217 (1989); Duker, *supra* note 52 at 535.

<sup>193</sup> See Garland, 71 U.S. (4 Wall.) at 380.

<sup>194</sup> Schick v. Reed, 419 U.S. 256, 264 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1855).

<sup>195</sup> Schick, 419 U.S. at 266.

<sup>196</sup> *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and *absolute discretion* to decide whether to prosecute a case." (emphasis added)); see also *Smith v. United States*, 375 F.2d 243, 247 (5th Cir. 1967) (stating that the Attorney General, as an agent of the President, has absolute discretion "in choosing whether to prosecute or not to prosecute, or to abandon a prosecution already started"); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (stating that the Attorney General exercises his prosecutorial discretion as a function of the executive power).

<sup>197</sup> JOHN M. MATHEWS, THE AMERICAN CONSTITUTIONAL SYSTEM 168 (1932) (stating that the President can issue amnesty proclamations); see also Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 588-90 (2001) (providing several examples of presidents' use of the pardon power to bring civil tranquility and prevent rebellion).

<sup>198</sup> See *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1871) (holding that the post-Civil War presidential amnesty "was a public act of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect"); see also *Knote v. United States*, 95 U.S. 149, 153 (1877); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871).

<sup>199</sup> See, e.g., Duker, *supra* note 52, at 519; Daniel T. Kobil, *The Quality of Mercy Strained*:

theoretical. As discussed in Part I, it has been exercised repeatedly since the early days of the Union and into modern times by some of our nation's most iconic presidents.<sup>200</sup> But for the criminal designation, it is hard to find a distinction between the power asserted by these presidents and the power asserted by President Obama through his creation of the DACA and DAPA programs. They all involve a categorical policy decision not to enforce a properly enacted statute against a broad class of offenders because of the President's normative judgment regarding the public interest, or lack thereof, in such prosecutions.

The criminal distinction is potentially critical insofar as the amnesties in the criminal context have been justified by the pardon power, which has generally been viewed as extending only to criminal matters. However, nothing in the plain language of the Clause limits pardons to the criminal context. Rather, the pardon power extends to "Offenses against the United States."<sup>201</sup> Despite the popular conception that the pardon power applies only to criminal matters, the limited authority available interpreting the phrase "Offenses against the United States" suggests some applications beyond the criminal context. Indeed, a comprehensive review recently undertaken of the historical practices in England and the colonies, records from the Constitutional Convention, and English common law strongly supports an understanding of the pardon power that is broad enough to reach civil offenses against the United States.<sup>202</sup>

While the Supreme Court has frequently remarked in dicta that the pardon power pertains to criminal proceedings,<sup>203</sup> only twice has it specifically considered the application of the power beyond the criminal context, each time reading the Clause to reach beyond its traditional criminal boundaries.<sup>204</sup> In *Ex parte Grossman*, the Court was confronted with the question of whether a

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*Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 577 (1991); MOORE, *supra* note 192, at 5.

<sup>200</sup> See *supra* notes 37-38, 57-64, 119-26 and accompanying text.

<sup>201</sup> U.S. CONST. art II, § 2.

<sup>202</sup> Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 BUFF. L. REV. 661, 663 (2016); see also 3 WILLIAM J. RICH, MODERN CONSTITUTIONAL LAW § 38:27 (3d ed. 2011) ("The pardoning power extends not only to felonies and misdemeanors with imprisonment but also to the remission of fines, penalties, and forfeitures. The power to pardon should not be limited by distinctions between 'civil' and 'criminal' penalties; property which has been seized by the government can be restored so long as third-party interests in the property have not vested."); Harold J. Krent, *Conditioning the President's Conditional Pardon Power*, 89 CALIF. L. REV. 1665, 1673 (2001) ("[T]he [Pardon] Clause covers civil as well as criminal sanctions imposed by the federal government."); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 582 n.356 (2005) (concluding that the pardon power extends to civil offenses); Brian C. Kalt, Note, *Pardon Me?: The Constitutional Case Against Presidential Self-Pardons*, 106 YALE L.J. 779, 780 n.10 (1996) ("A pardon can release the offender from civil liability as to the federal government . . .").

<sup>203</sup> See, e.g., *Schick v. Reed*, 419 U.S. 256, 260 (1974); *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833).

<sup>204</sup> *Ex parte Grossman*, 267 U.S. 87, 121 (1925); *The Laura*, 114 U.S. 411, 413-14 (1885).

presidential pardon could operate to relieve an individual of incarceration ordered by a court pursuant to a contempt finding.<sup>205</sup> The district court had issued an injunction against the petitioner prohibiting him from selling alcohol in violation of federal law. Upon violation of that order, the court held the petitioner in contempt and ordered him imprisoned for a period of one year and ordered him to pay a fine of \$1000. Thereafter, the President issued a pardon commuting the sentence to the fine alone, which was paid. Nevertheless, the district court ordered the petitioner remanded to serve the period of incarceration on the theory that the pardon power did not extend to contempt findings because "Offenses," as used in the Pardon Clause, only extends to "crimes and misdemeanors."<sup>206</sup>

The Court held that the President was acting within his powers under the Pardon Clause. The Court specifically held that "the term 'offences'" as used in the Pardon Clause is "more comprehensive . . . than are the terms 'crimes' and 'criminal prosecutions.'"<sup>207</sup> The contempt order in *Grossman* was technically classified as "criminal" rather than "civil" contempt, but the Court was clear that it was not criminal in the sense of the Fifth and Sixth Amendments because no right to jury attached, nor did other constitutional criminal procedure protections.<sup>208</sup> The civil versus criminal distinction in the contempt context rested on the question of whether the penalty imposed was intended to vindicate the rights of the state, the dignity of the court so to speak, or the rights of a private party. The former were designated as criminal contempt and the latter as civil contempt.

Critical to the Court's analysis was its holding that the scope of the pardon power was coextensive with the scope of the King's prerogative at the time of the framing.<sup>209</sup> The Court observed that the pardon power in England had extended to contempt orders that sought to vindicate wrongs against the state, but not to contempt orders aimed at delivering justice and restitution to private individuals.<sup>210</sup> Thus, the reach of the pardon power, the Court held, turned not on the criminal designation but on whether the offense was properly considered

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<sup>205</sup> *Grossman*, 267 U.S. at 88-89.

<sup>206</sup> *Id.* at 108.

<sup>207</sup> *Id.* at 117-18 (citing *Schick v. United States*, 195 U.S. 65, 69-70 (1904)).

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 109 (quoting *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833)) ("As this power had been exercised, from time immemorial, by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance; we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."); see also *Ex parte Wells*, 59 U.S. (18 How.) 307, 309 (1855) ("[The pardon power] is said to be the exercise of prerogative, such as the king of England has in such cases . . .").

<sup>210</sup> *Grossman*, 267 U.S. at 110 ; see also *Heckler v. Chaney*, 470 U.S. 821, 847-48 (1985) (Marshall, J., concurring); Duker, *supra* note 52, at 486.

an offense against the state rather than a dispute between private parties.<sup>211</sup> In its analysis, the Court explicitly recognized that such pardons, even for offenses against the state, can infringe on the power of the coordinate branches of government. Nevertheless, the Court explained that that was the balance the Constitution struck as a fail-safe protection against unjust deprivations of liberty.<sup>212</sup>

Several decades earlier, the Supreme Court considered the case of *The Laura*,<sup>213</sup> wherein a private citizen had filed suit against a steamboat operator seeking statutory damages imposed on such operators for exceeding its permissible passenger load.<sup>214</sup> The statute, however, made the private right of action secondary to an action in the name of the United States and also permitted the Secretary of the Treasury, in his discretion, to absolve any violating carrier of the liability imposed by statute. After the Secretary granted such absolution, the case was dismissed and the plaintiff appealed, arguing that Congress violated the Constitution by delegating to the Secretary the exclusive right of the President to issue reprieves and pardons for offenses against the United States. In its analysis, the Court accepted that pardon power would permit the President to absolve the carrier of civil liability for the cause of action held by the United States but rejected that the power was exclusive to the President, instead holding that Congress too could grant such relief.<sup>215</sup>

The conclusion that the pardon power extends beyond criminal offenses comports with the authoritative accounts of the historical exercise of the King's prerogative. Indeed, applying the Supreme Court's holding that the President's pardon power is coextensive with the pardon power of the King at the time of the Founding leads to an abundance of evidence of civil pardon power. While the criminal-civil divide was not well established at the time of the framing,<sup>216</sup> there is, nevertheless, an "unbroken line of kings and queens [who] pardoned offenses that would almost undoubtedly be civil today."<sup>217</sup> At common law, the pardon power was limited not by the criminal designation but by the principle that the Executive had full discretion to relieve an individual of penalties for offenses against the Crown but had no power to pardon individuals as a mechanism to interfere with disputes between private parties.<sup>218</sup> Thus, the

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<sup>211</sup> *Grossman*, 267 U.S. at 110; *Wells*, 59 U.S. at 312.

<sup>212</sup> *Grossman*, 267 U.S. at 120-21; see also *Power of the President to Remit Fines Against Defaulting Jurors*, 4 U.S. Op. Atty. Gen. 458, 461 (1845).

<sup>213</sup> 114 U.S. 411 (1885)

<sup>214</sup> *Id.* at 411-12.

<sup>215</sup> *Id.* at 413-14.

<sup>216</sup> Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations,"* 42 WM. & MARY L. REV. 447, 511-12 (2000); see also Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 320-28 (2008).

<sup>217</sup> Messing, *supra* note 202, at 689.

<sup>218</sup> *Id.* at 694; see also *In re Abrams*, 689 A.2d 6, 32 (D.C. Cir. 1997) (quoting *Osborn v.*

historical record establishes that, in the lead up to the founding of the Constitution, English kings pardoned fines and tariffs for a wide variety of noncriminal violations, including land use violation, import-export violation, tax violation, among others.<sup>219</sup> Given the Supreme Court's holding that the pardon power is identical to the corresponding power exercised by English kings at common law, this historical evidence lends strong additional support to the conclusion that the pardon power can reach civil offenses. So too does the practice of presidents, who have, without significant attention, issued pardons for civil offense many times throughout our nation's history.<sup>220</sup>

Thus, the Supreme Court has squarely held in *Grossman* that the pardon power could be used to protect the liberty of individuals in the context of noncriminal offenses against the federal government. In dicta, in *The Laura*, the Court again affirmed the use of pardons in noncriminal contexts.<sup>221</sup> The historical evidence, which the Court has treated as paramount, strongly indicates that a pardon may be extended to at least some civil offenses. The Court, likewise, has recognized that the pardon power includes the power to grant broad amnesties based on the President's unilateral normative judgment. This jurisprudence suggests that the pardon power may extend to modern administrative proceedings that involve offenses against the state, at least insofar as the offense implicates significant liberty interests.

However, the limitation of this authority must be recognized insofar as both cases arose before the New Deal and before the birth of the modern administrative state. The Court in these decisions therefore could not have foreseen the full modern separation of powers implications of extending the power beyond the criminal realm.<sup>222</sup> But regardless of whether a pardon can formally operate in such proceedings, insofar as the Clause is an established source of presidential authority to grant broad categorical amnesties, and insofar as its operation is not strictly limited to criminal proceedings, the Pardon Clause jurisprudence can, at minimum, help inform our understanding of the nature of prosecutorial discretion power in the administrative arena. Specifically, the

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United States, 91 U.S. 474, 477 (1875)); Duker, *supra* note 52, at 486; *cf.* *Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 270-71 (1935) (holding that outside the pardon context a civil suit was an "offense[] against the United States"). State courts, in interpreting their constitutions' pardon powers, have come to similar conclusions about the powers' extracriminal reach. *See, e.g., In re Opinion of the Justices*, 17 N.E.2d 906, 909 (Mass. 1938); *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, 121 (La. 1872).

<sup>219</sup> Messing, *supra* note 202, at 690; *see also id.* at 694-98 (citing common law cases approving the use of civil pardons).

<sup>220</sup> *Id.* at 719-23 (describing how Presidents Washington, John Adams, Jefferson, and Franklin Roosevelt used the pardon power to pardon offenses that would be considered civil in modern times).

<sup>221</sup> *The Laura*, 114 U.S. 411, 413-14 (1885) ("[T]he President, under the general, unqualified grant of power to pardon offences against the United States, may remit fines, penalties, and forfeitures of every description arising under the laws of Congress . . .").

<sup>222</sup> It is worth noting that the Supreme Court has continued to cite *Grossman* in the modern era. *See, e.g., Schick v. Reed*, 419 U.S. 256, 266 (1974).

Pardon Clause jurisprudence suggests that the President may enjoy heightened prosecutorial discretion powers beyond the criminal realm in administrative proceedings which are closely tied to the historic roots of the Pardon Clause.

The two primary textual sources of the President's generalized prosecutorial discretion authority—the Take Care and Executive Vesting Clauses—help us identify the tension between the President's *duty* to carry out the constitutionally enacted laws and his *power* to exercise independent discretion in enforcing the laws. However, these provisions do little to help us identify a workable limiting principle that can hold true to these sometimes competing constitutional goals. The jurisprudence regarding the Pardon Clause, however, helps move the inquiry forward insofar as it makes clear that there are certain categories of enforcement where the Constitution places a thumb on the scale of Presidential power and, conversely, the legislature's power is more limited. In short, the Pardon Clause jurisprudence suggests additional prosecutorial discretion authority when the enforcement proceedings relate to offenses against the state, rather than to disputes between private actors, and makes clear that the constitutional order permits unilateral power to deliver mercy but not punishment. Thus, the jurisprudence regarding the textual sources of prosecutorial discretion power suggests that the quest in the existing scholarship to identify a single appropriate limiting principle is misguided. The structural constitutional analysis below seeks to further explore the boundary of heightened power suggested by the Pardon Clause.

#### B. *Structural Constitutional Analysis*

The conventional wisdom is sound that the President may not generally, as a result of policy disagreements with Congress, direct administrative agencies to stop enforcing statutes against broad categories of potential offenders.<sup>223</sup> But the history and jurisprudence discussed above demonstrate that, in at least some limited contexts, broad categorical prosecutorial discretion policies have played an important role in federal policy making. This Section further explores the potential limiting principle for heightened prosecutorial discretion suggested by the Pardon Clause. Namely, I consider the implications of cabinining heightened prosecutorial discretion powers to the limited category of federal enforcement proceedings that relate to offenses against the state and that implicate significant liberty interests. Specifically, this Section evaluates the limiting principle with reference to the values that underlie the separation of powers doctrine and the structural bias against liberty deprivation built into the Constitution. In addition, this Section considers how this limiting principle interacts with the tenet that prosecutorial discretion may not generally be used to undermine vested private rights. Finally, this Section further considers the implications of the limiting principle through the lens of participatory democratic theory, before turning to the practical constraints this potential limiting principle can impose on presidential policy making in Part III.

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<sup>223</sup> See Andrias, *supra* note 16, at 1113.



### 1. The Constitutional Bias Against Liberty Deprivation

The question of how much prosecutorial discretion a president should have is first and foremost a question of the proper separation of powers between Congress and the President. In evaluating this issue, one must start by examining the purpose behind that separation of powers. There are few points where the intent of the Framers is as clear. As Justice Jackson explained in his famous concurring opinion in *Youngstown*, “the Constitution diffuses power the better to secure liberty.”<sup>224</sup> Madison made the same point emphatically in Federalist 47, wherein he sought to articulate the justification for the separation of powers between the three branches:

The reasons on which Montesquieu grounds his maxim [of separation of powers] are a further demonstration of his meaning. “When the legislative and executive powers are united in *the same* person or body,” says he, “there can be no liberty, because apprehensions may arise lest the same monarch or senate should *enact* tyrannical laws to execute them in a tyrannical manner.”<sup>225</sup>

While political theorists generally agree that the system of separation of powers was envisioned primarily as a “prerequisite for civil liberty,”<sup>226</sup> political liberty as well as physical liberty was surely encompassed in this vision.<sup>227</sup> Moreover, property protection is also clearly a central value in the constitutional order.<sup>228</sup> How then does the constitutional structure support the notion of

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<sup>224</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); see also *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (“The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.”); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536-38, 137 n.102 (1991) (describing the historical context and rationale for the structural protection of individual rights adopted by the Framers); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253, 1259-60 (1988) (describing how the constitutional system of checks and balances was designed “as a means of protecting individual liberty from arbitrary governance”); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) (describing how checks and balances and the separation of powers were designed “to protect the citizens from the emergence of tyrannical government”).

<sup>225</sup> THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed. 1961); see also MONTESQUIEU, THE SPIRIT OF THE LAWS 182 (J.V. Prichard ed., Thomas Nugent trans., 1900) (1748).

<sup>226</sup> Brown, *supra* note 224, at 1533 (quoting W. GWYN, THE MEANING OF THE SEPARATION OF POWERS 11 (1965)).

<sup>227</sup> *Id.*

<sup>228</sup> *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972) (“It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the

enhanced discretion solely for the protection of physical liberty? First, notwithstanding the value placed on property in the Constitution generally, in the context of separation of powers theory and jurisprudence, liberty protection, more than property preservation, is the primary consideration.<sup>229</sup> Thus, insofar as the robust prosecutorial discretion is viewed as primarily a separation of powers issue, a focus on liberty protection is warranted.

Second, while the Constitution secures many varieties of liberty, a review of the due process jurisprudence demonstrates that not all liberty interests receive the same level of protection. The Constitution reserves the greatest procedural protections for those at risk of losing their physical liberty.<sup>230</sup> The Supreme Court has not only extended a panoply of special procedural protections when physical liberty is at issue, but it has also characterized the deprivation of physical liberty as being “at the core of the liberty protected by the Due Process Clause,”<sup>231</sup> “the most elemental of liberty interests,”<sup>232</sup> “a massive curtailment of liberty,”<sup>233</sup> and an “interest of immense importance” and “transcending value.”<sup>234</sup> Modern jurisprudence demonstrates that creating special protections

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Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential pre-condition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee.” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 10 (1948)).

<sup>229</sup> *Brown*, *supra* note 224, at 1533 (“On the American side of the Atlantic the primary impetus for separated powers was the establishment and maintenance of political liberty.”).

<sup>230</sup> *See, e.g.*, *Jones v. United States*, 463 U.S. 354, 361-62 (1983) (noting that “commitment for any purpose constitutes a significant deprivation of liberty” and requiring clear and convincing evidence of dangerousness to confine a mentally ill individual (citations omitted)); *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (requiring that qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital); *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (holding that a state must bear the burden of proof beyond a reasonable doubt on facts that can trigger a more lengthy deprivation of physical liberty); *In re Winship*, 397 U.S. 358, 364, 368 (1970) (clarifying the requirement of proof beyond a reasonable doubt for individuals faced with criminal incarceration and extending the rule to juveniles facing physical liberty deprivations in juvenile delinquency proceedings); *In re Gault*, 387 U.S. 1, 35-42 (1967) (holding that due process requires the State to pay for representation by counsel in a civil “juvenile delinquency” proceeding that could lead to incarceration).

<sup>231</sup> *Turner v. Rogers*, 563 U.S. 431, 445 (2011) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)) (evaluating detention pursuant to contempt proceedings).

<sup>232</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (evaluating detention of military detainees).

<sup>233</sup> *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (evaluating detention of sex offenders).

<sup>234</sup> *Winship*, 397 U.S. at 363-64 (evaluating detention of juvenile delinquents).

against unwarranted liberty deprivations is entirely consistent with the constitutional scheme.

As Judge Cavanaugh of the D.C. Circuit explained:

The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers. One of the greatest *unilateral* powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior . . . . [T]he President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed . . . .<sup>235</sup>

Nevertheless, a robust vision of prosecutorial discretion, even confined to the liberty deprivation context, undeniably can come at a significant cost to congressional power. An organizing principle of separation of powers jurisprudence has always been to guard against the aggrandizement of one branch of government at the expense of the power of another.<sup>236</sup> However, it somewhat misses the mark to characterize the President's power to unilaterally prevent liberty deprivation through inaction as presidential aggrandizement vis-à-vis Congress. In fact, the constitutional scheme reserves precisely the same unilateral power for Congress to prevent liberty deprivations. The Due Process Clause ensures that the President may not deprive a person of liberty except pursuant to the law as set forth by Congress. Through inaction, the decision *not* to pass such a law, Congress could therefore also prevent liberty deprivation. Thus, the presidential power to prevent liberty deprivation must be viewed alongside the congressional power to prevent liberty deprivation through lawmaking and the judicial power to prevent liberty deprivation through habeas review. Rather than aggrandizing one branch above the others, the unilateral power of each branch to prevent liberty deprivation reflects a constitutional structural bias against liberty deprivation in general.<sup>237</sup>

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<sup>235</sup> *In re Aiken Cty.*, 725 F.3d 255, 264 (D.C. Cir. 2013).

<sup>236</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility."); *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."); THE FEDERALIST NO. 51 (James Madison), *supra* note 137, at 321-22 (describing how the separation of powers works to prevent power from gradually becoming concentrated in one part of the government).

<sup>237</sup> Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006) (explaining the effective veto power of each branch to prevent liberty deprivation in the criminal context); cf. *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003) ("Paradoxically, the plenary prosecutorial power of the executive branch safeguards liberty, for, in conjunction with the plenary legislative power of Congress, it assures that no one can be convicted of a crime without the concurrence of all three branches . . . .").

Another concern regarding robust prosecutorial discretion power relates to the fact that our system of lawmaking has a built-in bias toward inaction—a reality that is hard to escape in the context of today’s congressional gridlock.<sup>238</sup> Some have argued that, in light of the bias toward inaction, a robust vision of prosecutorial discretion power is especially problematic.<sup>239</sup> Insofar as it is extremely difficult to make laws in the first place, they argue that allowing a president to refuse to enforce, or fully enforce, a properly enacted law creates too great a bias toward inaction and thus too great a tendency toward effective deregulation.

In the narrow confines of the liberty deprivation context, however, the Constitution does precisely what these scholars identify as generally inconsistent with the constitutional scheme. The Constitution imposes several additional hurdles and safeguards against government action that can result in liberty deprivation. Several provisions of the Constitution impose special obstacles when government action involves the deprivation of physical liberty. The Suspension Clause dictates that, unlike most other contexts, the judiciary cannot be deprived of the opportunity to review the legality of deprivations of physical liberty.<sup>240</sup> The Bill of Attainder Clause limits the ability of the legislature to directly dictate the deprivation of an individual’s liberty.<sup>241</sup> Likewise, the Pardon Clause gives the President the unique power to prevent the deprivation of liberty.<sup>242</sup> And, of course, there are a host of additional protections against unwarranted liberty deprivations in criminal proceedings.<sup>243</sup> Not all of these provisions are strictly limited to the liberty deprivation context, but the unifying theme and the central danger against which these provisions guard is the danger of unwarranted physical liberty deprivation. Collectively, these provisions demonstrate that, notwithstanding the general hurdles to lawmaking, the constitutional order includes many additional fail-safe mechanisms when it comes to federal action that can result in the deprivation of physical liberty.

Thus, where prosecutorial discretion operates as a one-way ratchet against liberty deprivation, the foundational concern that underlies the system of separation of powers is not offended. Heightened prosecutorial discretion in this realm is also consistent with the constitutional scheme that includes several additional checks against government action in the liberty deprivation context. In contrast, a robust vision of prosecutorial discretion across all administrative contexts, which allows broad inaction based on policy disagreements with Congress would also act as a one-way ratchet. However, this vision would not specifically be in favor of liberty but rather in favor of a generalized deregulation

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<sup>238</sup> See, e.g., Price *supra* note 15, at 686-87.

<sup>239</sup> See Love & Garg, *supra* note 21, at 1200-01.

<sup>240</sup> U.S. CONST., art. I, § 9, cl. 2; *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

<sup>241</sup> U.S. CONST., art. I, § 9, cl. 3.

<sup>242</sup> See *supra* Section II.A.3.

<sup>243</sup> See, e.g., U.S. CONST. amend. V (granting the right to a grand jury, protection against double jeopardy, and the right against self-incrimination); *id.* amend. VI (granting the right to a speedy trial, the right to a trial by jury, the right to confront witnesses, and the right to counsel).

bias. That bias finds no support in the structure of the Constitution. In addition to the structure and foundational features, modern due process jurisprudence also demonstrates the unique protections the Constitution affords when physical liberty is at stake. Collectively, the foundational purpose of the separation of powers, the unique structural checks against liberty deprivation in the Constitution, and the modern case law reserving the greatest process protection when physical liberty is at stake all evince a constitutional scheme that militate in favor of the most robust protections against the deprivation of physical liberty.

## 2. Public Offenses Versus Interference with Private Rights

Insofar as the President derives some aspects of any heightened prosecutorial discretion authority from the Pardon Clause, it is important to consider the distinction in the Pardon Clause jurisprudence between offenses against the state and the disruption of private rights.<sup>244</sup> In some sense, all administrative and criminal proceedings can be understood as offenses against the state. There are always important societal interests at play, which is why society invests in establishing these enforcement systems. Society as a whole has a strong interest in the enforcement of labor, immigration, civil rights, securities, and criminal laws. Conversely, government enforcement proceedings always have some collateral impact on private rights (beyond the obvious private rights of the subject of the enforcement proceedings). In labor law, prosecutorial discretion decisions can impact the private rights of employers and employees. In civil rights law, prosecutorial discretion decisions can impact the private rights of potential victims of civil rights as well as potential rights violators. In criminal law, prosecutorial discretion decisions can similarly be conceived of as impacting the rights of victims and perpetrators.

In the context of the modern administrative state, how then do we give meaning to the principle that the pardon power, and the derivative aspects of the prosecutorial discretion power, extend only to "offenses against the United States" and may not be used to interfere in private disputes?<sup>245</sup> In its clearest form, a criminal prosecution for treason is an offense against the United States. Notwithstanding the potential presence of individualized victims, it is a well-established principle of criminal law that, as a formal matter, the rights being vindicated in criminal proceedings are societal, not individual, rights.<sup>246</sup> While a victim of a crime may have an individual civil cause of action against a criminal defendant, the public decision whether or not to prosecute that individual does not disrupt that right. On the other hand, the use of prosecutorial discretion to interfere in a private tort dispute, for example, would be a clear example of an impermissible use of the power to directly interfere with a private right. It is clear that the President could not generally use his enforcement discretion to direct the termination of a private civil law suit.

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<sup>244</sup> See *supra* notes 209-18 and accompanying text.

<sup>245</sup> U.S. CONST. art II, § 2, cl. 1.

<sup>246</sup> See *Heckler v. Chaney*, 470 U.S. 821, 847-48 (1985) (Marshall, J. concurring).

I start from the premise that all public enforcement proceedings involve some degree of public interest and some degree of private interest. If we think about the potentially competing public and private interests as a sliding scale, we would expect that, as the balance tips more toward the public interest, the President's prosecutorial discretion power would be greater. If the primary interest belongs to the government, on behalf of the people, the government should be free to forego enforcement to vindicate that interest at its discretion. Conversely, when the balance tips more toward a private interest, we would expect the President's power to diminish.

The line drawing is a difficult task. However, there are certain categories of federal enforcement proceedings where the balance tips more in favor of the public interest, where the *formal* interest at stake in the proceedings is societal, not individual, and where the result of the proceedings cannot avoid *directly* harming the private rights of persons who are not parties to the proceedings. In contrast, there are certain categories of federal enforcement proceedings that more closely resemble the rights at stake in private tort disputes than the public interest in treason prosecutions. Such proceedings are brought by the government primarily to vindicate the rights of specific individuals, or distinct groups of individuals, and the proceedings can have a *direct* impact on the private rights of nonparties to the proceedings. Again, insofar as the Pardon Clause is a source of heightened prosecutorial discretion authority, such power should be greater in regard to those proceedings that fall into the former group and lesser in those proceedings that fall into the latter group.

Notably, for this Article's purposes, enforcement proceedings that implicate the deprivation of physical liberty universally fall into the former group, where the public interest is paramount. The decision of the President to initiate or not initiate proceedings that could result in criminal incarceration, deportation, or military internment, for example, are formally designed to vindicate a general societal interest and cannot directly impact the private legal rights of nonparties. In contrast, there are certain administrative proceedings that are initiated primarily to vindicate particularized private interests and where the outcome of the proceedings can directly impact the legal rights of nonparties. The SEC may enforce securities laws on behalf of shareholders against a company, and the outcome of those proceedings can *directly* impact the legal rights of such shareholders. The DOL may enforce labor laws on behalf of employees against an employer, and the outcome of those proceedings can *directly* impact the legal rights of such employees. The DOJ may enforce civil rights laws on behalf of aggrieved individuals against a state or private entity, and the outcome of those proceedings can *directly* impact the legal rights of such aggrieved individuals. In these instances, inaction, as much as action, means the federal government is choosing sides in a private dispute. Choosing not to act—and not to initiate enforcement proceedings—puts the federal government on the side of the regulated entity. Choosing to act—and initiate enforcement proceedings—puts the federal government on the side of the intended beneficiary of the regulation.

Justice Marshall spoke to this distinction in his concurrence in *Heckler*:

Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The

conduct at issue has already occurred; all that remains is society's general interest in assuring that the guilty are punished. In contrast, requests for administrative enforcement typically seek [to remedy] . . . injuries [that] often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries.<sup>247</sup>

Though Justice Marshall drew a line between criminal and administrative enforcement, what he identified as unique and important about criminal enforcement that justifies the heightened discretion can be applied with equal force to administrative enforcement that threatens physical liberty. They are both post hoc enforcement proceedings that seek to vindicate society's general interest (as opposed to settling disputes between various private interests) and can result in a significant deprivation of liberty. He concluded by noting that "[t]o the extent arguments about traditional notions of prosecutorial discretion have any force at all in [the administrative] context, they ought to apply only to an agency's decision to decline to seek penalties against an individual for past conduct."<sup>248</sup>

There are some administrative enforcement schemes that do not implicate physical liberty but nevertheless may be conceived of as targeting offenses against society as a whole. Environmental enforcement and tax enforcement may fall into this category. Thus, while enforcement actions that implicate physical liberty are universally offenses against the state, offenses against the state do not universally implicate physical liberty interests. One can think of these two factors as separate—as offenses against the state *and* offenses that can trigger liberty deprivation—each militating in favor of more robust prosecutorial discretion powers. When both factors are present, we would expect the discretion to be at its height.<sup>249</sup>

### 3. Democratic Participatory Theory Considerations

A separate factor to be considered is how the scope of prosecutorial discretion authority should be informed by participatory democratic dynamics.<sup>250</sup> Outside

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<sup>247</sup> *Id.* (internal citations omitted).

<sup>248</sup> *Id.* at 849-50.

<sup>249</sup> Relatedly, in assessing the potential danger of robust prosecutorial discretion powers, some have argued it is the functional equivalent of unilateral presidential lawmaking because "inaction and action are two sides of the same coin: any refusal to act may quickly be recast as a decision to do something. . . . Inaction, in short, is no different from action in any fundamental, constitutional sense." Love & Garg, *supra* note 21, at 1205. However, while the distinction between inaction and action can be illusory at times, there is nothing abstract or subtle about the distinction between the affirmative act of locking someone up and the inaction of refusing to do so. As Cass Sunstein has explained, constitutional "dangers [are] thought to lie principally in governmental action rather than failure to act." Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 433 (1987). Nowhere is that more true than in the liberty deprivation context.

<sup>250</sup> See Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237, 1243-50 (2005) (discussing the utility of democratic participation as a guide to

of the liberty deprivation context, it is important to consider how the regulated entities, generally most able to advocate for themselves through Congress, would also benefit from the bias toward inaction that robust prosecutorial discretion provides. In most traditional administrative contexts—e.g., food safety, environmental regulation, labor protections, and banking regulations—the interests of the regulated entities are significantly more concentrated than the interests of the beneficiaries of the regulation. In addition, the regulated entities in these contexts, which are often powerful business interests, are usually better situated than the beneficiaries of the regulations to influence the congressional law-making process and thus to guard against excessively punitive statutory schemes. In these contexts, the dynamics of agency capture and, even short of capture, the ability of these types of regulated entities to influence the prosecuting agencies can operate as an additional effective check against excessive enforcement.<sup>251</sup> These dynamics support a more limited vision of prosecutorial discretion authority in traditional administrative realms since we have little reason to fear overly punitive statutory schemes.

However, precisely the opposite democratic participatory dynamic is at play in the liberty deprivation context. In the criminal context, troves have been written about how the political dynamics of criminal law create ever-expanding criminal codes and increasingly harsh penalties.<sup>252</sup> The same dynamics are almost universally present in other realms where Congress establishes enforcement schemes that threaten physical liberty.<sup>253</sup> Guantanamo detainees, Japanese internment victims, sex offenders, undocumented immigrants, and severely mentally ill individuals are dramatically unlike the entities regulated in the traditional administrative realms discussed above. These disenfranchised groups are least able to guard against excessively punitive statutory schemes through the democratic process. As a result, many commentators have observed how these realms of federal law, like criminal law, have trended almost consistently toward harsher enforcement schemes.<sup>254</sup> Thus, insofar as the concern about excessive prosecutorial discretion relates to the countermajoritarian potential for the President to undermine the will of Congress, in the liberty deprivation realm, a countermajoritarian safety valve is

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constitutional interpretation); *see also* Cheh, *supra* note 17, at 265-66 (discussing the participatory democratic theory considerations in evaluating prosecutorial discretion power).

<sup>251</sup> *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 17-19 (2010); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1342-61 (2013).

<sup>252</sup> *See, e.g.*, Bowers, *supra* note 146, at 1662; Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 759-60 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 508-09 (2001).

<sup>253</sup> *See* Cox & Rodríguez, *President and Immigration Law*, *supra* note 16, at 516; Price, *supra* note 15, at 746.

<sup>254</sup> *See, e.g.*, Cox & Rodríguez, *President and Immigration Law*, *supra* note 16, at 516 (describing how the development of international law has led to an expansion in the types of illegal behavior that can result in deportation).



an important safeguard against excessively punitive statutory schemes targeting politically disfavored minority groups. Moreover, the same political dynamics that operate against Congress and lead to the one-way ratchet of ever-harsher criminal and immigration laws, for example, also operate against the President directly—significantly reducing the potential for presidential overreach in these arenas.

In the context of the modern administrative state, vision of the President's prosecutorial discretion power threatens to seriously upset the constitutional balance and to create a deregulatory bias that is unsupported by the history, text, and structure of the Constitution. Concerns about presidential encroachment on Congress's primary policy-making function have led some to argue that permitting the President to unilaterally refuse to enforce, or substantially underenforce, laws based on her own normative judgment about the public interest could effectively give the President a second unconstitutional veto. Although this is a legitimate and significant concern, these scholars have failed to consider the possibility that not all prosecutorial discretion power is created equal.

In traditional administrative realms, the recent trend toward categorical prosecutorial discretion policies is ahistorical. Allowing the President to categorically underenforce in all administrative realms would grant her vast power to undermine the will of Congress across an enormously broad swath of subject areas that collectively make up a significant portion of the work of the federal government. It would further allow powerful regulated entities, fully able to advocate for themselves through the legislative process, an unnecessary second bite at the apple to escape regulation.

In contrast, recognizing the President's power to enact categorical prosecutorial discretion policies only in those realms where physical liberty is at stake is entirely consistent with historical practice. Throughout the nation's history, in both the immigration and criminal realms, presidents have repeatedly enacted such policies, generally without significant controversy. Such power is consistent both with the Constitution's structural bias against liberty deprivation and with the way in which prosecutorial discretion power is amplified by the Pardon Clause when enforcement proceedings seek to vindicate offenses against the public that do not directly interfere with vested private rights. It is also in the liberty deprivation realm where the regulated individuals are universally disfavored groups, least able to advocate for themselves through the legislative process, and thus where our system most needs an additional check on congressional power. Moreover, limiting robust prosecutorial discretion authority to the liberty deprivation context cabins this tool of presidential power to the context of its historic use and thus significantly limits the potential for unwarranted presidential encroachment into congressional policy making.<sup>255</sup> The number of arenas where the federal government locks people up, or imposes some equivalent physical deprivation of liberty, is quite limited. Beyond the

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<sup>255</sup> See *supra* notes 37-38, 54-76, 107-12 and accompanying text.

criminal sphere, immigration detention and deportation are unquestionably the largest areas implicated.<sup>256</sup> While caution should be exercised any time the President is empowered to undermine the will of Congress, limiting this power to the liberty deprivation realm is both consistent with historical practice and sharply circumscribes its reach, as the large majority of federal government's administrative enforcement apparatus would not be implicated.

### III. EXPLORING THE LIMITS OF THE EXECUTIVE POWER TO PROTECT LIBERTY

To say that the President's prosecutorial discretion authority is at its zenith in the liberty deprivation context does not mean that the authority is without limits. Certain limits are clear and uncontested. The difficult separation of powers issues are whether, when, and how Congress may circumscribe the heightened prosecutorial discretion authority of the President. Before turning to this inquiry, however, it is important to recognize the clear limits on the President's power that operate separate and apart from any limits Congress may be able to impose.

First, the definitional limits of prosecutorial discretion, which distinguish it from the repudiated dispensing and suspending powers, are foundational boundaries of the President's enforcement discretion.<sup>257</sup> Prosecutorial discretion may only be exercised after an offense has been committed.<sup>258</sup> The President thus has no power to sanction *ex ante* any violation of law.<sup>259</sup> Moreover, the President's enforcement discretion does not include the power to refuse to enforce congressional mandates that an agency take an action unrelated to individualized enforcement, for example, to promulgate regulations, spend appropriated dollars, or implement federal programs.<sup>260</sup> If, for example, Congress were to pass a law requiring the construction of a wall along the southern border of the country, the President would be obligated, notwithstanding his stated policy disagreements with such a project, to build the wall. Full enforcement is the default rule but the very nature of prosecutorial discretion is an exception to that default.

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<sup>256</sup> Other types of noncriminal federal confinement include prisoners of war subject to military commissions, military internment, and sex offenders and mentally ill individuals subject to civil commitment.

<sup>257</sup> See generally *supra* notes 21-23.

<sup>258</sup> See *supra* notes 46-52.

<sup>259</sup> See *supra* notes 46-52; see also *Brown v. Walker*, 161 U.S. 591, 601 (1896); Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 172 (1999); Duker, *supra* note 52, at 526; Hoffstadt, *supra* note 197, at 571 n.37.

<sup>260</sup> *Massachusetts v. EPA*, 549 U.S. 497, 533-34 (2007) (explaining that the word "judgment" in the Clean Air Act is "not a roving license [for the EPA] to ignore the statutory text . . . but a direction to exercise discretion within defined statutory limits"); *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610-13 (1838) (noting that construing the obligation "imposed on the President to see the laws faithfully executed, [to] impl[y] a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible").

Prosecutorial discretion is limited to those circumstances where Congress has enacted a statutory scheme that regulates private conduct and proscribes penalties for misconduct that can only be triggered by executive prosecution. The distinction was explained by the D.C. Circuit in *In re Aiken County*<sup>261</sup>:

As a general matter, there is widespread confusion about the differences between (i) the President's authority to disregard statutory mandates or prohibitions on the Executive, based on the President's constitutional objections, and (ii) the President's prosecutorial discretion not to initiate charges against (or to pardon) violators of a federal law. There are two key practical differences. [T]he President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds. By contrast, the President may exercise the prosecutorial discretion and pardon powers on any ground . . . .<sup>262</sup>

Thus, outside the context of enforcement proceedings, Congress may direct agency action and prosecutorial discretion principles impose no obstacle to such direction. This does not mean that Congress's general power to direct agency action can be used as a Trojan horse to limit the constitutionally protected prosecutorial powers of the President. To the extent that Congress cannot not directly limit the President's discretion over agency enforcement actions,<sup>263</sup> neither could it do so indirectly through appropriations or otherwise.<sup>264</sup>

Second, the President remains accountable to, and limited by, the will of the electorate. Some may discount the potency of this check on presidential power, especially during a second term in office. However, public support or hostility toward presidential action always remains a primary consideration insofar as the President's power vis-à-vis Congress is often a function of her public support. Moreover, the President at all times remains conscious of her role as the leader of her political party and acutely attuned to how her policies will impact the electoral fate of her party. In addition, the undivided concentration of the prosecutorial discretion power in the President serves to increase accountability to the electorate.<sup>265</sup> This is particularly true in the arenas where liberty deprivation is at stake—e.g., criminal, immigration, and military internment—since prosecutorial discretion in these contexts benefits widely disfavored classes. Thus, in the liberty deprivation context in particular, as Hamilton explained, the “dread of being accused of weakness or connivance” is a powerful

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<sup>261</sup> 725 F.3d 255 (D.C. Cir. 2013).

<sup>262</sup> *Id.* at 265 n.10.

<sup>263</sup> See *infra* Section III.B.

<sup>264</sup> See *McMellon v. United States*, 387 F.3d 329, 369 (4th Cir. 2004) (“[I]f Congress were to subject the Executive’s exercise of its core prosecutorial discretion to review by the courts, or, even more dramatically, to condition a significant level of funding on the exercise of the Executive’s pardon or appointment powers in a particular manner, legitimate questions as to the effect of those limitations on the independence of the Executive could be raised.”); *infra* Section III.B.

<sup>265</sup> THE FEDERALIST NO. 74 (Alexander Hamilton), *supra* note 28, at 447.

limit on the President's broad assertion of her power.<sup>266</sup> Accordingly, democratic accountability is a significant check on the President's prosecutorial discretion power, particularly in high-profile ambitious assertions of such power.

Finally, while the Constitution bestows on the President her prosecutorial discretion power, it also unquestionably limits that power.<sup>267</sup> Equal protection values require that prosecutorial discretion policies cannot be motivated by an improper discriminatory purpose.<sup>268</sup> Nor does the Constitution permit the President to exercise prosecutorial discretion with a retaliatory purpose or with the intent to punish individuals for exercising their First Amendment or other constitutional rights.<sup>269</sup> Similarly, an exercise of prosecutorial discretion triggered by bribery or other corrupt motives would offend due process norms.<sup>270</sup> Thus, while the Constitution bestows extremely broad prosecutorial discretion authority on the President, it also imposes some clear outer limits to the exercise of that discretion.

These principles limit the operation of prosecutorial discretion power in all contexts. However, in determining how that power may be limited by Congress, context matters. Pursuant to the familiar *Youngstown* framework, presidential power is generally a function of the extent to which Congress has authorized, remained silent, or disapproved of presidential action.<sup>271</sup> However, there are certain realms where Congress may not, or has only a limited ability to, intrude on the power of the President.<sup>272</sup> Insofar as the President's prosecutorial

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<sup>266</sup> *Id.* at 448.

<sup>267</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (noting that though prosecutorial discretion is broad, there are "undoubtedly constitutional limits upon its exercise"); *cf.* *Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that even actions generally precluded from judicial review can be reviewable if they raise a constitutional question).

<sup>268</sup> *See* *Wayte v. United States*, 470 U.S. 598, 630 (1985); *Hotel & Rest. Emps. Union, Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988) (en banc) (holding that the court could review policies for abuse of discretion where there is reason to believe a decision was motivated by discriminatory racial or religious animus); *Wadhia*, *supra* note 1, at 287 (noting that the Court has recognized an exception to the general presumption against reviewability in cases where it is alleged that an agency is engaging in selective enforcement on the basis of race). *But cf.* *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 488 (1999) (holding that an "alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation").

<sup>269</sup> *Heckler v. Chaney*, 470 U.S. 821, 846 (1985) (Marshall, J., concurring) (noting that the Court has previously "held that certain potentially vindictive exercises of prosecutorial discretion were both reviewable and impermissible"); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (observing that the Court had previously established a presumption of vindictiveness where a prosecutor sought a felony indictment only after a defendant exercised his statutory right to a trial *de novo*).

<sup>270</sup> *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978).

<sup>271</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>272</sup> *See, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2096 (2015) (holding

discretion authority is at its height in the liberty deprivation context, it follows that Congress's power is at its lowest ebb when it attempts to limit the President's authority to protect liberty. It is beyond the scope of this Article to identify the exact boundaries of presidential and congressional authority here. Below, I attempt to consider the areas where Congress may assert some control over prosecutorial discretion in the liberty deprivation context and to draw into focus those areas where congressional power may be uniquely limited.

#### A. *Indirect Mechanisms of Congressional Control*

There are certain indirect mechanisms that Congress can unquestionably utilize to exert control over prosecutorial discretion policies in any realm. Congress has oversight authority of all federal agencies and can engage in fact finding, hold public hearings, and call agency heads to account for controversial policies. Moreover, even when Congress lacks the authority to directly alter prosecutorial discretion policies, it has a myriad of tools to assert collateral political pressure on the Executive to express its disapproval.<sup>273</sup> For example, it can withhold appropriations, refuse to confirm executive nominees, conduct investigations, withhold action on collateral legislation of import to the President, or refuse to act on legislation essential to the operation of the government. Depending on the depth of Congress's disapproval and the depth of the President's commitment to her prosecutorial discretion policies, these collateral levers could be significant mechanisms of control.

#### B. *Direct Mechanisms of Congressional Control*

The most challenging constitutional issue is when and how Congress can directly assert control over a president's enforcement discretion. Congress can unquestionably always ratchet down enforcement, either by deregulating prohibited conduct, reducing proscribed statutory penalties, reducing or eliminating appropriations for certain types of enforcement actions, or in extreme cases, by granting legislative amnesties. The hard question is when, if ever, Congress can restrict the prosecutorial discretion policies of a President—either by establishing enforcement priorities or by directly mandating a certain level of enforcement.

Courts have, in a handful of cases, suggested that Congress can directly limit an administrative agency's enforcement discretion. In *Heckler*, the Supreme Court opined that "Congress may limit an agency's exercise of enforcement

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that the President has exclusive power to recognize foreign nations and Congress may not intrude on that power); *Schick v. Reed*, 419 U.S. 256, 266 (1974) (holding that the pardon power "cannot be modified, abridged, or diminished by the Congress").

<sup>273</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2701, 2704-05 (2013) (Scalia, J., dissenting) (discussing the "innumerable ways" Congress can exert indirect political pressure on the President); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012) (same); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 671-72 (1992) (same); Richman, *supra* note 252, at 759 (same).

power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency's power to discriminate among issues or cases it will pursue.<sup>274</sup> In *Dunlop v. Bachowski*,<sup>275</sup> an unsuccessful candidate for labor union office sued challenging the Secretary of Labor's decision not to bring a civil action to set aside a union election.<sup>276</sup> The Court held that review of the Secretary's decision not to file suit was justiciable and that Congress had permissibly limited the agency's prosecutorial discretion authority by mandating that an action be initiated if the Secretary finds probable cause of a violation that likely impact the outcome of the union election.<sup>277</sup> Similarly, in *Cook v. FDA*,<sup>278</sup> the D.C. Circuit interpreted a statute to entirely deprive the FDA of discretion to decline to initiate enforcement actions regarding the importation of certain restricted drugs.<sup>279</sup> Notably all of these cases arose in traditional administrative realms where the enforcement proceedings would not result in the deprivation of physical liberty.

Two things are clear from the case law and scholarship. First, there is widespread agreement that Congress may sometimes directly limit the scope of the Executive's prosecutorial discretion authority.<sup>280</sup> Second, there is widespread agreement that some congressional limits would impermissibly intrude on the President's prosecutorial discretion authority.<sup>281</sup> Nothing in the

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<sup>274</sup> *Heckler*, 470 U.S. at 833.

<sup>275</sup> 421 U.S. 560 (1975).

<sup>276</sup> *Id.* at 562-63.

<sup>277</sup> *Id.* at 566-68.

<sup>278</sup> 733 F.3d 1 (D.C. Cir. 2013).

<sup>279</sup> *Id.* at 7-10.

<sup>280</sup> *See, e.g., Morrison v. Olson*, 487 U.S. 654, 696 (1988); *Heckler v. Chaney*, 470 U.S. 821, 833 (1985); *Dunlop*, 421 U.S. at 566-68; Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2295 (2006); Love & Garg, *supra* note 21, at 1236; Price, *supra* note 15, at 707; Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 316 (2009).

<sup>281</sup> *See, e.g., Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976); *Schick v. Reed*, 419 U.S. 256, 266-67 (1974); *McMellon v. United States*, 387 F.3d 329, 369 (4th Cir. 2004); Price, *supra* note 15, at 707. Perhaps unsurprisingly, the OLC has been particularly protective of the President's nondefeasible enforcement discretion. *See, e.g.,* Memorandum from Patrick Philbin, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Daniel J. Bryant, Assistant Att'y Gen., Office of Legislative Affairs (Apr. 8, 2002), <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memojusticeauthorizationact0482002.pdf> [<https://perma.cc/6ZA9-BCAY>] ("Particularly where the Constitution expressly assigns a duty to the Executive, the Supreme Court has recognized grave constitutional flaws with attempts by Congress to effect encroachments upon subjects within the Executive's control."); Congress Requests for Info. from Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 79 (1989) ("[N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the executive branch by directing it to prosecute particular individuals."); Subpoenas of Dep't of Justice Investigative Files, 8 Op. O.L.C. 252, 264 (1984) ("The Executive therefore has the exclusive

case law or scholarship, however, provides adequate guidance regarding the line between these two generally accepted principles. The division between traditional administrative enforcement proceedings and enforcement proceedings that implicate physical liberty can fill this void and appropriately balance the critical separation of powers considerations.

In the traditional administrative realms, Congress should enjoy greater power to dictate the terms of executive enforcement via statute. Indeed, there are examples of statutory schemes that mandate enforcement in all cases where a violation is found.<sup>282</sup> It is hard to imagine, for example, that Congress could not mandate enforcement action necessary to remedy unsafe conditions discovered at a nuclear power plant. Identifying the precise boundaries of congressional power to limit enforcement discretion in traditional administrative realms is beyond the scope of this Article. However, whatever those boundaries may be, it seems clear that Congress cannot aggrandize its own power by granting executive discretion to actors under congressional control.<sup>283</sup> Categorical prosecutorial discretion policy in these traditional administrative realms, particularly when motivated by policy disagreements with Congress, would be the most difficult to justify.<sup>284</sup>

In the context of criminal enforcement and the limited administrative arenas that can result in the deprivation of an individual's physical liberty, Congress's power should be significantly more limited. Here Congress should not be permitted to encroach on the Executive's constitutional enforcement discretion by imposing an enforcement quota mandating a particular level of

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authority to enforce the laws adopted by Congress, and neither the Judicial nor Legislative Branches may directly interfere with the prosecutorial discretion of the Executive by directing the Executive to prosecute particular individuals.”).

<sup>282</sup> See, e.g., *Dunlop*, 421 U.S. at 560; *Cook*, 733 F.3d at 10 (holding that 21 U.S.C. § 381(a) requires the FDA to refuse admission of a drug where it finds a violation of the act).

<sup>283</sup> See *Buckley*, 424 U.S. at 136-37 (“Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection . . .” (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928))); see also *Free Enter. Fund*, 561 U.S. at 508 (“The only issue in this case is whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy. We hold that it cannot.”).

<sup>284</sup> In contrast, executive agencies must always be free to make prosecutorial discretion determinations based on resource allocation considerations. However, it can at times be difficult to distinguish pure resource allocation justifications from justifications based on normative considerations tied to mercy or societal utility. A decision, in the face of limited resources, to prioritize one type of labor violation over another because the Executive deems one more serious can be framed as a resource allocation decision. But the Executive has no special expertise in determining the seriousness of one offense versus the other. True resource allocation policies are based on considerations where the Executive holds some superior institutional expertise such as assessing the cost of certain types of prosecution or the likelihood of success.

enforcement.<sup>285</sup> Neither should Congress be permitted to proscribe the President's authority by dictating the factors that must be considered when the President exercises her enforcement discretion.<sup>286</sup> This is relatively uncontroversial in the criminal realm where courts have recognized that Congress may not limit prosecutorial discretion authority.<sup>287</sup> The same considerations that drive nondefeasible prosecutorial discretion authority in criminal proceedings—consistent historical practice, the Constitution's structural bias against liberty deprivation, the enhanced power emanating from the Pardon Clause for offenses against the state, and the participatory democratic theory dynamics—apply with equal force to other liberty deprivation realms.<sup>288</sup> Permitting Congress to dictate the terms of the President's prosecutorial

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<sup>285</sup> Interestingly, unlike in traditional administrative realms, Congress has almost universally refrained from enacting statutes that purport to limit executive enforcement discretion in the liberty deprivation realm. One prominent counter example is a provision that Congress has included in appropriations bills in recent years, which was originally understood to require that immigration authorities maintain custody of a certain number of immigrants on any given day. *See Consolidated Appropriations Act, 2014*, Pub. L. No. 113-76, 128 Stat. 5, 251 (2013) (requiring that the immigration agency maintain not “[fewer] than 34,000 detention beds”). This appears to be the sort of enforcement quota that I maintain is impermissible in the liberty deprivation realm. However, Secretary of Homeland Security Jeh Johnson, who oversaw the immigration agency, has rejected this interpretation. *See Jessica Vaughan, DHS Sec. Johnson Disputes Detention Bed Mandate*, CTR. FOR IMMIGR. STUD. (Mar. 14, 2014), <http://cis.org/vaughan/dhs-sec-johnson-disputes-detention-bed-mandate> [<https://perma.cc/RL4R-MXXX>]. He maintains that Congress cannot dictate a certain level of enforcement, and that the appropriation language only means that he must have 34,000 beds available on any given day. *Id.* Because the agency has adopted this view of the purported “bed quota,” its daily detained population of immigrant detainees has fallen significantly below the 34,000 beds described in the appropriations language. Joanne Faryon, *U.S. Government Holding Fewer Immigrants in Detention*, KPBS (Apr. 6, 2015), <http://www.kpbs.org/news/2015/apr/06/us-government-holding-fewer-immigrants-detention> [<https://perma.cc/WW6W-YZJL>] (reporting on data showing that the average daily immigrant detainee population for the first five months of fiscal year 2015 was 26,374).

<sup>286</sup> The OLC, in a memorandum issued on the same day President Obama announced his DAPA program, at least partially endorsed the idea that congressional priorities can act as a limiting principle on the President's prosecutorial discretion power. OLC Opinion, *supra* note 11, at 6 (noting Congress may limit an agency's exercise of enforcement power by setting substantive priorities). *But see Cox & Rodríguez, Redux*, *supra* note 16, at 148-59 (convincingly demonstrating the unworkability of this proposed limiting principle); Wadhia, *supra* note 1, at 246 (“Neither the immigration statute nor the regulations contain eligibility criteria for seeking a favorable grant of prosecutorial discretion.”).

<sup>287</sup> *See supra* notes 65-66 and accompanying text.

<sup>288</sup> *Cf. INS v. Chadha*, 462 U.S. 919, 935 n.8, 953 n.17 (1983) (reserving the question of whether Congress “retain[ed] the power . . . to enact a law, in accordance with the requirements of Art. I of the Constitution, mandating a particular alien's deportation,” explaining that “other constitutional principles [may] place substantive limitations on such action,” and noting then-Attorney General Jackson's characterization of such a law as “an historical departure from an unbroken American practice and tradition”).



discretion in this realm would be inconsistent with the constitutional scheme, requiring consensus of the three branches of government to deprive an individual of physical liberty. It would likewise undermine the role the President can play in checking against overly punitive statutory schemes targeting disfavored groups. In these realms, therefore, where physical liberty is at stake, the President should be permitted to enact categorical prosecutorial discretion policies.

### C. *Evaluating Modern Prosecutorial Discretion Practices*

Using this proposed framework, I return to the practices of modern presidents and their increasing use of broad policy-driven prosecutorial discretion policies. When the Bush Administration issued its policy directing that the EPA should categorically refrain from initiating enforcement proceedings against certain coal-fired power plants, it did so presumably based on its judgment that the economic impact of regulatory violations at issue did more harm to the public interest than the environmental benefits that could be reaped through enforcement.<sup>289</sup> This was, however, in direct conflict with the judgment of Congress in enacting the statutory scheme. Thus, insofar as physical liberty deprivation was not at stake, it is difficult to justify the President using his enforcement discretion to supplant the judgment of Congress. A similar analysis applies to President Bush's apparent categorical nonenforcement policies in the labor, food safety, securities regulation, and civil rights realms, though because these policies were not memorialized in public memorandum it is more difficult to conclusively evaluate them.<sup>290</sup>

President Obama's determination to categorically refrain from enforcing certain requirements regarding noncompliant insurance plans under the ACA for a period during which Congress had mandated enforcement presents a slightly more difficult case. One could argue that the President's categorical nonenforcement policy here was driven by his judgment that the congressional timeline was unworkable and would thus undermine effective implementation of the law that Congress designed. Insofar as the President's policy was aligned with congressional objectives, this would militate in favor of a permissible exercise of prosecutorial discretion. However, two factors cut significantly in the other direction. First, there was no ambiguity in the statutory scheme regarding the timeline for implementation. The relevant implementation date was deliberate, staged, and plain on the face of the statute. Thus, Congress had made clear its considered judgment regarding the workable timeline for implementation. Second, there is ample evidence to suggest that the President was motivated less by a desire to protect against undermining the statutory scheme and more by his political desire to adhere to prior representations that he had made about people's ability to maintain health insurance policies they liked. This would not have been true if he adhered to the congressional timeline.

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<sup>289</sup> See *supra* note 62 and accompany text.

<sup>290</sup> See *supra* note 74 and accompany text.

Thus, here too, I propose that the President exceeded his discretion in enacting the categorical nonenforcement policy.<sup>291</sup>

President Obama's nonenforcement guidelines related to marijuana offenses in states that have legalized various aspects of marijuana use and sale present the clearest case of appropriate categorical discretion. Insofar as the guidelines fall within the criminal realms and the President unquestionably has the power to pardon all such offenses, so too could the President grant amnesty from prosecution. President Clinton's "Corporate Leniency Policy," which protected corporations, as well as their directors, officers, and employees, from antitrust prosecutions under certain circumstances, was also within the President's power. Insofar as the policy relates to nonenforcement of criminal laws, it again falls easily within the President's power.<sup>292</sup>

Finally, I turn to an analysis of the DACA and DAPA programs. There is significant debate regarding whether or not the DACA and DAPA programs are consistent with the statutory scheme and whether the programs can be justified as part of an enforcement prioritization program that, regardless of any heightened powers, is within the authority of the agency to efficiently allocate limited enforcement resources. In regard to the prioritization issue, recall that current appropriations support the deportation of a maximum of a few hundred thousand individuals each year; but there are approximately twenty-five million individuals who could potentially face deportation proceedings.<sup>293</sup> Insofar as DACA and DAPA are available to nonpriority immigrants only, the Obama Administration has justified the programs, in part, based on the need to remove some of the haystack to find the needles that are its enforcement priorities.<sup>294</sup> This, however, begs the question, in the first instance, of whether its enforcement priorities are consistent with the statutory scheme.

The OLC explicitly justified the programs as consistent with the statutory scheme, explaining that the beneficiaries are individuals who could eventually gain status through the statute, though sometimes not for decades.<sup>295</sup> Opponents have asserted that the programs are in direct conflict with the statute and, in fact, it was the President's inability to secure passage of the DREAM Act and comprehensive immigration reform through Congress that led him to attempt to

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<sup>291</sup> See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA L. REV. 1715, 1722-25 (2016).

<sup>292</sup> The issue of corporate criminal prosecution raises an interesting issue insofar as corporations, even in the criminal context, can never face a deprivation of physical liberty. Query whether criminal proceedings that do not result in a deprivation of liberty should suggest a narrower vision of prosecutorial discretion authority. Certainly some of the democratic participatory theory dynamics would play out differently in the corporate context. However, ultimately this is a narrow issue and one controlled by Supreme Court precedent declaring the Executive's absolute discretion in the criminal context. See *supra* notes 65-66 and accompany text.

<sup>293</sup> See *supra* notes 89-95 and accompany text.

<sup>294</sup> See OLC Opinion, *supra* note 11, at 25.

<sup>295</sup> *Id.* at 31.

undermine the statutory scheme.<sup>296</sup> It is first important to note that the failures of Congress to pass the DREAM Act and comprehensive immigration reform are not relevant to the analysis of the values and priorities underlying the previously enacted Immigration and Nationality Act (“INA”). Perhaps more importantly, however, Adam Cox and Christina Rodríguez have recently, and convincingly, critiqued the analysis of the OLC, not because they see a conflict between the programs and the INA but because they have demonstrated that there is no way to reasonably discern the congressional priorities that underlie the Act, which is the product of decades of revisions and rewrites by multiple congresses with many different motivations.<sup>297</sup>

Ultimately, under the framework I propose, however, adherence to statutory priorities is only potentially dispositive if physical liberty is not at stake. Thus, the threshold question is whether the deportation proceedings implicate a potential physical liberty deprivation. I answer that question in the affirmative for three reasons. First, while not all individuals facing deportation are detained, the physical act of deportation—of being banished from the United States—is a physical liberty deprivation, restricting one’s physical freedom of movement in a manner on par with physical incarceration. The Supreme Court has characterized the liberty deprivation related to deportation in the gravest of terms, suggesting that it is akin to the “loss of all that makes life worth living” and that it is often more significant than the consequences of incarceration.<sup>298</sup> Indeed, the historic precursors to deportation, first banishment and later the English practice of “transportation” to the colonies, were among the most severe consequences imposed on individuals convicted of crimes.<sup>299</sup> Deportation is, in many circumstances, increasingly recognized as a form of quasi-criminal

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<sup>296</sup> Randy Borntrager, *GOP: President Obama’s Out To Destroy Our Nation Through His Executive Actions on Immigration*, HUFFINGTON POST (May 19, 2015, 11:37 AM), [http://www.huffingtonpost.com/randy-borntrager/gop-president-obamas-out-to-destroy-our-nation\\_b\\_7314252.html](http://www.huffingtonpost.com/randy-borntrager/gop-president-obamas-out-to-destroy-our-nation_b_7314252.html) [<https://perma.cc/J297-VF5C>].

<sup>297</sup> Cox & Rodríguez, *Redux*, *supra* note 16, at 151 (“The congressional priorities approach fails because those priorities are a mirage.”).

<sup>298</sup> *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010) (noting that the Immigration Act of 1917 brought “‘radical changes’ to our law” because, for the first time, “Congress made classes of noncitizens deportable based on conduct committed on American soil”); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (“[A]lthough deportation technically is not criminal punishment, it may nevertheless visit as great a hardship as the deprivation of the right to pursue a vocation or a calling.” (citations omitted)); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (“[Deportation] may result also in loss of both property and life; or of all that makes life worth living.”).

<sup>299</sup> *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 736-41 (1893) (Brewer, J., dissenting) (“Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes most severe and cruel.”); Markowitz, *supra* note 216, 323-24 (noting transportation was “the only significant form of punishment short of death utilized during” the eighteenth century).

punishment.<sup>300</sup> Second, while not every (or even most) criminal proceedings result in a sentence of incarceration, it is the *potential* for incarceration that triggers the Executive's heightened prosecutorial discretion. The same is true in deportation proceedings. While hundreds of thousands of immigrants facing deportation are detained each year, many are not.<sup>301</sup> However, like criminal defendants, all immigrants facing deportation face the potential of detention.<sup>302</sup> Third, in considering the availability of habeas corpus review for deportation proceedings, the Supreme Court has held that deportation proceedings categorically satisfy the custody requirement of the great writ.<sup>303</sup> Thus, I place deportation proceedings in the category of proceedings that implicate physical liberty deprivations.

Therefore, I conclude that the President is within his powers to enact broad categorical prosecutorial discretion policies regarding deportation proceedings. Two issues remain to consider whether the DACA and DAPA programs fall within the definitional limits of prosecutorial discretion rather than the repudiated dispensing and suspending powers. First, DACA and DAPA carry with them not only a decision to forego deportation proceedings but also an affirmative grant of work authorization. No vision of prosecutorial discretion authority can justify the affirmative grant of a statutorily prohibited benefit. Yet this issue is ultimately a red herring, because far from being prohibited, work authorization is affirmatively authorized for these individuals under the statute enacted by Congress.<sup>304</sup> Thus, the benefit of work authorization flows from the statute, and from Congress, and not from the President's enforcement discretion.

The second and more difficult issue is whether DACA and DAPA are truly retrospective only or whether they could be viewed as impermissibly authorizing future violations of law. On their face, the programs are clearly retrospective. Only individuals who are without legal status and who have been in the country

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<sup>300</sup> Peter L. Markowitz, *Deportation Is Different*, 13 U. PA. J. CONST. L. 1299, 1314 (2011) ("While the Court . . . continues to utilize the civil label to describe deportation proceedings, increasingly that label is in tension with the application of criminal, or quasi-criminal, doctrine in deportation proceedings.").

<sup>301</sup> John F. Simanski, *Immigration Enforcement Actions: 2013*, U.S. DEP'T HOMELAND SECURITY ANN. REP., (Sept. 2014), at 1, [http://www.dhs.gov/sites/default/files/publications/ois\\_enforcement\\_ar\\_2013.pdf](http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf) [<https://perma.cc/L4F9-52XC>] (noting ICE detained nearly 441,000 aliens during 2013).

<sup>302</sup> 8 U.S.C. § 1226(a) (2012) ("On a warrant issued by the Attorney General, an alien may be arrested and detained pending a decision on whether the alien is to be removed from the United States.").

<sup>303</sup> *INS v. St. Cyr*, 533 U.S. 289, 300 (2001).

<sup>304</sup> See 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3) ("[T]he term 'unauthorized alien' means, with respect to the employment of an alien at a particular time, that the alien is not at that time . . . authorized to be so employed by this Act or by the Attorney General."); 8 C.F.R. § 274a.12(c)(14) (2016) (declaring that any "alien who has been granted deferred action, an act of administrative convenience to the government which gives some cases lower priority, if the alien establishes an economic necessity for employment" must apply for work authorization); *supra* notes 126 and accompanying text.

for five years prior to the announcement of the program are eligible.<sup>305</sup> Thus the program can in no way be viewed as prior authorization for individuals to illegally enter the United States. However, the program allows for the issuance of deferred action for three years. Insofar as that states an intention not to initiate deportation proceeding based upon some past act—the illegal entry into the United States, for example—this would be squarely within the President’s prosecutorial discretion authority. The memorandum makes clear, however, as it must, that a grant of deferred action confers no legal immigration status. Certain provisions of the INA make mere presence without legal immigration status a violation.<sup>306</sup> If the three-year grant of deferred action is understood to authorize a future and continuing violation of the INA,<sup>307</sup> the grant would fall beyond the prosecutorial discretion authority of the President.

However, the DAPA memorandum also makes clear that it confers no rights to protection from future prosecution.<sup>308</sup> Nothing prevents the President from revoking a grant of deferred action at any time and initiating deportation proceedings. Indeed, fear that the next President would not honor the grant of deferred action created significant anxiety in the immigrant community and deterred some from applying for the program. The practice of granting deferred action for fixed periods of time is a longstanding practice acknowledged without challenge by the Supreme Court.<sup>309</sup> The three-year grant of deferred action contemplated under the DACA and DAPA programs is best understood, not as a license for future unlawful conduct, but as a matter of administrative convenience and diligence, ensuring that the decision will be periodically revisited. Thus insofar as the President’s DACA and DAPA programs implicate potential deprivations of physical liberty and do not authorize future illegality, and insofar as the affirmative benefit work authorization is grounded in the statute, the programs appear within the President’s constitutional authority.<sup>310</sup>

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<sup>305</sup> DAPA Memorandum, *supra* note 2, at 4.

<sup>306</sup> 8 U.S.C. § 1227(a)(1)(B) (“Any alien who is present in the United States in violation of this Chapter or any other law of the United States, or whose nonimmigrant visa . . . has been revoked under section 1201(i) of this title is deportable.”).

<sup>307</sup> *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (characterizing immigration violations as “an ongoing violation of United States law”).

<sup>308</sup> DAPA Memorandum, *supra* note 2, at 2.

<sup>309</sup> *Am.-Arab Anti-Discrimination Comm.*, 525 U.S. at 483-84 (“At each stage the Executive has discretion to abandon the endeavor, and at the time IIRIRA was enacted the INS had been engaging in a regular practice (which had come to be known as ‘deferred action’) of exercising that discretion for humanitarian reasons or simply for its own convenience.”).

<sup>310</sup> It is important to note that this Article only directly bears upon the constitutionality of the DACA and DAPA programs. The legal challenges to the programs also raise procedural and substantive challenges under the Administrative Procedure Act (“APA”). See *Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015), *aff’d mem.*, 136 S. Ct. 2271 (2016). It is on the bases of the courts’ assessment of the likelihood of success on the APA claims that the programs have been preliminarily enjoined. *Id.* While this Article has no direct bearing on those claims, query whether, if the President is within his nondefeasible constitutional authority, Congress has the power, through the APA or otherwise, to prevent his actions.

## CONCLUSION

When a law sweeps too broadly and bristles with harshness against a significant sector of the American public, the first and best response is legislative reform. However, when the impacted sector of the public is politically disfavored, and when legislators fear a political price for participating in reform, our legislative process is often unable to react to the crisis. This is a danger inherent in the democratic process. The solution to this dilemma is not, as a general matter, to empower the President to substitute her own vision of sound public policy for that of Congress. Such a cure would be worse than the disease. However, in the limited arenas where the congressional scheme results in the physical deprivation of liberty, the balance of potential harms and benefits shifts.

Our nation's history is checkered with instances where the federal government has, in heated political moments, punitively deprived disfavored minorities of their physical liberty. In these instances, Congress was unable to evenhandedly assess the public interest. The same political dynamics that paralyze or inflame Congress often also act against the President and, thus, empowering the President to act is no guarantee that such episodes can be avoided. However, working alongside the Constitution's individual rights framework, robust presidential prosecutorial discretion authority in the liberty deprivation context can provide another important constitutional tool to protect disfavored groups from unjust applications of the most coercive power of the federal government. Cabining heightened prosecutorial discretion authority in this way can provide a workable constitutional limiting principle, consistent with both historical practice and the structure of the Constitution.