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## ARTICLE

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# LAW ENFORCEMENT AS POLITICAL QUESTION

Zachary S. Price\*

### ABSTRACT

*Across a range of contexts, federal courts have crafted doctrines that limit judicial second-guessing of executive nonenforcement decisions. Key case law, however, carries important ambiguities of scope and rationale. In particular, key decisions have combined rationales rooted in executive prerogative with concerns about nonenforcement's "unsuitability" for judicial resolution. With one nonenforcement initiative now before the Supreme Court and other related issues percolating in lower courts, this Article makes the case for the latter rationale. Judicial review of nonenforcement, on this account, involves a form of political question, in the sense of the "political question doctrine": while executive officials hold a basic statutory and constitutional obligation to faithfully execute regulatory statutes, that obligation is subject to incomplete judicial enforcement because structural constitutional considerations place a gap between executive duties and judicial enforcement of those duties. What is more, the twin prongs of the modern political question doctrine—"textual assignment" and "judicial manageability"—usefully describe the gap between executive obligation and judicial power. Bringing enforcement suits and prosecutions in particular cases is a textually assigned function of the executive branch, while the broader executive task of setting priorities for enforcement frequently presents a judicially unmanageable inquiry.*

*This reframing may account descriptively for much of the current doctrine but also carries important normative implications. Among other things, the framework clarifies that judicial decisions may not fully define executive obligations with respect to enforcement; it helps identify contexts in which judicial review may be appropriate, including with respect to current immigration programs before the Supreme Court and the controversial prosecutorial practice of entering*

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*“deferred prosecution agreements” in white-collar criminal cases; and it reinforces longstanding arguments for a more flexible doctrine of Article III standing.*

## INTRODUCTION

What authority do federal courts have to review executive nonenforcement choices? On the one hand, the Supreme Court has deemed prosecutorial discretion an “exclusive” and “absolute” executive authority,<sup>1</sup> interpreted the Administrative Procedure Act (APA) to presumptively bar judicial review of nonenforcement,<sup>2</sup> and severely limited Article III standing to challenge government inaction.<sup>3</sup> On the other hand, the Court has indicated that agencies cannot “simply . . . disregard statutory responsibilities,”<sup>4</sup> suggested that they cannot adopt policies that “abdicat[e]” enforcement,<sup>5</sup> and at least entertained the possibility of tort damages for failures of enforcement.<sup>6</sup> What is more, the Court has repeatedly coupled assertions of executive authority with descriptions of enforcement discretion as “unsuitable” for judicial review,<sup>7</sup> leaving it unclear whether executive nonenforcement authority is unreviewable because it is absolute, or only absolute insofar as it is unreviewable. While generally insulating executive nonenforcement from judicial scrutiny, the case law thus carries important ambiguities of scope and rationale.

Clarifying the boundaries of judicial power over executive enforcement has nevertheless gained new urgency. Depending on how various preliminary questions are resolved, the Supreme Court may well address the issue this term in litigation challenging controversial immigration nonenforcement initiatives.<sup>8</sup> At the same time, litigation percolating in lower courts has raised questions about prosecutorial “deferred prosecution agreements” (DPAs), an increasingly significant executive practice in which the government forgoes prosecution in exchange for the defendant’s acceptance of

1 *United States v. Nixon*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965)); *see also, e.g., ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987) (stating that “the refusal to prosecute cannot be the subject of judicial review”).

2 *See Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985).

3 *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575–76 (1992); *cf. Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (“The doctrine of standing . . . ‘serves to prevent the judicial process from being used to usurp the powers of the political branches.’” (quoting *Clapper v. Amnesty Int’l USA*, 133 S. Ct. 1138, 1146 (2013))).

4 *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993).

5 *Heckler*, 470 U.S. at 833 n.4.

6 *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761, 765 (2005) (indicating that a state could “create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented”).

7 *See infra* Section I.A.

8 *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016). Justice Scalia’s passing as this Article was going to press has also created the possibility that the Supreme Court will affirm the lower court’s decision by an equally divided vote.

alternative reform conditions.<sup>9</sup> In both contexts, critics have pushed for a broader judicial role, despite courts' historic reluctance to intrude on executive enforcement decisions, yet few commentators have grappled adequately with the particular challenges that judicial review of enforcement-related questions presents.

This Article proposes a framework for nonenforcement's reviewability—one rooted in considerations of “suitability” for review rather than notions of preclusive executive prerogative. In prior work, I have addressed the scope of executive nonenforcement authority in its own right and directly questioned the origins and validity of a supposed preclusive nonenforcement prerogative.<sup>10</sup> Here, I build on this account by exploring reasons why executive enforcement obligations may nonetheless defy complete judicial elaboration. In particular, although courts have often invoked notions of Article II prerogative to justify their passivity with respect to nonenforcement,<sup>11</sup> I argue that institutional limitations on courts—limitations with a broader resonance in constitutional and administrative law doctrines—provide a cogent descriptive and normative justification for judicial deference to executive nonenforcement.

The Constitution by its terms obligates the President to “take Care that the Laws be faithfully executed.”<sup>12</sup> Yet courts confront very real practical and institutional challenges in ensuring faithful execution of prohibitory statutes by enforcement officials. To begin with, directly compelling an enforcement suit in any particular case would raise acute separation-of-powers concerns, as it would collapse the constitutional separation of judicial and executive power and compromise the court's neutrality in adjudicating the resulting lawsuit. Beyond this particular formal problem, moreover, insofar as enforcement officials must pick and choose between cases because they cannot do everything, courts will rarely have objective benchmarks for assessing whether enforcement agencies are focusing on the right priorities, or indeed whether they are genuinely doing their best at all. The upshot is that exercise of executive nonenforcement authority, like certain other core executive functions, is effectively a political question, in the peculiar sense of the “political question doctrine”—it is an area where institutional limitations on courts place a gap between what executive officials ideally should do and what

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9 *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015) (rejecting DPA), *vacated and remanded*, Nos. 15-3016, 15-3017, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016).

10 See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014) [hereinafter Price, *Enforcement Discretion*].

11 See, e.g., *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 . . . .” (citing *Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868))); *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) (asserting that “[o]ne aspect” of the executive “power to take care that the laws be faithfully executed” is “the prerogative to decline to enforce a law, or to enforce a law in a particular way” (citing *Hotel & Rest. Emps. Union v. Smith*, 846 F.2d 1499, 1519 (D.C. Cir. 1988) (en banc))).

12 U.S. CONST. art. II, § 3.

courts will require from them. What is more, the twin criteria used to identify political questions more generally, “textual assignment” to a political branch and absence of “judicially manageable standards,”<sup>13</sup> provide key guideposts for the limits on judicial power over executive enforcement. Bringing enforcement suits and prosecutions in particular cases is a textually assigned function of the executive branch, while the broader executive task of setting priorities for enforcement frequently presents a judicially unmanageable inquiry.

This framework may account descriptively for much of the key current case law but also carries important normative implications. First, the framework suggests that whatever the limits of the judicial role with respect to non-enforcement, those limits do not ultimately define executive obligations. The U.S. Justice Department’s own Office of Legal Counsel (OLC) recently recognized this distinction in its important opinion on one of the Obama immigration initiatives; courts should as well.<sup>14</sup> Second, the framework supports a broader judicial role in some areas. Tracing limits on judicial review to problems of textual assignment and judicial unmanageability may support exercising broader review when those particular problems are absent. For reasons discussed further below, that is true with respect to some current immigration programs as well as DPAs and some other policies such as a controversial Bush Administration environmental program. Such government actions should not be categorically unreviewable, even if courts ultimately uphold them on the merits. Finally, and most tentatively, the framework may have implications for standing analysis. By addressing Article II concerns about judicial oversight of enforcement more directly, a political question framework may support rethinking case law that indirectly protects such prerogatives through constitutional limitations on Article III standing.

In advancing these arguments, my main contribution is to trace nonenforcement’s unreviewability to institutional limits on courts, rather than any more absolute conception of executive prerogative. Prior scholarship has tended either to advocate broader judicial review of nonenforcement<sup>15</sup> or

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13 *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

14 Office of Legal Counsel, Opinion Letter on the Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. 5 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter OLC Immigration Opinion] (identifying legal limits on nonenforcement even though “the exercise of enforcement discretion generally is not subject to judicial review”).

15 See, e.g., Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157 (1996) (analyzing *Heckler*); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690 (2004) (advocating arbitrariness review of nonenforcement); 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, 285–88 (2003) (examining scope of President’s enforcement discretion and the nature of judicial review).

else to read key decisions as enabling presidential administration by leaving enforcement decisions to raw politics.<sup>16</sup> My claim is that executive enforcement obligations instead fall within the family of executive obligations that are principally matters of political accountability and conscience rather than judicial enforcement, but that are genuine legal obligations nonetheless. Approaching the issue from this angle leads me to draw lines with respect to judicial review of nonenforcement that are similar to lines I drew in prior work with respect to executive obligation itself. In particular, in both contexts, I distinguish policies that effectively license prohibited conduct from policies that merely set internal priorities for enforcement. I emphasize here, however, that for institutional reasons this line is subject to judicial enforcement in only the clearest cases. As a result, agency nonenforcement is effectively immune from judicial reversal in many contexts where the agency's fidelity to statutory policies could legitimately be questioned as a matter of first principles.

A secondary aim is to place current litigation over nonenforcement, and in particular the politically charged litigation over current immigration initiatives, into a broader legal context. The challenged programs are novel in scale and significance, but the central questions they present—what constitutes faithful enforcement of statutory policies, and what role courts may play in enforcing any such notion of faithful execution—are recurrent. Indeed, these questions have arisen in the past primarily in contexts with an opposite political valence.<sup>17</sup> Accordingly, although attempting a synthesis on the eve of a Supreme Court case that may redefine the field is perilous, my hope is that placing these programs, as well as the novel practice of DPAs, within a broader separation-of-powers framework may help clarify what is (and is not) ultimately at stake in these particular cases.

The Article proceeds as follows. I begin in Part I with a brief account of the key case law addressing executive nonenforcement, followed by an

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16 See, e.g., Richard M. Thomas, *Prosecutorial Discretion and Agency Self-Regulation: CNI v. Young and the Aflatoxin Dance*, 44 ADMIN. L. REV. 131, 143 (1992) (“*Chaney* at least implicitly recognizes that the decisions an agency makes are inevitably political . . . .”); Bressman, *supra* note 15, at 1678 (associating *Heckler* with promoting presidential control of “complex and essentially political determinations” regarding enforcement priorities). Lisa Schultz Bressman has proposed treating reviewability as a political question, but in a more limited sense. Bressman, *supra* note 15, at 1697–1700. The approach closest to mine is Eric Biber’s. Biber argues that APA reviewability should turn on a balance between “statutory supremacy” and “resource allocation” and that general nonenforcement policies should thus be reviewable but not case-specific decisions. Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 24 (2008) [hereinafter Biber, *Resource Allocation*]; see also Eric Biber, *Two Sides of the Same Coin: Judicial Review of Administrative Agency Action and Inaction*, 26 VA. ENVTL. L.J. 461, 468 (2008) [hereinafter Biber, *Judicial Review*]. Biber, however, does not address the broader separation of powers questions that I focus on here.

17 For an account of this political reversal including pertinent examples, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125–33 (2015) [hereinafter Price, *Politics of Nonenforcement*]. See also *infra* notes 60–61 and accompanying text.

account of novel executive practices that support renewed attention to the role of courts in policing it. Part II then develops the argument for treating law enforcement choices as political questions. I argue first that the function of bringing particular enforcement suits is “textually assigned” to the executive branch in the peculiar sense of the political question doctrine, and second that many broader enforcement-related choices are “judicially unmanageable” in the peculiar way courts have used that term. Part III then addresses my argument’s normative implications with respect to independent executive legal interpretation, judicial review of nonenforcement policies, judicial oversight of DPAs, and Article III standing doctrine. The Article concludes with a brief summary placing the argument here in the context of broader debates over judicial supremacy and the political question doctrine.

### I. IMPORTANCE OF THE ISSUE

Nonenforcement, as I use the term here, refers to an enforcement official’s deliberate decision not to seek applicable punitive or coercive remedies against civil or criminal legal violations through judicial or administrative process. So understood, the term encompasses not only everyday administrative and prosecutorial decisions not to investigate and prosecute possible violations in particular cases, but also broader decisions such as current controversial immigration and marijuana enforcement policies,<sup>18</sup> as well as earlier de-emphasizing of civil rights, environmental, and labor enforcement during Republican administrations.<sup>19</sup> A general policy, in these terms, may constitute nonenforcement if it either excludes certain cases from likely enforcement, or conversely designates some cases for enforcement to the likely exclusion of others. Sometimes nonenforcement may reflect (or mask) interpretation. Particularly in administrative contexts where agencies hold delegated authority to make governing law by interpreting vague, ambiguous, or open-ended statutory or regulatory requirements, agencies might choose not to enforce laws in particular contexts because they interpret them not to apply.<sup>20</sup> In other cases, however, prohibitions are clearly applicable yet executive officials may choose not to enforce them in some or all cases.

As we shall see, nonenforcement decisions of this sort can be highly consequential. Yet a series of foundational Supreme Court decisions has largely (though not completely) foreclosed a judicial role in policing the legality and reasonableness of executive decisions of this sort, in both criminal and civil or administrative contexts. Precisely why the Court has taken this hands-off

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18 See *infra* notes 62–65 and accompanying text for description of these policies.

19 I have described some previous examples in Price, *Politics of Nonenforcement*, *supra* note 17, at 1125–33.

20 Absent a statutory directive to the contrary, agencies generally may choose whether to issue rules or proceed by adjudication. See *NLRB v. Bell Aerospace Co. Div. of Textron Inc.*, 416 U.S. 267, 294 (1974); *SEC v. Chenery Corp.*, 318 U.S. 80, 84–86 (1947); see generally M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1386–403 (2004) (discussing agency choice between proceeding through administrative enforcement, judicial enforcement, or rulemaking).

approach has not been entirely clear, however, and the doctrine's ambiguities have come under pressure as a result of novel executive practices.

### A. *Vexed Case Law*

The Supreme Court's most important nonenforcement case is *Heckler v. Chaney*. There, the Court held that administrative nonenforcement is presumptively unreviewable under the APA.<sup>21</sup> In *Heckler*, death-row inmates sought judicial review after the Food and Drug Administration (FDA) denied their petition to enforce drug-misuse laws against state officials administering capital punishment by lethal injection.<sup>22</sup> The APA generally permits review of any "final agency action."<sup>23</sup> The statute, moreover, expressly defines "agency action" to include an agency's "failure to act,"<sup>24</sup> and it requires reviewing courts to "set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>25</sup> In *Heckler*, the Court nevertheless interpreted the APA to preclude judicial review of nonenforcement unless Congress has expressly provided for it.<sup>26</sup> The APA exempts from review actions "committed to agency discretion by law";<sup>27</sup> *Heckler* held nonenforcement to fall within this category.<sup>28</sup>

*Heckler's* holding was in tension not only with the APA's express equation of "action" with "failure to act," but also with prior doctrinal principles.<sup>29</sup> On

21 470 U.S. 821, 831–32 (1985).

22 *Id.* at 823–24.

23 5 U.S.C. §§ 701(a), 704 (2012).

24 *Id.* § 551(13).

25 *Id.* § 706(2). The APA also requires the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* § 706(1). The Supreme Court has interpreted this provision to apply "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 65 (2004). Insofar as statutes rarely require enforcement specifically in any discrete case, challenging nonenforcement under this standard would be difficult. See *PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1097–98 (D.C. Cir. 2015) (rejecting challenge under section 706(1) to "decade-long" nonenforcement of statute with respect to class of cases). In any event, the exception to review for matters "committed to agency discretion by law" applies equally to sections 706(1) and (2) and thus, under *Heckler*, bars review of nonenforcement decisions. See *infra* text accompanying notes 27–28.

26 470 U.S. at 832–33. In an earlier decision, *Citizens to Preserve Overton Park v. Volpe*, the Court held that a matter may be committed to agency discretion by law, and thus immune from APA review, if the statutory standard imposed on the agency is so capacious that there is effectively "no law to apply." 401 U.S. 402, 410 (1971) (quoting S. REP. NO. 79-752, at 212 (1945)). The Court in *Overton Park* emphasized that this exception was "very narrow." *Id.*

27 5 U.S.C. § 701(a)(2).

28 470 U.S. at 831–32.

29 For a contemporary appraisal, see Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 657 (1985) ("On its face . . . the APA treats agency inaction the same as agency action."); see also, e.g., Magill, *supra* note 20, at 1421 (observing "[i]t is not easy to pin down exactly why courts resist reviewing" nonenforcement).



the whole, the Supreme Court has adopted a robust presumption in favor of judicial review of administrative action.<sup>30</sup> What is more, the Court has interpreted the APA's "arbitrary and capricious" standard of review to require reasoned decisionmaking on the part of administrative agencies; though their review is deferential, courts may thus invalidate even discretionary agency actions as "arbitrary" if the agency relied on improper considerations or failed to consider important aspects of the problem.<sup>31</sup> Indeed, a central premise of modern administrative law is that such arbitrariness review helps legitimate agency decisionmaking (despite separation of powers concerns about its validity) while also improving its accountability and quality.<sup>32</sup>

*Heckler*, however, invoked a putative background "tradition" of enforcement discretion as a basis for exempting nonenforcement from the demand for legitimation through review.<sup>33</sup> According to the *Heckler* Court, nonenforcement is generally "unsuitab[le]" for judicial review not only because it often turns on "a complicated balancing of a number of factors which are

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30 See, e.g., *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015) ("[T]his Court applies a 'strong presumption' favoring judicial review of administrative action." (quoting *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986))); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) ("[O]nly upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review.").

31 As the Supreme Court recently summarized:

Review under the arbitrary and capricious standard is deferential; we will not vacate an agency's decision unless it "has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

*Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

32 For a sampling of literature addressing these points, see for example LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) "The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.", Nicholas Bagley, *The Puzzling Presumption of Reviewability*, 127 HARV. L. REV. 1285, 1319–20 (2014) (describing and critically analyzing this theory), John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 413 (2010) ("[T]he availability of judicial review is thought to make the agency's exercise of delegated authority more acceptable by ensuring that its discretion can be checked against standards set by Congress."), Jerry Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 FORDHAM L. REV. 17, 26 (2001) ("The path of American administrative law has been the progressive submission of power to reason."), Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 491–92 (2010) (attributing courts' "expansion of substantive judicial scrutiny of agency decisionmaking" in part to "constitutional concerns with broad delegations to agencies and the attendant risk of unaccountable and arbitrary exercises of power"), and Sunstein, *supra* note 29, at 655–56 (describing judicial review as a "surrogate safeguard[ ]" for concerns reflected in the nondelegation doctrine).

33 470 U.S. at 832.

peculiarly within its expertise,”<sup>34</sup> but also because “an agency’s refusal to institute proceedings” involves no exercise of “coercive” power<sup>35</sup> and

shares to some extent the characteristics of 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, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed.”<sup>36</sup>

In effect, then, if the Court has generally sought to legitimate agencies’ performance of effectively legislative and adjudicatory functions by interpreting the APA and other statutes to provide for judicial review,<sup>37</sup> *Heckler* reflects a countervailing impulse to insulate a characteristically executive form of decision from judicial scrutiny.<sup>38</sup>

Other key enforcement-related decisions have invoked the same mix of rationales.<sup>39</sup> For example, although I concentrate here on nonenforcement

34 *Id.* at 831–32.

35 *Id.* at 832. For critique of this rationale, see *id.* at 851 (Marshall, J., dissenting) (“[O]ne of the very purposes fueling the birth of administrative agencies was the reality that governmental refusal to act could have just as devastating an effect upon life, liberty, and the pursuit of happiness as coercive governmental action.”), and Sunstein, *supra* note 29, at 674–75 (“[U]nlawful governmental failure to act can be as harmful as unlawful action and is equally subject to judicial review under APA standards.”).

36 *Heckler*, 470 U.S. at 832 (quoting U.S. CONST. art. II, § 3).

37 See, e.g., Metzger, *supra* note 32, at 492 (“[T]his basic requirement of reasoned explanation is central to alleviating core separation-of-powers concerns associated with the administrative state.”).

38 Two other key unreviewability cases may reflect a similar impulse to shield traditional executive functions from intrusive judicial oversight. In *Webster v. Doe*, 486 U.S. 592 (1988), the Court interpreted the governing statute to permit unreviewable, discretionary terminations of Central Intelligence Agency personnel in part because courts would have “no basis” for assessing the termination “[s]hort of cross-examination of the Director concerning his views of the Nation’s security and whether the discharged employee was inimical to those interests.” *Id.* at 600; see also *id.* at 608–09 (Scalia, J., dissenting) (interpreting the APA to incorporate a common law of unreviewability based in part on “a traditional respect for the functions of the other branches”). Similarly, in *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993), the Court held allocation of funds from lump-sum appropriations to be unreviewable based on an asserted traditional understanding that “the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.” *Id.* at 192. Some have also described *Heckler*, along with the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), from the preceding year, as facilitating a more presidential model of administration by carving out broader areas of agency autonomy from judicial scrutiny. See, e.g., Bressman, *supra* note 15, at 1678 (associating *Heckler* with promoting presidential control of “complex and essentially political determinations” regarding enforcement priorities); Thomas, *supra* note 16, at 143 (“[A]s with the Court’s *Chevron* decision a year earlier, *Chaney* at least implicitly recognizes that the decisions an agency makes are inevitably political . . .”).

39 See, e.g., *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761, 765 (2005) (rejecting claimed Fourteenth Amendment right to enforcement of state-law restraining order

for constitutionally permissible reasons,<sup>40</sup> the Court has given narrow scope to even constitutional claims based on the same mix of concerns evident in *Heckler*. In the criminal context, the Court has recognized that equal protection principles forbid racially motivated prosecution, yet the Court has given this “selective prosecution” doctrine exceedingly narrow scope.<sup>41</sup> Once again, a key asserted reason for doing so is concern about undue interference with a putative executive prerogative. The Court thus held in *United States v. Armstrong* that allowing discovery on a selective prosecution claim without a strong threshold showing of discriminatory intent would “impair the performance of a core executive constitutional function.”<sup>42</sup> Federal prosecutors, the Court explained, generally hold broad charging discretion “because they are designated by statute as the President’s delegates to help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully executed.’”<sup>43</sup> Also as in *Heckler*, however, the Court invoked “an assessment of the relative competence of prosecutors and courts.”<sup>44</sup> The Court explained: “Such factors as the strength of the case, the prosecution’s general deterrence value, the Government’s enforcement priorities, and the case’s relationship to the Government’s overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.”<sup>45</sup>

Finally, the Supreme Court has also insulated nonenforcement from judicial challenge through its interpretation of the Article III “case or controversy” requirement.<sup>46</sup> In *Linda R.S. v. Richard D.*, the Court rejected a single mother’s claimed standing to challenge state criminal non-prosecution of fathers who failed to pay child support.<sup>47</sup> Noting that in general “a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution,” the Court

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because of the “deep-rooted nature of law-enforcement discretion” and because of doubts that “state law gave respondent an entitlement to enforcement of the mandate”).

40 The *Heckler* Court reserved the question whether nonenforcement on racial or other constitutional grounds would be unreviewable. 470 U.S. at 838. The Court has since held that even when an employment termination decision was “committed to agency discretion by law” under the APA because the statute failed to permit “application of any meaningful judicial standard of review,” the Court could nonetheless consider “colorable constitutional claim[s]” arising out of the termination. *Webster*, 486 U.S. at 600, 603.

41 See, e.g., *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (rejecting selective-prosecution defense to deportation proceedings and noting that even in criminal prosecutions “we have emphasized that the standard for proving [selective-prosecution defenses] is particularly demanding, requiring a criminal defendant to introduce ‘clear evidence’ displacing the presumption that a prosecutor has acted lawfully” (quoting *United States v. Armstrong*, 517 U.S. 456, 463–65 (1996))).

42 *Armstrong*, 517 U.S. at 465.

43 *Id.* at 464 (quoting U.S. CONST. art. II, § 3).

44 *Id.* at 465.

45 *Id.* (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)); see also *Reno*, 525 U.S. at 489–90 (same).

46 U.S. CONST. art. III, § 1.

47 410 U.S. 614, 619 (1973).

held that the mother demonstrated “an insufficient showing of a direct nexus between the vindication of her interest and the enforcement of the State’s criminal laws.”<sup>48</sup> The Court in *Linda R.S.* appeared to view this holding only as a default; it implied that a clear statute might establish standing.<sup>49</sup> But in two subsequent cases, *Allen v. Wright*<sup>50</sup> and *Lujan v. Defenders of Wildlife*,<sup>51</sup> the Court constitutionalized the requirement of “concrete” injury, traceable to the challenged conduct and redressable by the court, to challenge all forms of government inaction. In both cases, moreover, the Court invoked the President’s putative Article II prerogative to control law enforcement as a central reason for restricting the class of injuries sufficient to establish an Article III case or controversy.<sup>52</sup>

Across a range of contexts, then, the Supreme Court has erected barriers to judicial scrutiny of executive enforcement choices.<sup>53</sup> Yet the Court’s rea-

48 *Id.*

49 *See id.* at 617 n.3 (“Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute.”).

50 468 U.S. 737, 739–40 (1984).

51 504 U.S. 555, 571–72 (1992).

52 *Allen*, 468 U.S. at 761 (holding that the Constitution’s assignment “to the Executive Branch, and not to the Judicial Branch, the duty to ‘take Care that the Laws be faithfully executed’” supports denying “standing in a case brought, not to enforce specific legal obligations whose violation works a direct harm, but to seek a restructuring of the apparatus established by the Executive Branch to fulfill its legal duties”); *see also Lujan*, 504 U.S. at 577 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”).

In footnotes in two more recent cases, the Supreme Court asserted that standing limits derive entirely from Article III, not Article II. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 n.4 (1998). Nevertheless, the Court has adhered firmly to the notion that plaintiffs lack standing to challenge legal nonenforcement unless the government’s inaction causes them some specific personal injury that differentiates them from the public at large. *See, e.g., Hollingsworth v. Perry*, 133 S. Ct. 2652, 2656, 2668 (2013). What is more, in scholarly writing both Justice Scalia (*Lujan*’s author) and Chief Justice Roberts (*Hollingsworth*’s author) have forcefully advocated an Article II basis for limits on Article III standing. *See* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1230 (1993) (“The Article III standing requirement that the judiciary act only at the behest of a plaintiff suffering injury in fact . . . ensures that the court is carrying out *its* function of deciding a case or controversy, rather than fulfilling the *executive’s* responsibility of taking care that the laws be faithfully executed.”); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896 (1983) (“Where the courts, in the supposed interest of all the people, do enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce, they are likely (despite the best of intentions) to be enforcing the political prejudices of their own class.”).

53 Two other APA doctrines, finality and ripeness, may also obstruct judicial review of nonenforcement. *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 375–85 (2011) (describing doctrines and critically analyzing their application to guidance documents). Because these doctrines apply

soning in key decisions has combined rationales based on presumed executive authority with rationales based on presumed judicial incapacity. Beyond these ambiguities of rationale, moreover, the doctrine carries important ambiguities of scope. *Heckler*, in particular, has spawned conflicting case law regarding precisely what sorts of executive decisions it exempts from judicial oversight.<sup>54</sup> At the same time, novel executive practices (and resulting litigation challenging them) have given new salience to questions about the proper judicial role with respect to nonenforcement.

### B. *Contemporary Salience*

The Court's decisions regarding judicial review of nonenforcement matter because nonenforcement is an endemic feature of federal criminal justice and many areas of administrative law. As a practical matter, federal agencies rarely have the wherewithal to fully enforce the laws they administer. To give just a few examples, federal prosecutors could never plausibly detect and punish every crime covered by the vast federal criminal code;<sup>55</sup> federal immigration officials estimate that with current resources they can remove at most 400,000 undocumented immigrants annually out of a population of roughly eleven million;<sup>56</sup> the Internal Revenue Service can audit at most one percent of tax returns each year;<sup>57</sup> and the Occupational Safety and Health Administration, even in combination with state partner agencies, annually inspects only about 83,000 worksites out of more than eight million within its jurisdiction.<sup>58</sup> Enforcement officials must pick and choose, and their choices may have profound effects on regulated parties' incentives to comply with applicable prohibitions. Yet even apart from nonenforcement's overall importance, at least two important new developments, both occurring against a backdrop of increasing partisan polarization and legislative paralysis, have given renewed salience to the issue.

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generally and have not specifically targeted nonenforcement, I do not focus directly on them here. These doctrines at any rate have not uniformly prevented consideration of nonenforcement where *Heckler* has been held not to apply. For a proposal to "massage" them to enable broader judicial review of guidance documents in general, see *id.*

54 Compare, e.g., *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) (deeming general policy of entering identical consent decrees with certain polluters unreviewable), and *Sierra Club v. Jackson*, 648 F.3d 848, 856 (D.C. Cir. 2011) (deeming unreviewable agency's failure to prevent construction of allegedly unlawful pollution-emitting facilities), with *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 675–76 (D.C. Cir. 1994) (deeming general enforcement policies reviewable), and *Cook v. FDA*, 733 F.3d 1, 7 (D.C. Cir. 2013) (reviewing refusal to prevent importation of unlawful medications).

55 See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 *YALE L.J.* 1420, 1423 (2008) ("As Congress well understands when it enacts federal criminal proscriptions, both prosecutorial and sentencing discretion are inevitable because of the broad reach of these proscriptions and the severity of authorized punishments.").

56 OLC Immigration Opinion, *supra* note 14, at 1.

57 Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 *STAN. L. REV.* 241, 258 (2013).

58 OCCUPATIONAL SAFETY & HEALTH ADMINISTRATION, COMMONLY USED STATISTICS, <https://www.osha.gov/oshstats/commonstats.html> (reporting figures for fiscal year 2014).

One trend is the increasingly overt and deliberate formulation of non-enforcement policies by presidential administrations.<sup>59</sup> In a world of extensive federal law, partisan disagreement over the merits of that law, and pervasive resource constraints and practical limits on enforcement, political disputes over how executive agencies go about giving effect to those laws may well be inevitable, particularly during periods of divided government. At any rate, the issue has been a matter of recurrent political conflict in recent administrations. For instance, the Reagan and two Bush Administrations deliberately deemphasized enforcement of disfavored laws, both by lowering overall levels of enforcement and pursuing conciliatory rather than coercive remedies in cases they did pursue.<sup>60</sup> Critics persistently faulted these administrations for lax enforcement of environmental, labor, consumer protection, and civil rights laws they disfavored as a matter of policy.<sup>61</sup>

In the Obama Administration, the issue reemerged with opposite partisan alignments. Particular controversy has centered on two controversial immigration programs, “Deferred Action for Childhood Arrivals” (DACA) and “Deferred Action for Parents of Americans and Lawful Permanent Residents” (DAPA).<sup>62</sup> Under these programs, in an asserted exercise of prosecutorial discretion, the administration has invited large categories of undocumented immigrants to apply for three-year (formally revocable) promises of non-removal known as “deferred action”; those receiving deferred action face no effective threat of removal while the deferral remains in effect and (among other benefits) may be eligible for work authorization, despite general prohibitions on employment of undocumented immigrants.<sup>63</sup> Earlier, the administration also sparked controversy with an announced criminal enforcement policy (now partially codified by appropriations restrictions<sup>64</sup>) that limits prosecution of state-approved marijuana businesses despite federal statutes criminalizing possession and distribution of the drug.<sup>65</sup>

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59 See Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1054–69 (2013) (discussing this development).

60 For a description of this history, see Price, *Politics of Nonenforcement*, *supra* note 17, at 1125–33.

61 *Id.*

62 See 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., et al. (June 15, 2012); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014). For the Obama Administration’s legal justification for the latter of these policies, see OLC Immigration Opinion, *supra* note 14, at 12–20.

63 For further description of the programs, see for example Adam B. Cox & Cristina M. Rodríguez, *The President & Immigration Law Redux*, 125 YALE L.J. 104, 131–33 (2015).

64 See Pub. L. No. 113-235, tit. II, § 538 (2015) (barring use of Justice Department funds “to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana”).

65 See Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’y’s (Feb. 14, 2014) [hereinafter 2014 Cole Memorandum]; Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’y’s (Aug. 29, 2013) [hereinafter 2013 Cole Memorandum]; Memo-

In their scale and significance, these policies highlight both the potential real-world impact of nonenforcement and the separation of powers dimension of the issue. These policies have quite a tangible impact, reflected in the flourishing of overt marijuana businesses in some states and the opportunity for millions of immigrant families to come out of the shadows. Yet in neither case can the executive branch plausibly interpret governing substantive laws not to cover the conduct in question; marijuana possession is concededly a federal crime,<sup>66</sup> and immigrants benefiting from DACA and DAPA are concededly removable under governing statutes.<sup>67</sup> The only question is the scope of executive authority to enforce or not enforce those laws. Both policies, moreover, responded to political pressures on the president to mitigate laws that are deeply unpopular with his constituents, but that opponents in Congress have resisted amending.<sup>68</sup> These controversies thus raise directly the question of how presidential administrations should view enforcement responsibilities with respect to laws they disfavor.

At the same time, at least one development at the ground level of federal enforcement raises related questions about the scope and nature of nonenforcement authority. In federal criminal law enforcement, prosecutors have increasingly relied on DPAs, rather than actual criminal convictions, to redress suspected corporate wrongdoing.<sup>69</sup> In such agreements, the government files criminal charges with the court, but enters a court-approved agreement to “defer” prosecution in exchange for the defendant’s acceptance of specified conditions.<sup>70</sup> (Relatedly, the government has also increasingly used non-prosecution agreements (NPAs), which are not court-approved, for similar purposes.<sup>71</sup>) Court approval of DPAs enables the government to avoid Speedy Trial Act deadlines for commencing trial.<sup>72</sup> But unlike plea agree-

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randum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’y’s (June 29, 2011) [hereinafter 2011 Cole Memorandum].

66 See 2014 Cole Memorandum, *supra* note 65 (“Congress has determined that marijuana is a dangerous drug and that the illegal sale and distribution of marijuana is a serious crime.”).

67 See OLC Immigration Opinion, *supra* note 14, at 1 (describing deferred action as providing “a form of temporary administrative relief from removal”).

68 See, e.g., Matt Ford, *A Ruling Against the Obama Administration on Immigration*, ATLANTIC (Nov. 10, 2015) (noting that the policies were adopted following “considerable pressure from immigration-reform activists” and after “the defeat of comprehensive immigration reform in Congress”), <http://www.theatlantic.com/politics/archive/2015/11/fifth-circuit-obama-immigration/415077/>.

69 The government apparently first entered a DPA in the corporate context in 1992, but by 2001, the government has entered at least 250 such agreements with corporate offenders, including over 100 between 2010 and 2012. BRANDON L. GARRETT, *TOO BIG TO JAIL* 5, 17–33, 55–56 (2014); Court E. Golumbic & Albert D. Lichy, *The “Too Big to Jail” Effect and the Impact on the Justice Department’s Corporate Charging Policy*, 65 HASTINGS L.J. 1293, 1309–10 (2014).

70 18 U.S.C. § 3161(h)(2) (2012) (excluding time from deadlines for trial if court approves agreement).

71 GARRETT, *supra* note 69, at 76.

72 *Id.*

ments and civil consent decrees, such agreements do not formally resolve alleged criminal or civil violations with an adjudicated judgment of liability.<sup>73</sup> Instead the agreements leverage non-prosecution to impose affirmative obligations on the defendant—obligations that have included paying substantial fines, adopting internal reforms, making changes in corporate management, accepting intrusive outside monitoring, and, in the most notorious cases, endowing a law school professorship and ensuring state tax revenue.<sup>74</sup> Though DPAs have been attacked by some as too harsh<sup>75</sup> and others as too lenient,<sup>76</sup> recent scholarship has raised important questions about whether they genuinely advance policy goals underlying criminal statutes.<sup>77</sup>

Much like assertive nonenforcement policies, DPAs involve deliberate use of nonenforcement (albeit of a peculiar type) to reshape the environment in which regulated parties operate. Both practices, moreover, involve enforcement officials stepping into perceived policy gaps opened up by partisan paralysis and legislative incapacity. No doubt President Obama's first choice would have been legislation granting legal status to undocumented immigrants and relaxing federal criminal prohibitions on marijuana. Faced with partisan opposition in Congress, however, nonenforcement provided a means of adjusting the law on the ground to better conform to his constitu-

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73 See FED. R. CRIM. P. 11 (procedures for guilty pleas); *SEC v. Citigroup Glob. Markets, Inc.*, 752 F.3d 285, 294 (2d Cir. 2014) (“[T]he proper standard for reviewing a proposed consent judgment involving an enforcement agency requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the ‘public interest would not be disserved,’ in the event that the consent decree includes injunctive relief.” (citation omitted) (quoting *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391 (2006))); GARRETT, *supra* note 69, at 162–63, 282 (contrasting DPAs and NPAs with plea agreements and civil consent decrees).

74 GARRETT, *supra* note 69, at 76–77.

75 See, e.g., John C. Coffee, Jr., *Deferred Prosecution: Has It Gone Too Far?*, 27 NAT'L L.J., 13 (2005) (“[P]rosecutors are starting to possess something close to absolute power.”); *The Criminalisation of American Business*, ECONOMIST, Aug. 30, 2014, at 9 (describing criminal settlements as “shakedowns”); Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J. (Nov. 28, 2006), <http://www.wsj.com/articles/SB116468395737834160> (“The agreements often read like the confessions of a Stalinist purge trial, as battered corporations recant their past sins and submit to punishments wildly in excess of any underlying offense.”); cf. Jennifer Arlen, *Removing Prosecutors from the Boardroom: Limiting Prosecutorial Discretion to Impose Structural Reforms*, in PROSECUTORS IN THE BOARDROOM 62, 63 (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (arguing that “prosecutors should not impose structural reforms on nonindicted corporations”).

76 See, e.g., Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/archives/2014/jan/09/financial-crisis-why-no-executive-prosecutions/> (“Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing.”). For general accounts of the two sides of the debate, see Golumbic & Lichy, *supra* note 69, at 1312–15, and Daniel C. Richman, *Corporate Headhunting*, 8 HARV. L. & POL'Y REV. 265, 277–80 (2014).

77 See GARRETT, *supra* note 69, at 281–84 (discussing concerns).



ents' preferences without obtaining affirmative change of the law on the books. Similarly, many proponents of DPAs no doubt would prefer greater oversight and enforcement capacity on the part of regulatory agencies. But in a world of scarce resources and powerful political opposition to new civil regulation, DPAs have enabled the leveraging of criminal law to obtain prospective reforms of troubled organizations.<sup>78</sup>

Again, however, both these developments underscore the potential significance of nonenforcement. The Justice Department's marijuana enforcement guidelines have prompted development of vast marijuana industries in some states. The Department of Homeland Security's initiatives potentially shield millions of immigrants from removal. DPAs have imposed millions of dollars in fines and extensive organizational changes. These are policy effects of the first order, but no clear lawmaking delegation underlies them, only the negative discretion not to enforce laws already on the books, or to leverage such nonenforcement to achieve alternative aims. Critics have thus argued for a more assertive judicial role, and current litigation over the immigration initiatives and DPAs has raised anew the question whether courts can or should play any role in defining and enforcing limits on executive nonenforcement.<sup>79</sup>

## II. A POLITICAL QUESTION FRAMEWORK

Executive law-enforcement obligations should be understood to present a form of political question—an issue, that is, on which structural constitutional considerations support placing a gap between executive duties and judicial enforcement of those duties. Courts' reluctance to bridge that gap is often well-founded, but for reasons relating primarily to judicial capacity and institutional competence, not limitations on congressional authority, executive obligation, or the case or controversy requirement. Accordingly, the Supreme Court has been correct to emphasize the “unsuitability” of nonenforcement for judicial review, but wrong to infer “absolute” executive discretion from judicial unmanageability, and equally wrong to shoehorn concerns about intrusion on executive inaction into constitutional standing doctrine. Reframing the issue in this way reveals, moreover, that courts' hands-off attitude towards nonenforcement is not always justified. As discussed in Part III, in some important contexts, including approval of DPAs and review of some unusual general nonenforcement policies, courts might police important

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<sup>78</sup> See *id.* at 266–68 (arguing that prosecutors are “crucial to filling the gap left by regulators who may lack adequate resources to punish the most severe corporate violators” and that “prosecutions may be symptoms of regulatory failures”); Richman, *supra* note 76, at 280 (“Criminal sanctions will simply be the ‘second-best preference’ of those who would really prefer a very different regulatory (or deregulated) regime.”).

<sup>79</sup> See, e.g., *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016) (challenge to deferred action program); *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015) (rejecting DPA), *vacated and remanded*, Nos. 15-3016, 15-3017, 2016 WL 1319266 (D.C. Cir. 5, 2016).

boundaries to executive nonenforcement authority without overstepping their proper role.

Before turning to such normative issues, I offer in this Part a descriptive account of existing doctrine rooted in the political question criteria of “textual assignment” and “judicial unmanageability.” Section A briefly describes the political question doctrine, while Sections B and C explore the applicability of these twin criteria to executive nonenforcement.

### A. *Political Question Criteria*

The animating idea of the political question doctrine is that some legal obligations defy judicial enforcement. As one lower court recently put it, “a question is ‘political’ and thus nonjusticiable when its adjudication would inject the courts into a controversy which is best suited to resolution by the political branches.”<sup>80</sup> On this theory, lower courts have repeatedly dismissed cases questioning particular applications of military force,<sup>81</sup> as well as cases challenging certain executive foreign policy decisions.<sup>82</sup> The Supreme Court has declined to resolve the adequacy of a Senate impeachment trial and the sufficiency of National Guard training and oversight,<sup>83</sup> a plurality has deemed constitutional prohibitions on political gerrymandering to be judicially unenforceable,<sup>84</sup> and four Justices have suggested that the Senate’s constitutional role in treaty termination is non-justiciable.<sup>85</sup> Courts in all these contexts have distinguished justiciability from the merits. “In invoking the political question doctrine,” the Court has said, “a court acknowledges the possibility that a constitutional provision may not be judicially enforcea-

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80 *Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180 (4th Cir. 2015).

81 *Id.* at 178 (rejecting claim based on “accidental killing of [plaintiff’s] husband and the intentional sinking of her husband’s fishing vessel during a NATO counter-piracy mission”); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 844 (D.C. Cir. 2010) (“If the political question doctrine means anything in the arena of national security and foreign relations, it means the courts cannot assess the merits of the President’s decision to launch an attack on a foreign target . . . .”); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 46–52 (D.D.C. 2010) (rejecting challenge to military targeting of alleged terrorist overseas).

82 *Li-Shou*, 777 F.3d at 180 (“[I]t is not within the purview of ‘judicial competence’ to review purely military decisions.” (quoting *Lebron v. Rumsfeld*, 670 F.3d 540, 548 (4th Cir. 2012))); *El-Shifa Pharm. Indus.*, 607 F.3d at 842 (“The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security constitutionally committed to their discretion.”); *Bancoult v. McNamara*, 445 F.3d 427, 436 (D.C. Cir. 2006) (“[T]he decision to establish a military base [overseas] is not reviewable.”).

83 *See Nixon v. United States*, 506 U.S. 224 (1993) (impeachment trials); *Gilligan v. Morgan*, 413 U.S. 1 (1973) (National Guard).

84 *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion).

85 *Goldwater v. Carter*, 444 U.S. 996, 1002 (1979) (Rehnquist, J., concurring) (“[T]he basic question presented by the petitioners in this case is ‘political’ and therefore nonjusticiable because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.”).

ble. Such a decision is of course very different from determining that specific congressional action does not violate the Constitution.”<sup>86</sup>

Insofar as law enforcement, no less than war powers or foreign affairs, is a central constitutional function of the executive branch, recognizing it as a political question could create a certain doctrinal symmetry. But what defines a political question? As a matter of doctrine, a vague six-factor test outlined in *Baker v. Carr* supposedly governs the identification of political questions:

Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.<sup>87</sup>

In its more recent cases, the Supreme Court has emphasized the first two *Baker v. Carr* factors, “textually demonstrable . . . commitment of the issue to a coordinate political department” and “lack of judicially discoverable and manageable standards for resolving it.”<sup>88</sup>

The first of these two seems to reflect an assumption, dating to *Marbury v. Madison*,<sup>89</sup> that certain judgments are assigned specifically to another branch and thus beyond judicial power.<sup>90</sup> As the Court observed in *Marbury*, the Constitution “invest[s]” the President “with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.”<sup>91</sup> In his opinion for the Court, Chief Justice John Marshall placed the President’s power to appoint federal officers within this category.<sup>92</sup> The exercise of this authority, Marshall explained, “respect[s] the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive.”<sup>93</sup> In more recent cases, the Court has emphasized

86 *U.S. Dep’t of Commerce v. Montana*, 503 U.S. 442, 458 (1992) (footnotes omitted) (citing MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 116–17 (1991); Louis Henkin, *Is There a “Political Question” Doctrine?*, 85 *YALE L.J.* 597, 599 (1976)).

87 369 U.S. 186, 217 (1962).

88 *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1427 (2012) (quoting *Nixon v. United States*, 506 U.S. 224, 228 (1993)).

89 5 U.S. (1 Cranch) 137 (1803).

90 This so-called “classical” view of the doctrine is associated with Herbert Wechsler. See HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 11–14 (1961).

91 *Marbury*, 5 U.S. (1 Cranch) at 165–66.

92 *Id.*; see U.S. CONST. art. II, § 3.

93 *Marbury*, 5 U.S. (1 Cranch) at 166. For discussion of Marshall’s understanding of political questions, see Walter Dellinger & H. Jefferson Powell, *Marshall’s Questions*, 2 *GREEN BAG* 2d 367 (1999).

that text alone is generally insufficient to create textual assignment; textual assignment in the relevant sense instead requires particular institutional reasons not to involve the judiciary.<sup>94</sup> After all, nearly every government function is constitutionally assigned to one branch or another, yet courts normally enforce constitutional limits on the exercise of those functions.

The second criterion, absence of judicially manageable standards, is even more mysterious. As one commentator summarizes, the Court “has suggested that a judicially manageable rule must be ‘principled, rational, and based upon reasoned distinctions,’ in contrast to a legislated rule, which ‘can be inconsistent, illogical, and ad hoc.’”<sup>95</sup> The concept, so described, seems to put the cart before the horse, at least in the constitutional context. To quote another commentator, “Judicially manageable standards . . . are far more often the products or outputs of constitutional adjudication than inherent elements of the Constitution’s meaning.”<sup>96</sup> That is to say, in our system of constitutional adjudication, courts normally give determinate content to amorphous standards through doctrinal elaboration, rather than throwing up their hands at the outset. Accordingly, this political question factor, much like textual assignment, seems ultimately to turn on a judgment of relative institutional competence—a determination that judicial line-drawing would infringe on judgments that another branch is better positioned to make.<sup>97</sup> On some accounts, for example, the constitutional prohibition on delegation of legislative power is judicially unenforced because it is judicially unmanageable: courts’ ungoverned policy preferences would inevitably infect any judgment that Congress has gone too far, so the question is best left to the political process.<sup>98</sup> Similarly, in deferring to executive judgments

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94 See, e.g., *Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1428 (2012) (contrasting textual assignment of a particular power with “exclusive commitment” of authority to decide an issue); *id.* at 1431 (Sotomayor, J., concurring) (characterizing the “textual assignment” factor as covering cases in which “the Constitution itself requires that another branch resolve the question presented”); *Nixon v. United States*, 506 U.S. 224, 228 (1993) (“[T]he courts must, in the first instance, interpret the text in question and determine whether and to what extent the issue is textually committed.”); see also generally John Harrison, *The Relation Between Limitations on and Requirements of Article III Adjudication*, 95 CALIF. L. REV. 1367, 1375 (2007) (“[T]he fear that drives judicial reticence in political question cases is about second-guessing highly sensitive and discretionary decisions, even when those decisions are about or substantially constrained by legal principles.”).

95 Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 22 (2013) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion)).

96 Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1277 (2006).

97 Cf. Kenneth Culp Davis, “*No Law to Apply*”, 25 SAN DIEGO L. REV. 1, 4 (1988) (criticizing *Heckler v. Chaney* because “when an American court is confronted with an entirely new problem that is governed by no statute and by no prior decision, it *never* says it must give up for lack of law to apply; it creates whatever law is needed to decide the case”).

98 See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting))); John F. Manning,

with respect to war powers and foreign affairs, courts often “couple a determination that they lack competence to make factual or predictive judgments with a conclusion that another institution is both better situated and constitutionally obliged to make the requisite assessments.”<sup>99</sup>

Outside the constitutional context, courts have also deemed certain statutory standards “judicially unmanageable.” Their approach there reflects the same emphasis on relative institutional competence. Just last term, for example, the Supreme Court held in *Armstrong v. Exceptional Child Center* that certain statutory standards for state Medicaid reimbursement were not subject to private equitable enforcement, in part because of the “judicially unadministrable nature” of the statutory standard.<sup>100</sup> The provision in question required state Medicaid plans to provide for reimbursement of certain services at rates:

[N]ecessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.<sup>101</sup>

In the Court’s view, any judicial determination of this standard’s meaning would be “judgment-laden”; it would turn on multifaceted policy considerations that politically accountable administrators could evaluate with greater legitimacy and competence than courts.<sup>102</sup> Accordingly, “[t]he sheer complexity associated with enforcing [this standard], coupled with the express provision of an administrative remedy” (in the form of withholding of federal funds by the Secretary of Health and Human Services), established congressional intent to make the public enforcement remedy exclusive.<sup>103</sup>

Can law enforcement choices qualify as political questions by these standards? Historically, key authorities, including John Marshall himself in an important floor speech as a member of Congress, described law enforcement

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*Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 901 (2004) (arguing that “[T]he central inquiry in a nondelegation case necessarily asks what degree of legislatively conferred discretion crosses the line from permissible law implementation to an impermissible delegation of legislative power” and that “this question reduces to little better than an I-know-it-when-see-it test”); see also Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1786 (2012) (“The danger is too grave that if courts attempted to police the boundaries of permissible delegation, they would approve of delegations that seemed to them necessary in light of policy realities, and disapprove of those that did not. This would be a usurpation of the legislative function.”). Some, of course, argue instead that the non-delegation doctrine is unenforced because it does not exist. See, e.g., Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

99 Fallon, *supra* note 96, at 1277.

100 135 S. Ct. 1378, 1385 (2015).

101 42 U.S.C. § 1396a(a)(30)(A) (2012).

102 *Exceptional Child Center*, 135 S. Ct. at 1385.

103 *Id.*

as a textually assigned function of the executive branch and thus no province of the courts.<sup>104</sup> More broadly, in its important Reconstruction-era decision *Mississippi v. Johnson*, the Supreme Court characterized faithful execution of federal regulatory statutes as a non-justiciable presidential duty.<sup>105</sup> According to the Court, “the duty of the President in the exercise of the power to see that the laws are faithfully executed, and among these laws the acts named in the bill,” was “purely executive and political.”<sup>106</sup> “An attempt on the part of the judicial department of the government to enforce the performance of such duties by the President might be justly characterized, in the language of Chief Justice Marshal [sic] as ‘an absurd and excessive extravagance.’”<sup>107</sup>

Given subsequent doctrinal developments, *Mississippi v. Johnson*’s categorical exclusion of faithful execution from judicial oversight could not be transposed wholesale into modern doctrine without significant disruption. Courts in *Johnson*’s day understood separation of powers to preclude direct review of any discretionary executive function.<sup>108</sup> Today, in contrast, although the President’s own actions remain unreviewable for abuse of discretion under the APA,<sup>109</sup> review of discretionary agency decisions is otherwise routine and provides important legitimation for broad delegations to administrative agencies.<sup>110</sup> To the extent modern judicial review under the APA and other statutes departs from the “separate spheres” conception of separation of powers underlying *Johnson* and other early authorities, the question why nonenforcement remains exempt from judicial review becomes harder.<sup>111</sup> But even under the more modest criteria for political questions

104 10 ANNALS OF CONG. 615 (1800) (statement of Rep. Marshall).

105 71 U.S. (4 Wall.) 475, 499 (1866).

106 *Id.*

107 *Id.* In a new article tracing the historical origins of the political question doctrine, Tara Grove suggests that *Mississippi v. Johnson* was a political question case only insofar as it involved a state’s assertion of “sovereign ‘political rights’ in court,” a matter she asserts courts would address today as a matter of standing doctrine. Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 N.Y.U. L. REV. 1908, 1916 n.30 (2015). Though Grove’s argument is compelling in other respects, this account of *Johnson* overlooks the Court’s description of faithful execution as a “purely executive and political” responsibility. *Mississippi*, 71 U.S. (4 Wall.) at 499; cf. Harrison, *supra* note 94, at 1375 (“[T]he fear that drives judicial reticence in political question cases is about second-guessing highly sensitive and discretionary decisions, even when those decisions are about or substantially constrained by legal principles.”).

108 For background on nineteenth-century judicial review of executive action, see JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION* (2012); Bagley, *supra* note 32, at 1294–1303; Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 946–53 (2011); Ann Woolhandler, *Judicial Deference to Administrative Action—A Revisionist History*, 43 ADMIN. L. REV. 197, 206–09 (1991).

109 *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

110 See *supra* Section I.A.

111 See, e.g., Bagley, *supra* note 32, at 1294–1301 (contrasting the nineteenth-century approach with the modern presumption of reviewability).

reflected in modern doctrine, there remains a kernel of truth to *Johnson's* holding. Seeing why requires separately unpacking limitations on judicial authority that apply under idealized baseline conditions, on the one hand, and messier modern enforcement realities, on the other.

*B. Separation of Powers at Baseline: Textual Assignment*

To clarify the scope of judicial power over executive enforcement, I consider first the division of authority that would obtain under idealized baseline conditions: If Congress enacted a civil or criminal prohibition, provided adequate resources for full enforcement, and provided some otherwise valid mechanism for judicial review of nonenforcement decisions, could a federal court compel executive officials to bring a prosecution or enforcement action before it in the particular case?

For compelling textual, structural, and normative reasons, the answer is no. Allowing such judicially compelled prosecution would collapse any meaningful distinction between executive and judicial power in the enforcement context. At the same time, it would compromise courts' core function of guaranteeing due process to defendants in public enforcement suits. But this limit on judicial power is narrow: it does not preclude judicial review of administrative nonenforcement, nor even more indirect review of the government's reasons for proceeding or not proceeding in a particular case through judicial process. Nor does it reflect any more absolute executive prerogative to decline enforcement. Any obligation to bring particular enforcement suits is instead a political question of the "textually assigned" variety—an obligation binding on executive officials as a matter of politics and conscience but not judicial enforcement.

To start with the text itself, the Take Care Clause specifically assigns responsibility for law enforcement to the executive branch.<sup>112</sup> Article II thus plausibly implies, by negative inference, that courts lack authority to direct the enforcement of federal laws. At a most basic level, in law enforcement contexts, faithful execution of federal laws requires identifying legal violations and pursuing appropriate remedies. That responsibility, in turn, often requires bringing appropriate cases before federal courts, which then function as neutral arbiters between the government and individual defendants.<sup>113</sup> Court-ordered prosecution of particular parties would violate this understanding: it would involve the court in adjudicating legal violations identified by the court on its own initiative, just as much as if the court compelled a private party to bring a particular claim before it for resolution. A

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112 U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

113 For a colorful early expression of this idea, see ST. GEORGE TUCKER, VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 293 (Liberty Fund 1999) (1803) ("The judiciary . . . is that department of the government to whom the protection of the rights of the individual is by the constitution especially confided, interposing its shield between him and the sword of usurped authority, the darts of oppression, and the shafts of faction and violence.").

prohibition on court-ordered official prosecution thus ensures that a parallel rule of party-presentation applies equally to public and private litigants.<sup>114</sup>

On a more functional level, allowing court-ordered prosecution in particular cases would collapse any meaningful separation between executive and judicial power. At the time of the founding, “the division of executive and judicial power into two separate branches [of government] was a relative novelty in political theory.”<sup>115</sup> Yet foundational theorists described the separation as an essential protection for liberty. As James Madison, quoting Montesquieu, observed in *The Federalist No. 47*: “Were [the power of judging] joined to the executive power, the judge might behave with all the violence of an oppressor.”<sup>116</sup> By requiring three discrete steps for criminal or civil punishment—legislative enactment, executive prosecution, and judicial determination of guilt—the Constitution’s tripartite scheme of separated powers stacks the deck in favor of liberty, making unwarranted or unjustified sanctions less likely.<sup>117</sup> What is more, separated executive and judicial power ensures determination of the defendant’s due process rights by a neutral adjudicator with no predetermined interest in the case’s outcome.<sup>118</sup>

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114 For discussion of the party-presentation requirement in private litigation, see Scott Dodson, *Party Subordination in Federal Litigation*, 83 GEO. WASH. L. REV. 1, 7–12, 25–33 (2014). In some conventional forms of litigation such as shareholder derivative suits, the court notionally compels an entity to pursue civil claims against other parties, but in such cases the compulsion to bring suit is effectively a legal fiction to enable litigation between conflicting underlying interests (such as shareholders and managers).

115 Powell, *How Does the Constitution Structure Government?*, in A WORKABLE GOVERNMENT 27 (B. Marshall ed., 1987); Woolhandler, *supra* note 108, at 214 (citing M.J.C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 154–55 (Liberty Fund 2d ed. 1998) (1967)); see also GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 159–61 (1998) (discussing revolutionary-era difficulties “fit[ting] the judiciary into the scheme of government”).

116 THE FEDERALIST NO. 47, at 303 (James Madison) (Clinton Rossiter ed., 1961) (quoting Montesquieu); see also 1 WILLIAM BLACKSTONE, COMMENTARIES \*258 (1765) (emphasizing that the king’s role as prosecutor in criminal cases would make it an “absurdity[ ] if the king personally sate in judgment”); *id.* at 260 (“Nothing . . . is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state.”).

117 See, e.g., *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 . . .”); Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536–38 & n.102 (1991).

118 The Supreme Court has recognized a related principle of judicial neutrality as a requirement of due process. In *In re Murchison*, 349 U.S. 133, 134, 139 (1955), the Court held that a judge who approved criminal charges as a “one-man grand jury” could not preside over the resulting trial. *Id.* at 139 (“We hold that it was a violation of due process for the ‘judge-grand jury’ to try these petitioners.”). The Court explained: “Having been a part of [the single-judge grand-jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused. While he would not likely have all the zeal of a prosecutor, it can certainly not be said that he would



Federal courts have thus rejected suits to compel criminal enforcement, even when underlying statutes seem to require it.<sup>119</sup> Early in the country's history, Federalist judges attempted on at least two occasions to compel criminal enforcement.<sup>120</sup> But the District Attorney and grand jury rebuffed the judges' efforts in one case,<sup>121</sup> and in the other, Supreme Court Justice Samuel Chase was impeached.<sup>122</sup> Early practice thus established an enduring prohibition against judicially compelled prosecution. More recently, although the Civil Rights Act of 1866 purports to require executive enforce-

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have none of that zeal." *Id.* at 137; *see also* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 887 (2009) (involving judge bias and recusal for purposes of due process).

119 *See, e.g.*, Otero v. U.S. Att'y Gen., 832 F.2d 141, 141–42 (11th Cir. 1987); Ross v. U.S. Attorney's Office for the Cent. Dist. of Cal., 511 F.2d 524, 524 (9th Cir. 1975) (*per curiam*); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973); Bass Anglers Sportsman's Soc'y of Am. v. Scholze Tannery, Inc., 329 F. Supp. 339, 346 (E.D. Tenn. 1971); Powell v. Katzenbach, 359 F.2d 234, 234–35 (D.C. Cir. 1965); Pugach v. Klein, 193 F. Supp. 630, 635 (S.D.N.Y. 1961); *cf.* United States v. Cox, 342 F.2d 167, 181 (5th Cir. 1965).

120 *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 195 (1926) (describing one such instance); Richard Ellis, *The Impeachment of Samuel Chase, in* AMERICAN POLITICAL TRIALS 60 (Michal R. Belknap ed., 1994) (describing another).

121 JAMES F. SIMON, WHAT KIND OF NATION 150 (2002); WARREN, *supra* note 120, at 196–97.

122 One article of impeachment accused Justice Chase of "authoritatively enjoin[ing]" the executive branch to prosecute. 14 ANNALS OF CONG. 327 (1804). In discussing this charge at his trial in the Senate, the House managers advocating Chase's removal emphasized that such intrusion on independent executive judgment violated a constitutional obligation of neutrality—a duty, that is, to serve as an "impartial dispenser[ ] of justice between such as might resort [to the federal courts] for an adjustment of their differences." *Id.* Although the Senate ultimately acquitted Chase on all charges, even his attorneys appear not to have disputed the managers' conception of the proper judicial role. *Id.* at 543 (admitting "that he requested the District Attorney to assist [the grand jury] with his advice in making this inquiry"); *see also id.* at 549 (emphasizing Chase's acquiescence in the DA's and grand jury's determination that no crime occurred); *id.* at 142 (characterizing allegations in the article as "altogether erroneous"); *id.* at 144 (contending that it was Chase's "duty, when informed of an offence, which the grand jury had overlooked, to direct their attention towards it, and to request for them, and even to require, if necessary, the aid of the District Attorney in making their inquiries"). In any event, historians have pointed to Chase's trial as a watershed in chastening overzealous early judges and entrenching a more limited conception of the judicial role. *See, e.g.*, R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 179 (2001); STEPHEN B. PRESSER, THE ORIGINAL MISUNDERSTANDING 156–58 (1991); GORDON S. WOOD, EMPIRE OF LIBERTY 422–25 (2009); Ellis, *supra* note 120, at 57–73.

ment,<sup>123</sup> even very sympathetic federal courts rejected civil rights–era efforts to compel prosecutions under the statute.<sup>124</sup>

To be sure, some authorities suggest that courts lack power to compel prosecution because executive officials have no obligation to prosecute in the first place.<sup>125</sup> As I have elsewhere argued, however, while some degree of enforcement discretion is a natural incident of the executive function, Article II’s requirement of faithful execution is at odds with presuming unbounded executive nonenforcement authority, particularly in civil and administrative contexts.<sup>126</sup> Furthermore, when Congress affirmatively mandates enforcement, as it has done in some important statutes, the enforcement mandate itself is a law that the executive branch must faithfully execute.<sup>127</sup> Congress cannot mandate enforcement even when the executive branch deems it factually unjustified; any such mandate would itself violate separation of powers by collapsing the distinction between legislative and executive power.<sup>128</sup> But short of that narrow limit on congressional power, Congress may impose enforcement obligations that are binding as a matter of politics and conscience, even if courts cannot directly enforce them.

At any rate, and more to the point here, a narrow prohibition on judicially compelled prosecution comports better with the case law than any broader theory of preclusive executive nonenforcement power. In contexts where the issue has most directly presented itself, courts have in fact come close to embracing this understanding explicitly. In *Dunlop v. Bachowski*, for example, the Supreme Court applied a statute requiring the Secretary of Labor to bring civil suits in response to certain labor violations.<sup>129</sup> In doing so, it recognized no constitutional difficulty with exercising judicial review over executive nonenforcement decisions, but nevertheless avoided deciding “the question whether the district court is empowered to order the Secretary

123 42 U.S.C. § 1987 (2012); Civil Rights Act of 1866, § 4, 14 Stat. 27, 28 (providing “[t]hat the district attorneys, marshals, and deputy marshals of the United States . . . shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offence”). This law presumably reflected Congress’s suspicion that President Andrew Johnson, who would later be impeached for obstructing Reconstruction, could not be trusted with discretionary nonenforcement power. See Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1306–07 (1965).

124 See, e.g., *Peek v. Mitchell*, 419 F.2d 575, 577 (6th Cir. 1970); *Moses v. Kennedy*, 219 F. Supp. 762, 765–66 (D.D.C. 1963), *aff’d per curiam*, 342 F.2d 931 (D.C. Cir. 1965).

125 See, e.g., *In re Aiken Cty.*, 725 F.3d 255, 263 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (discussing “the President’s Article II prosecutorial discretion”); AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION* 429–30 (2012).

126 Price, *Enforcement Discretion*, *supra* note 10, at 675–77.

127 *Id.* at 711–18.

128 *Id.* at 711–12; *cf.* U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder . . . shall be passed.”).

129 421 U.S. 560, 562–63 (1975).

to bring a civil suit against the union to set aside the election.”<sup>130</sup> Lower courts have continued avoiding the question,<sup>131</sup> while at least one judge has suggested an affirmative order to prosecute would be unconstitutional.<sup>132</sup> Similarly, while the Supreme Court has recognized inherent judicial power to punish contempt of court,<sup>133</sup> its principal rationale for doing so—that inherent judicial authority is “essential to ensuring that the Judiciary has a means to vindicate its own authority without complete dependence on [the] other [two] Branches”—presumes that any judicial request for executive prosecution would not be binding on the executive branch.<sup>134</sup>

At the same time, courts have exercised more indirect forms of review. Although in dicta the Supreme Court has also called it “entirely clear that the refusal to prosecute cannot be the subject of judicial review,”<sup>135</sup> in fact under a federal procedural rule courts do review (albeit on limited grounds) dismissal of criminal charges once filed.<sup>136</sup> In principle, moreover, the court may present possible crimes to a grand jury itself, although courts rarely do so today.<sup>137</sup> Courts likewise must approve plea bargains, and accordingly may sometimes reject them for being unduly lenient, in what is effectively a form of review of the choice not to prosecute certain crimes or pursue certain

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130 *Id.* at 575. The Court in *Heckler* described *Dunlop* as a case involving an express provision for judicial review that rebuts the general presumption of non-reviewability for nonenforcement decisions. *See Heckler*, 470 U.S. 821, 833 (1985).

131 *See, e.g.*, *Harrington v. Chao*, 280 F.3d 50, 60–61 (1st Cir. 2002) (remanding administrative decision not to sue); *Shelley v. Brock*, 793 F.2d 1368, 1375–76 (D.C. Cir. 1986) (same); *cf. Doyle v. Brock*, 821 F.2d 778, 786–87 (D.C. Cir. 1987) (declining to issue injunctive relief but relying on assurances from Secretary that he would commence suit).

132 *See Doyle*, 821 F.2d at 788 (Silberman, J., dissenting) (“I very much doubt the constitutional propriety of an order directing the Secretary to file suit.” (citing *Smith v. United States*, 375 F.2d 243, 246–48 (5th Cir. 1967); *United States v. Cox*, 342 F.2d 167, 171–73 (5th Cir. 1965))).

133 *See, e.g.*, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795–96 (1987); *see also generally* Note, *Permitting Private Initiation of Criminal Contempt Proceedings*, 124 HARV. L. REV. 1485, 1487–89 (2011) (summarizing case law). This power is also recognized by statute. 18 U.S.C. § 401 (2012); *see also* FED. R. CRIM. P. 42.

134 *Young*, 481 U.S. at 796; *see also id.* at 801 (“If the Judiciary were completely dependent on the Executive Branch to redress direct affronts to its authority, it would be powerless to protect itself if that Branch declined prosecution.”).

135 *ICC v. Bhd. Of Locomotive Eng’rs*, 482 U.S. 270, 283 (1987).

136 FED. R. CRIM. P. 48(a); *see also, e.g.*, *Rinaldi v. United States*, 434 U.S. 22, 30 (1977) (deeming non-dismissal abuse of discretion only because the government’s request “was motivated by considerations which cannot fairly be characterized as clearly contrary to manifest public interest” (internal quotation marks omitted)). *See* note 197 below for further discussion of applicable case law.

137 ADMIN. OFFICE OF U.S. COURTS, HANDBOOK FOR GRAND JURORS 3 (“Matters may be brought to its attention in three ways: (1) by the United States Attorney or an Assistant United States Attorney; (2) by the court that impaneled it; and (3) from the personal knowledge of a member of the grand jury or from matters properly brought to a member’s personal attention.”). For discussion of early federal practice, *see Price, Enforcement Discretion, supra* note 10, at 732 & n.263.

penalties.<sup>138</sup> The defense of selective prosecution (despite its limited scope) indirectly restricts nonenforcement by precluding some prosecutions following non-prosecution in other similar cases.<sup>139</sup> Historically, at least, the common law and some state statutes provided remedies for failures of enforcement in certain circumstances.<sup>140</sup> By way of contrast, under settled doctrine and practice, Presidents can issue pardons and other forms of clemency for any reason or no reason or even bad reasons.<sup>141</sup> Although some have attempted to derive criminal prosecutorial discretion from the pardon power,<sup>142</sup> courts have not extended the same degree of absolute freedom to enforcement-related decisions. At the very least, even if criminal non-prose-

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138 FED. R. CRIM. P. 11; *In re Morgan*, 506 F.3d 705, 712 (9th Cir. 2007) (“Rule 11 vests district courts with considerable discretion to assess the wisdom of plea bargains.”).

139 See, e.g., *United States v. Armstrong*, 517 U.S. 456, 465 (1996).

140 See, e.g., *South v. Maryland*, 59 U.S. 396, 402–03 (1855) (indicating that neglect of public duty to preserve the public peace was punishable by indictment at common law); *Darlington v. Mayor of New York*, 31 N.Y. 164, 187 (1865) (upholding statute indemnifying property owners for damage caused by riot that public officials failed to prevent; see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768–69 (2005) (noting that the people of a state may “create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented”)).

141 See, e.g., *United States v. Klein*, 80 U.S. 128, 147 (1871) (“To the executive alone is intrusted the power of pardon; and it is granted without limit.”); *Ex parte Garland*, 71 U.S. 333, 380 (1866) (“The power thus conferred is unlimited, with the exception stated [for impeachments]. It extends to every offence known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control.”). But cf. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1346 (2008) (“[T]he clemency power has faced increasing criticism for its inconsistency with the fundamental values of administrative law.”). A majority of Justices in one case with no majority opinion suggested that state clemency decisions must comport with due process, but the extent of review they contemplated appeared limited to situations where “a state official flipped a coin to determine whether to grant clemency, or . . . the State arbitrarily denied a prisoner any access to its clemency process.” *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289 (1998) (O’Connor, J., concurring in part and concurring in the judgment); see also *id.* at 292 (Stevens, J., concurring in part and dissenting in part).

142 Some have argued that nonenforcement is a lesser power necessarily implied by the greater power to issue pardons. See, e.g., AMAR, *supra* note 125, at 429. A pardon or amnesty, however, has different requirements and effects from nonenforcement decisions. Whereas an award of clemency irrevocably excuses a completed criminal offense, nonenforcement turns a blind eye to legal violations. Moreover, nonenforcement may apply prospectively insofar as the offenses in question are incomplete or ongoing. Such prospective cancellation of legal requirements could arguably amount to a greater power than the power to pardon, insofar as it may induce non-compliance rather than simply excusing past violations. At any rate, the pardon power is limited to criminal rather than civil offenses, and the specific textual grant of pardon power may well imply that even as to criminal offenses clemency rather than nonenforcement is the proper means of exercising leniency. For further discussion of differences between clemency and nonenforcement, see Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 849 (2015).

cution approaches an absolute prerogative in practice, *Dunlop*, *Heckler*, and other cases have rejected the prerogative's extension to civil nonenforcement.

In sum, even under idealized conditions of adequate resources and a clear duty to enforce, the constitutional separation of powers imposes one narrow but important limitation on judicial power: courts may not compel an executive enforcement suit in any particular case. As a result, any executive enforcement obligation in such cases, either as a result of a specific statutory mandate or as a function of the more general requirement of faithful execution, presents a political question of the textually assigned variety. Law enforcement thus parallels the approach the Supreme Court took in another political question case with respect to the House of Representative's exclusion of a member: courts may have power to declare another branch's obligations, but not to compel their performance.<sup>143</sup> In the enforcement context, this admittedly awkward balance preserves legal accountability for clear breaches of executive duty, but at the same time protects the most central, irreducible aspect of the executive function from direct judicial control.<sup>144</sup>

Nevertheless, this limit does not readily translate to modern appellate-style judicial review of administrative decisions, where the court's function is to ensure administrative adherence to legal requirements, not to referee between the government and a private defendant. In such contexts, too, the proper outcome of judicial review might normally be a remand rather than an order of enforcement, so as to enable an exercise of administrative judgment subject to applicable requirements of administrative due process.<sup>145</sup>

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143 *Powell v. McCormack*, 395 U.S. 486, 517–18 (1969) (avoiding the question whether federal courts could “issue mandamus or injunctions compelling officers or employees of the House to perform specific official acts” because declaratory relief could resolve case).

144 *Cf. Saikrishna Prakash*, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 704 (“At bottom, the executive power is the power to execute the laws.”). Although I do not further develop this proposal here, this remedial conception of political questions may have broader application. For example, courts might hold authority to adjudicate the legality of a war by indirect means, but not to enjoin presidentially directed combat directly. On one controversial account, court judgments are always essentially precatory with respect to the executive branch because presidents hold independent authority to decline to execute them. Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 221 (1994) (“[T]he executive’s power to interpret the law may, and should, be exercised independently of the interpretations of other branches, including those of the federal courts.”). For a more limited view, see, for example, William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809 (2008) (“[T]he judicial power vested in Article III courts allows them to render binding judgments that must be enforced by the Executive Branch so long as those courts have jurisdiction over the case.”).

145 *See, e.g., Gonzales v. Thomas*, 547 U.S. 183, 186 (2006) (“[T]he proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare cir-

But the specific concern about collapsing executive and adjudicative functions under conventional separation of powers is absent. At the least, the prohibition on compelled prosecution cannot justify *Heckler's* refusal to require even a reasoned basis for administrative nonenforcement decisions, nor indeed can it explain courts' broader reluctance to police enforcement decisions by indirect means. Finally, it fails to preclude judicial scrutiny of general enforcement policies whose reversal would not necessarily result in enforcement in any particular case. Courts' broader reluctance to intrude on nonenforcement requires reference to the other prong of the political question analysis, judicial unmanageability.

### C. *Real-World Enforcement: Judicial Unmanageability*

In reality, as already noted, federal enforcement agencies rarely have anywhere near adequate resources to fully enforce the laws they administer, nor are they under any explicit mandate to do so.<sup>146</sup> Congress in any case legislates against a background assumption of at least case-specific enforcement discretion. Hence, even when Congress uses the mandatory term "shall" (rather than "may") with respect to a given prohibition, some executive discretion should be presumed.<sup>147</sup> But whatever the extent of that baseline discretion under idealized conditions, it is greatly magnified in practice by the resource constraints and practical challenges that generally preclude anything approaching full enforcement. As one scholar puts it, "The problem of insufficient resources is an endemic feature of the modern federal government."<sup>148</sup> This feature of modern law enforcement creates problems of judicial manageability that powerfully supplement and reinforce any considerations of textual assignment that would otherwise justify a limited judicial role.

#### 1. The Problem in General

In *Heckler*, the Supreme Court in fact emphasized unmanageability as a rationale for interpreting the APA to limit judicial review. As a general matter, the Court observed that questions are "committed to agency discretion by law"<sup>149</sup> when "the statute is drawn so that a court would have no meaning-

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stances, is to remand to the agency for additional investigation or explanation."); *Adams v. Richardson*, 480 F.2d 1159, 1163 n.5 (D.C. Cir. 1973) (en banc) (affirming remand nonenforcement decision but emphasizing that district court order required only commencement of administrative proceedings subject to due process requirements).

146 See *supra* notes 55–58 and accompanying text.

147 Price, *Enforcement Discretion*, *supra* note 10, at 704; see also, e.g., *Heckler v. Chaney*, 470 U.S. 821, 835 (1985) (interpreting term "shall" in enforcement provision to preserve discretion because such language is "commonly found in the criminal provisions of Title 18 of the United States Code").

148 Saikrishna Bangalore Prakash, Response, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. SEE ALSO 115, 118–19 (2013).

149 5 U.S.C. § 701(a)(2) (2012).

ful standard against which to judge the agency's exercise of discretion."<sup>150</sup> The Court then elaborated on why nonenforcement decisions entail a similar absence of "judicially manageable standards . . . for judging how and when an agency should exercise its discretion."<sup>151</sup> The Court observed:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities.<sup>152</sup>

The Court has offered parallel justifications for limiting even constitutional selective prosecution challenges:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.<sup>153</sup>

These compressed statements highlight central practical problems with judicial review, yet they also pointedly presume some enforcement responsibility on the part of the agency. Agencies cannot pursue every "technical violation." Nevertheless, the agency's challenge is one of "ordering . . . priorities," determining how resources are "best spent," and assessing the likelihood of success and "general deterrence value" of a given set of cases, not deciding whether the statute the agency "is charged with enforcing" is worth implementing at all. The question these assertions beg is why judicial inquiry into the availability of resources and their highest value application is so inappropriate, even if conducted deferentially. Why is it not "the kind of analysis the courts are competent to undertake" to assess the agency's reasons for not acting and judge whether those reasons reflect an adequate effort to effectuate statutory policies? Placing the Court's statements in the context of broader ideas about judicial unmanageability suggests an answer.<sup>154</sup>

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150 *Heckler*, 470 U.S. at 830 (discussing *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)).

151 *Id.* (discussing *Citizens to Pres. Overton Park*, 401 U.S. at 410).

152 *Id.* at 831-32.

153 *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489-90 (1999) (quoting *Wayte v. United States*, 470 U.S. 598, 607-08 (1985)).

154 As noted earlier, *Heckler* gave several additional rationales, beyond these "administrative" difficulties, for deeming nonenforcement unreviewable. In particular, it analogized administrative nonenforcement to a prosecutor's refusal to press criminal charges, indicated that nonenforcement is not "coercive" in character, and noted the absence of any clear "focus for review" when the agency takes no action. 470 U.S. at 832. Most com-

The central problem with judicial review of nonenforcement is that second-guessing executive choices under real-world conditions of restricted resources, practical challenges, and presumed case-by-case discretion risks engaging in unprincipled line-drawing of the sort courts more generally describe as judicially unmanageable. Nonenforcement, in other words, is judicially unmanageable because it is practically inevitable. Against a background of resource constraints and practical challenges, enforcing even the most determinate legal requirement in practice becomes a task as indeterminate as interpreting the sort of open-ended statutory standard deemed unmanageable in *Armstrong*; in both contexts, the court has “no meaningful standard against which to judge the agency’s exercise of discretion.”<sup>155</sup> To draw a constitutional analogy, determining how little enforcement is too little, or how important a violation must be to be important enough for enforcement, comes to resemble a judgment about how much delegation is too much: courts cannot draw either line in unbiased fashion.<sup>156</sup> Attempting to do so with respect to nonenforcement, moreover, could compromise courts’ long-term credibility and legitimacy by making judges, rather than accountable executive officials, responsible for underenforcement in areas that the public deems more worthy of attention. Courts thus may best leave any necessary line-drawing to the political process.

Indeed, this problem of judicial unmanageability has at least three dimensions. The first, perhaps most commonly invoked by commentators, is that enforcement under conditions of resource scarcity becomes an essentially managerial problem.<sup>157</sup> Enforcing in one case means not enforcing in another. Without full visibility into an agency’s opportunities and challenges, courts cannot readily assess whether the agency made the right call in failing to pursue a particular case or set of cases.<sup>158</sup> Nor can courts gain

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mentators have not found these rationales compelling on their own. The analogy of criminal prosecution to administrative nonenforcement is strained, for reasons addressed earlier. See *supra* Section II.B. Emphasizing the non-coercive character of nonenforcement neglects the interests of regulatory beneficiaries who may be shortchanged by administrative inaction, and agencies would likely provide a record to enable “focus[ed]” review of nonenforcement decisions if the Court interpreted the APA to provide for review in the first place. For critique of these rationales in *Heckler*, see for example Biber, *Judicial Review*, *supra* note 16, at 486–88, and *supra* note 35.

155 *Heckler*, 470 U.S. at 830.

156 See *supra* note 98 and accompanying text.

157 See, e.g., Magill, *supra* note 20, at 1421–22 & n.131 (characterizing nonenforcement as involving a “polycentric” problem on which courts have limited perspective); Cass R. Sunstein & Adrian Vermeule, *The Law of “Not Now”: When Agencies Defer Decisions*, 103 GEO. L.J. 157, 170–71 (2014) (noting “agencies must necessarily set priorities among possible actions, based on a myriad of imponderable factors that courts are ill-suited to assess”).

158 *Fleszar v. U.S. Dep’t of Labor*, 598 F.3d 912, 914–15 (7th Cir. 2010) (“Judges do not know what is on the agency’s menu and so cannot displace the agency’s choices among projects.”); *Bd. of Trade of Chicago v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) (“Courts cannot intelligently supervise the Commission’s allocation of its staff’s time, because although judges see clearly the claim the Commission has declined to redress, they do not see at all the tasks the staff may accomplish with the time released. . . . Judges compare the



comprehensive perspective on agency activities without intruding on basic aspects of the agency's administration. From this point of view, courts' reluctance to question nonenforcement is consistent with other decisions limiting judicial intrusion on agencies' allocation of resources and other "programmatic" aspects of administration.<sup>159</sup>

A second, related problem is that, much like some other questions deemed judicially unmanageable, nonenforcement decisions often turn on "empirical findings or predictive judgments for which [courts] lack competence" and that "another institution [here, the executive branch] is both better situated and constitutionally obliged to make."<sup>160</sup> In fact, just ascertaining what enforcement focus the agency has adopted may be difficult if the agency has made no public announcement.<sup>161</sup> Compounding the problem, secrecy is often essential to faithful execution of a statutory policy that cannot be fully enforced. Whereas public disclosure of enforcement practices may enable evasion, secrecy keeps regulated parties guessing, potentially enabling the agency to obtain maximum compliance.<sup>162</sup> For this reason, courts have resisted both discovery and Freedom of Information Act requests for internal enforcement guidelines.<sup>163</sup>

Even if the agency's approach is ascertainable in the first place, determining its efficacy presents further problems. Assessing what resources the agency has available may be difficult; determining what can realistically be

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case at hand against a rule of law or an abstract standard of diligence and do not see the opportunity costs of reallocations within the agency.").

159 See, e.g., *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004) ("[R]espondent cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990))); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (deeming allocation of funds within lump-sum appropriation unreviewable).

160 Fallon, *supra* note 96, at 1291 (citing *Holtzman v. Schlesinger*, 484 F.2d 1307, 1309 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973); *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982)).

161 See, e.g., *PETA v. U.S. Dep't of Agric.*, 7 F. Supp. 3d 1 (D.D.C. 2013) (finding nothing to review in challenge to agency's alleged failure to enforce statutory prohibition on bird abuse because agency had made no official pronouncement), *aff'd on other grounds*, 797 F.3d 1087 (D.C. Cir. 2015).

162 For my own elaboration of this point, see Price, *Politics of Nonenforcement*, *supra* note 17, at 1138.

163 See, e.g., 5 U.S.C. § 552(b)(7) (2012) (exempting agency documents from disclosure under the Freedom of Information Act where production "would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law"); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (observing with respect to selective-prosecution challenge that judicial review of a prosecution's basis "may undermine prosecutorial effectiveness by revealing the Government's enforcement policy" (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985))); *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (observing with respect to Freedom of Information Act provision that "the importance of deterrence explains why the exemption is written in broad and general terms").

accomplished with those resources even more so.<sup>164</sup> What is more, a faithful agency devoted to accomplishing a statute's policy goals must often decide what balance between forbearance and severity is best calculated to effectuate long-run compliance by regulated parties. In principle, all these aspects of enforcement strategy are matters of expertise and judgment in light of experience; they are not matters of law-like determination on which judges with different policy predilections can be expected to reach convergent conclusions. Accordingly, they present precisely the sort of difficulty that has led courts in other contexts to leave the matter to political judgment and accountability rather than judicial elaboration of legal standards.

These first two problems might nevertheless be surmountable if courts confronted a clear enough violation of faithful execution; courts, after all, have mandated extensive institutional reforms in other contexts.<sup>165</sup> Yet a third difficulty, also suggested in *Heckler*,<sup>166</sup> reinforces the first two: when Congress adopts laws (either directly or by delegation) while limiting enforcement resources, its intent as to proper agency focus—as opposed to overall policy—is fundamentally indeterminate. In taking affirmative action, some “intelligible principle” articulated in the statute guides the agency's action, providing the basic goal the agency should aim to achieve.<sup>167</sup> When selecting enforcement priorities, agencies should likewise aim to achieve overall statutory objectives, yet statutes rarely provide explicit guidance as to what the agency should do, or even what it should do first, when it cannot do everything.<sup>168</sup>

In particular, prohibitory statutes and regulations typically provide only primary rules of conduct, not secondary rules regarding which primary viola-

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164 Agencies do present such evidence in some contexts, such as in suits challenging delays in rulemaking based on resource scarcity, but courts generally give great deference to agency claims of resource incapacity. See, e.g., *WildEarth Guardians v. EPA*, 751 F.3d 649, 656 (D.C. Cir. 2014) (“EPA submitted evidence of its budgetary and staff constraints[ ] [and] explained that it has 45 mandatory rulemakings in progress or under review . . . .”); see also *infra* note 221–22 and accompanying text.

165 See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1295–96 (1976) (discussing rise of so-called structural reform litigation). But cf. Myriam E. Gilles, *Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights*, 100 COLUM. L. REV. 1384, 1389–99 (2000) (discussing decline of such litigation).

166 470 U.S. at 835–36.

167 See, e.g., *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (discussing the constitutional requirement of an “intelligible principle” to guide exercises of authority delegated by Congress).

168 See *Webster v. Doe*, 486 U.S. 592, 600 (1988) (describing *Heckler* as holding that “[s]ince the statute conferring power on the Food and Drug Administration to prohibit the unlawful misbranding or misuse of drugs provided no substantive standards on which a court could base its review, we found that enforcement actions were committed to the complete discretion of the FDA to decide when and how they should be pursued”). For general discussion of this issue, see Sunstein & Vermeule, *supra* note 157, at 178–81.

tions deserve emphasis.<sup>169</sup> Nor can such secondary rules generally be inferred, in any determinate law-like fashion, from a statute that fails to provide explicitly for them.<sup>170</sup> As the Court put it in *Heckler*, substantive prohibitions, without more, are “simply irrelevant to the agency’s discretion to refuse to initiate proceedings.”<sup>171</sup> Absent more specific statutory direction, narcotics enforcement might focus on supply or demand; environmental enforcement might focus on widespread small violations or isolated big-impact offenses; tax enforcement might focus on the largest underpayments, the most readily provable violations, or perhaps on maintaining overall levels of compliance through relatively random auditing.<sup>172</sup> One or the other focus might be more humane, or more sensible, or more genuinely calculated to bring about overall compliance with the law. But insofar as resource constraints preclude full enforcement and a statute or implementing regulation renders all the conduct in question unlawful, it may be difficult to say that the substantive law itself dictates any particular choice of priority.<sup>173</sup>

Further parsing of the statutes may only yield contradictory inferences. To use a current example, provisions in the immigration code allowing adjustment of status based on family relationships might suggest congressional support for an enforcement policy focused on family unity, or it might suggest that those specific means of relief, and not enforcement discretion, should advance that particular objective.<sup>174</sup> Specific crimes addressing nar-

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169 Agencies do sometimes adopt regulations imposing procedural requirements and standards on enforcement efforts. For discussion of this case law, see *infra* note 272.

170 For discussion of this point in the context of immigration law, see Cox & Rodriguez, *supra* note 63, at 151 (“In a world where nearly *half* of all noncitizens living in the United States are formally deportable, there can be no meaningful search for the congressionally preferred screening criteria.”).

171 470 U.S. at 835–36.

172 Congress does, of course, sometimes impose general constraints on enforcement priorities. See, e.g., Dep’t of Homeland Security Appropriations Act of 2014, Pub. L. No. 113-76, div. F., tit. II, 128 Stat. 5, 251 (directing DHS to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”); Cox & Rodriguez, *supra* note 63, at 151–53 (discussing other examples). My point is that in the absence of congressional direction the statute generally cannot be understood to provide judicially manageable standards for reviewing agency priorities. Even when Congress does provide such directions, courts would likely still lack manageable standards unless the agency openly defied the congressional directive or the legislation provided guidance specifically applicable to particular cases.

173 For a recent application of this principle, see *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm’n*, 528 F.3d 310, 318 (4th Cir. 2008) (declining to review enforcement decision for consistency with the “purposes and policies” of the statute because doing so would “render the principles of nonreviewability [established by *Heckler*] null and void”). See also *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 158 (D.C. Cir. 2006) (rejecting “purposes and policies” standard for review because “it invites the reviewing body to substitute its views of enforcement policy for those of the Secretary”).

174 See Cox & Rodriguez, *supra* note 63, at 152–53 (elaborating this argument). Cox and Rodriguez’s use of this argument to support DACA and DAPA is not necessarily persuasive, insofar as those programs require more affirmative legal authority than organic agency enforcement discretion. See *infra* text accompanying notes 291–97.

cotics-related violence might suggest a priority for preventing violence overall in narcotics enforcement, or might suggest that enforcement of plain-vanilla narcotics violations should not be thus targeted. Even the grading of penalties might suggest either that offenses with the highest penalties are most significant, or only that such penalties are merited insofar as the violation in question is otherwise worth pursuing. Courts normally give great deference to administrative agencies' resource-allocation judgments.<sup>175</sup> Against a backdrop of presumed agency enforcement discretion, judicial efforts to extract an ordering of priorities from a statute that fails to provide for them would intrude directly on such choices.

Enforcement discretion's prevalence may even produce a troubling divergence between formal legal requirements and actual public preferences. Despite the general presumption that Congress intends laws it adopts to be faithfully executed, entrenched enforcement discretion may permit Congress to pass, or at least fail to repeal, laws that lack genuine public support. That is to say, once widespread nonenforcement becomes practically inevitable, Congress may enact laws with the expectation that they will not be fully enforced; and by the same token, it may choose not to devote legislative effort to narrowing or repealing existing laws that would be deeply unpopular if fully enforced, precisely because those laws' nonenforcement reduces the urgency to update them.<sup>176</sup> Polarized politics and legislative incapacity exacerbate these problems.<sup>177</sup> Political minorities who favor existing laws may employ the legislative process's multiple veto-gates to stymie legal change, even if those laws are deeply unpopular with overall majorities and would be politically intolerable if fully enforced.<sup>178</sup>

At the least, this distressing paradigm appears to capture the current politics of immigration. Over time, Congress has enacted a harsh and restrictive immigration code that formally requires removal of undocumented immigrants but is effectively unenforceable, at least with available resources. But despite substantial majorities favoring reform, political minorities have blocked legislative change.<sup>179</sup> Immigration law may be an extreme example,

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175 See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its designated responsibilities."); *Nat. Res. Def. Council, Inc. v. FDA*, 760 F.3d 151, 170–71 (2d Cir. 2014) (observing that "[a]gencies have many responsibilities, and limited resources" and "[i]t is rare that agencies lack discretion to choose their own enforcement priorities").

176 See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546–49 (2001) (discussing this risk in the context of criminal law).

177 On partisan polarization in general, see Richard H. Pildes, *Why the Center Does Not Hold: the Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) ("American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.").

178 See, e.g., William N. Eskridge Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1444–49 (2008) (describing multiple "vetogates" that impede legislation).

179 See Mark Murray, *NBC/WSJ Poll: Nearly Half Oppose Executive Action on Immigration*, NBC NEWS (Nov. 19, 2014), <http://www.nbcnews.com/storyline/immigration-reform/>

but public choice theory suggests the problem may be more general. Congress has incentives to curry favor with broad electoral interests by passing aspirational statutes, while at the same time leaving to executive agencies the hard tradeoffs about which focused interests to target in actual regulation and enforcement.<sup>180</sup> Certainly, at least until recently, the political preferences of a tough-on-crime electorate, coupled with prosecutors' discretion to avoid politically costly applications of overbroad prohibitions, drove steady expansion of federal criminal law.<sup>181</sup>

The force of these concerns about ambiguous congressional intent and slippage from public preferences likely varies by context, but their potential applicability provides important context for courts' resistance to second-guessing executive nonenforcement. The practical inevitability of enforcement discretion in many regulatory contexts makes assessing the choices agencies have made judicially unmanageable by conventional criteria. As in other contexts involving questions deemed unmanageable, courts could develop doctrinal benchmarks for faithful enforcement. But doing so would quickly lead courts into a thicket of hard tradeoffs and fuzzy factual determinations, ultimately requiring a statutorily ungoverned determination of which violations are most important. Courts rightly judge that line-drawing of this sort is better left to the political process. That is particularly true insofar as enforcement discretion may itself open up gaps between substantive laws and public preferences. Were they to question executive nonenforcement too sharply, courts would risk compromising their own legitimacy by taking Congress's laws more seriously than Congress has itself.

## 2. Case-Specific Nonenforcement

These manageability problems apply with particular force to case-specific nonenforcement decisions, as opposed to announced general policies.<sup>182</sup> Although *Heckler* itself was ambiguous about the meaning of nonenforcement and the scope of decisions subject to its unreviewability presumption, some lower courts have understood the decision to apply only to case-specific—"single shot"—nonenforcement, as opposed to general agency policies.<sup>183</sup> Even some courts articulating this distinction have not applied it

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nbcwsj-poll-nearly-half-oppose-executive-action-immigration-n251631 (reporting poll finding that "a majority of Americans (57 percent) favor[ ] a pathway to citizenship for undocumented immigrants" and that such support "increases to 74 percent when respondents are told that such a pathway requires paying fines and back taxes, as well as passing a security background check").

180 See Biber, *Resource Allocation*, *supra* note 16, at 40–48 (discussing public choice theory literature).

181 See Stuntz, *supra* note 176, at 546–49. For discussion of possible shifting politics in favor of decreased severity, see HADAR AVIRAM, *CHEAP ON CRIME* (2015).

182 See *infra* subsection II.C.3 for discussion of general policies.

183 See, e.g., *Kenney v. Glickman*, 96 F.3d 1118, 1123 (8th Cir. 1996) ("*Chaney* applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards."); *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671,

consistently.<sup>184</sup> Furthermore, although *Heckler* itself was a “single shot” decision in the sense that it involved denial of a specific petition for enforcement, the petition related to a general class of cases and the agency’s decision announced a general approach of nonenforcement with respect to that class.<sup>185</sup> All that said, the basic insight that *Heckler* carries greatest force with respect to “single shot” nonenforcement is sound.<sup>186</sup>

Confronted with nonenforcement in a particular case, courts cannot readily judge the agency’s opportunity costs in pursuing that case rather than another. Indeed, even the agency may not be aware of the full set of potentially comparable cases that could be developed with adequate investigation. Courts likewise cannot assess the agency’s likelihood of success as competently as the agency can; nor can they objectively judge the relative importance of the case within the agency’s overall responsibilities.

Some critics of *Heckler* have argued that arbitrariness review of the sort courts normally perform with respect to discretionary agency action should nevertheless apply equally to administrative nonenforcement.<sup>187</sup> On this view, at least insofar as the agency has memorialized its nonenforcement decision in some form (such as through denial of a petition for enforcement), a court conducting judicial review under the APA could set aside the agency’s decision if the agency failed adequately to consider its decision’s implications, made some evident mistake in its perception of the facts or law, or appeared to rely on arbitrary or impermissible reasons rather than reasons rooted in statutory or regulatory policy.<sup>188</sup> While this proposal in principle might help ensure consistency and fairness in agency enforcement practices, it carries at least two fatal drawbacks.

The first is that requiring a decisionmaking process sufficient to support such review would itself squander enforcement resources while achieving little commensurate benefit in terms of statutory compliance. As Eric Biber has

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676–77 (D.C. Cir. 1994) (holding that general policies are reviewable but “single-shot” nonenforcement decisions are not).

184 See, e.g., *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1030 (D.C. Cir. 2007) (deeming general policy unreviewable); cf. *California v. United States*, 104 F.3d 1086, 1091 (9th Cir. 1997).

185 470 U.S. 821, 830 (1985).

186 The Supreme Court indeed stated in *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007), that agency resource-allocation discretion is “at its height when the agency decides not to bring an enforcement action.” The Court, however, did not specifically address general nonenforcement policies, but rather distinguished case-specific nonenforcement from failure to initiate rulemaking. *Id.* at 527–28.

187 See, e.g., Bhagwat, *supra* note 15, at 158; Bressman, *supra* note 15, at 1690–91. This argument traces a lineage to Kenneth Culp Davis’s argument in *Discretionary Justice* that administrative prosecutorial decisionmaking should be bound by rules to the maximum degree possible. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE* 55 (1969). For an account placing Davis’s argument within contemporary intellectual currents and the broader trajectory of Davis’s work, see Reuel E. Schiller, *Enlarging the Administrative Polity: Administrative Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1414 (2000).

188 See, e.g., Bressman, *supra* note 15, at 1690–91.

argued, agencies typically “must make many informal and quick judgments on a regular basis” about “whether to enforce a regulation or statute against a private party.”<sup>189</sup> “In such situations, the possibility of judicial review would force the agency to make those decisions in a more formal and regularized manner, require a vast increase in resources for the decisionmaking process, and sharply circumscribe its ability to address other issues or problems.”<sup>190</sup> In contrast, the principal asserted benefit of judicial review would be to mitigate risks of corruption, improper bias, or legal error.<sup>191</sup> But absent any particular reason to suspect such improper motivations, the benefits of reducing this risk may not be worth the costs in terms of reducing administrative efficiency and overall enforcement potential.<sup>192</sup>

At any rate, these proposals carry the additional problem that requiring reasoned elaboration of agency enforcement practice could itself be counterproductive with respect to the ultimate goal of faithful execution—ensuring compliance with substantive law. An articulated enforcement practice is one that regulated parties can evade. For this reason, agencies often keep enforcement priorities secret or even avoid articulating them formally.<sup>193</sup> To be sure, there may also be benefits to announcing an agency’s priorities; I address the benefits and costs of doing so below.<sup>194</sup> But interpreting the APA to require such reason-giving across the board would unduly collapse the distinction between law and its enforcement. Advocates of this view, indeed, recognize that it would require articulation of general enforcement policies independent of substantive legal requirements; insofar as the substantive law itself fails to prescribe any focus of agency effort, the agency would need to articulate such priorities itself and then justify each enforcement proceeding in their terms.<sup>195</sup> But to the extent such policies bind the agency (either practically or legally), they may effectively replace applicable substantive law as the governing law for regulated parties.<sup>196</sup>

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189 Biber, *Resource Allocation*, *supra* note 16, at 35.

190 *Id.*

191 See Bressman, *supra* note 15, at 1690–91 (arguing for arbitrariness review on these grounds).

192 See Biber, *Resource Allocation*, *supra* note 16, at 35 (noting this concern); *cf.* Bressman, *supra* note 15, at 1693–04 (acknowledging “considerable costs, both in terms of administrative flexibility and administrative efficiency,” in requiring probing arbitrariness review of nonenforcement decisions).

193 See 5 U.S.C. § 552(b)(7) (2012) (exempting from required disclosure agency documents whose production “would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law”); *Mayer Brown LLP v. IRS*, 562 F.3d 1190, 1193 (D.C. Cir. 2009) (explaining this provision in terms of “the importance of deterrence”).

194 See *infra* text accompanying notes 208–09.

195 See, *e.g.*, Bressman, *supra* note 15, at 1690–93 (proposing to require agency “standard-setting” so that particular enforcement decisions could be judged against pre-established standards); Bhagwat, *supra* note 15, at 182–83 (similar).

196 Proponents of this view often focus on contexts in which the agency has broad effective lawmaking authority and the regulatory context makes it likely that regulated parties (but perhaps not regulatory beneficiaries) will detect the agency’s unstated enforcement

For all these reasons, interpreting the APA to categorically bar review of such decisions comports with more general, constitutionally informed ideas about the relative institutional competence of courts and executive agencies—whether or not the effective freedom given to executive officials by this judicial passivity accords with any appropriate conception of how executive officials should independently understand their responsibility. As *Heckler* recognizes, if Congress specifically provides for review or imposes a specific mandate of enforcement, then the problem of judicial unmanageability disappears. The court then need not consider the imponderable tradeoffs involved in not proceeding in the particular case; Congress has effectively established an enforcement priority for the agency, and the court need only review the agency's decision in the particular case. But without such congressional direction the court would have no objective basis for requiring enforcement in the particular case.<sup>197</sup>

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patterns even if the agency articulates no public enforcement policy. *See, e.g.*, Bhagwat, *supra* note 15, at 175–76 (suggesting that in heavily regulated industries enforcement patterns may become apparent to regulated parties even without any formal statement of policy). The proposals to regularize agency enforcement discretion may well carry greatest force in that context, but these concerns cannot necessarily be generalized to other contexts where substantive statutes are more specific or regulated parties less attuned to agency choices.

197 Federal courts' approach to the procedural rule on criminal charge dismissals provides an instructive comparison to *Heckler's* interpretation of the APA. Federal Rule of Criminal Procedure 48 requires judicial approval for any dismissal of criminal charges. *See* FED. R. CRIM. P. 48(a) ("The government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent."). When the Supreme Court adopted this rule in 1944, it apparently aimed to conform federal procedure to state reforms requiring judicial approval of charge dismissals. *See* *United States v. Cowan*, 524 F.2d 504, 510–11 (5th Cir. 1975) (describing history of federal rule). Those state reforms, in turn, apparently aimed to limit perceived prosecutorial laxity by preventing discretionary charge dismissals. *See* ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 14, 17–18 (1981).

If federal criminal law were more uniformly enforced, and prosecutorial discretion less central to federal criminal justice, reviewing the government's reasons for charge dismissals in this way might have helped ensure equity among defendants and more complete enforcement of applicable laws. But against the backdrop of extensive nonenforcement, including many crimes that are never charged at all, courts have no manageable standard against which to assess prosecutorial choices, and requiring reason-giving in the limited context of charge dismissals would do little to enforce equity among defendants. It too, moreover, could be counter-productive from the standpoint of deterrence if it forced the government to reveal undisclosed priorities. *See* *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (limiting discovery to prove selective prosecution in part because of concerns about impairing "prosecutorial effectiveness by revealing the Government's enforcement policy" (internal quotation marks omitted)). Courts have thus effectively limited the rule to contexts in which prosecutors appear likely to proceed in any event, but in an abusive or harassing fashion. *See, e.g.*, *In re United States*, 345 F.3d 450, 452–53 (7th Cir. 2003) (indicating that the rule's "purpose, at least the principal purpose, is to protect a defendant from the government's harassing him by repeatedly filing charges and then dismissing them before they are adjudicated"); *In re Richards*, 213 F.3d 773, 786–87 (3d Cir. 2000) (describing the "rarest of cases" in which "refusal to dismiss is appropriate"); *United States*



### 3. General Policies

Concerns about judicial unmanageability apply somewhat differently to publicly disclosed general nonenforcement policies. To begin with, insofar as it alerts regulated parties to agency enforcement plans, any such policy carries costs in terms of statutory compliance that more ad hoc or indefinite or undisclosed nonenforcement practices do not. Articulating a general policy thus moves one step beyond the inevitable enforcement discretion that results from resource constraints and practical challenges. To be sure, the agency might well have achieved the same pattern of results through case-by-case nonenforcement without articulation of a general policy. In principle, moreover, the agency might always change its policy without notice and resume enforcement.<sup>198</sup> Even so, insofar as the policy provides advance notice of the agency's intentions, it may carry costs to compliance with substantive law that nonenforcement in any particular case does not. By the same token, setting aside the policy through judicial review might vindicate the primacy of the substantive law simply by restoring that law's deterrent effect, even if the agency never ultimately pursues enforcement in any particular case. Furthermore, the very choice to articulate the policy provides an opportunity for deliberation and explanation, thus enabling more probing judicial scrutiny of agency reasoning without triggering concerns about diverting agency resources or forcing an articulation of undisclosed internal priorities.<sup>199</sup>

Nevertheless, for the same reasons that review of single-shot nonenforcement decisions is generally unmanageable, any substantive review of a policy that merely sets resource-allocation priorities should be highly deferential.<sup>200</sup> If the policy is expressly predicated on legal interpretation, courts should assess the interpretation's validity, as indeed they have done in some decisions.<sup>201</sup> Legal error in single-shot decisions may be tolerable given the low

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v. Carrigan, 778 F.2d 1454, 1463 (10th Cir.1985) (identifying "prosecutorial harassment" or a threat to "the fair administration of criminal justice and the need to preserve the integrity of the courts" as the sole grounds for refusing dismissal).

198 See Seidenfeld, *supra* note 53, at 340-42, 376 (discussing these features of guidance documents in general).

199 Crowley Caribbean Transp., Inc. v. Peña, 37 F.3d 671, 677 (D.C. Cir. 1994) ("[A]n agency will generally present a clearer (and more easily reviewable) statement of its reasons for acting when formally articulating a broadly applicable enforcement policy, whereas such statements in the context of individual decisions to forego enforcement tend to be cursory, ad hoc, or post hoc.").

200 See Massachusetts v. EPA, 549 U.S. 497, 527 (2007) ("As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its designated responsibilities."). The intensity of arbitrariness review is generally "context-dependent." Magill, *supra* note 20, at 1414; cf. Seidenfeld, *supra* note 53, at 385 (noting that "courts hesitate to demand meaningful reasoned decisionmaking when an agency adopts a rule without developing a public record").

201 See, e.g., Kenney v. Glickman, 96 F.3d 1118, 1123 (8th Cir. 1996) ("[W]e do not believe the Court in *Chaney* intended its definition of 'enforcement action' to include an interpretation by an agency that the statute's goals could be met by adopting a certain

costs to statutory compliance and high costs to formalizing such decisionmaking.<sup>202</sup> But these costs and benefits reverse when an agency has formalized a mistaken interpretation in an otherwise reviewable general policy; and no problem of judicial unmanageability precludes assessing an express legal interpretation (subject to any applicable degree of deference).<sup>203</sup> Relatedly, the policy may properly be subject to judicial review on procedural grounds if the agency should have used notice-and-comment procedures. Under the APA, as currently interpreted, such procedures are required for “legislative rules,” that is, rules that create “legally binding obligations or prohibitions,”<sup>204</sup> but not “general statements of policy,” including enforcement policies.<sup>205</sup> While case law drawing this distinction is notoriously confused and imprecise, courts have generally sought to detect when agencies have made an effectively binding determination of law without using the more participatory and deliberative procedures the APA requires for such acts of lawmaking.<sup>206</sup>

Yet if a policy surmounts these hurdles—if it is procedurally valid, does not involve explicit interpretation, and comports with any explicit statutory directives—courts should rarely look past a facially reasonable articulation of how the policy will advance the agency’s statutory mission given resource limitations and practical constraints. Requiring some articulation of the policy’s consistency with overall statutory or regulatory objectives may impose a useful discipline and help ensure public accountability for the agency’s choices.<sup>207</sup>

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permanent standard”); *OSG Bulk Ships, Inc. v. United States*, 132 F.3d 808, 812 (D.C. Cir. 1998) (reviewing agency statutory interpretation underlying policy despite agency’s invocation of *Heckler*); *Crowley Caribbean Transp., Inc.*, 37 F.3d at 677 (“As general statements, [enforcement policies] are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion.”); *Edison Elec. Inst. v. EPA*, 996 F.2d 326, 332 (D.C. Cir. 1993) (reviewing policy despite *Heckler* because policy interpreted “the substantive requirements of the law” and was “not the type of discretionary judgment concerning the allocation of enforcement resources that *Heckler* shields from judicial review”).

202 See *Crowley Caribbean Transp., Inc.*, 37 F.3d at 675–76 (declining to review legal reasoning underlying agency nonenforcement decision (citing *ICC v. Bhd. of Locomotive Eng’rs*, 482 U.S. 270, 282 (1987))).

203 See Biber, *Resource Allocation*, supra note 16, at 31–33.

204 *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

205 5 U.S.C. § 553(b)(3)(A) (2012) (also excluding from notice and comment “interpretative rules” and “rules of agency organization, procedure, or practice”); see also generally *Nat’l Mining Ass’n*, 758 F.3d at 250–52 (discussing distinctions).

206 For one recent summary of the case law, see Jill E. Family, *Administrative Law Through the Lens of Immigration Law*, 64 ADMIN. L. REV. 565, 571–78 (2012).

207 For a recent example of such generic articulation of consistency with statutory objectives, see *WildEarth Guardians v. EPA*, 751 F.3d 649, 655–56 (D.C. Cir. 2014) (upholding denial of rulemaking petition because “EPA’s decision to focus on more significant sources of air pollutants before addressing coal mines is consistent with the statutory objective of reducing hazardous emissions overall” and “EPA has submitted evidence of its budgetary and staff constraints, explained that it has 45 mandatory rule rulemakings in progress

But more probing scrutiny could quickly involve the court in unmanageable judgments of relative importance, just as much as reviewing individual non-enforcement decisions would. After all, the policy only does overtly and formally what the agency must in any event do privately and informally. And while public articulation of the agency's priorities may carry costs to statutory compliance, it may also carry countervailing benefits. For one thing, it may facilitate managerial control of low-level enforcement decisions within the agency.<sup>208</sup> In addition, insofar as it alerts regulatory beneficiaries to agency practice and provides a focus for opposition, the policy may even facilitate pressure on the agency to redirect its efforts.<sup>209</sup> Weighing these benefits and costs is likely itself a judicially unmanageable inquiry and thus a matter properly "committed to agency discretion by law" under *Heckler's* interpretation.

Accordingly, to be concrete, were the current marijuana nonenforcement policy otherwise reviewable,<sup>210</sup> courts would have no manageable standard against which to assess the government's choice of priorities. The policy is expressly framed in terms of resource allocation, it emphasizes the policy's value in concentrating resources on crimes judged to be more significant (and more in accordance with traditional federal enforcement priorities), and it avoids any definite promise of future nonenforcement; it simply states the government's current judgment that marijuana offenses are not presently the most important to pursue.<sup>211</sup> Although I have elsewhere given it an uneasy defense on the merits,<sup>212</sup> the policy's unusually public character and dramatic real-world effects on compliance may raise concerns about its legitimacy as a matter of faithful execution.<sup>213</sup> The key point here is that such concerns are not judicially manageable; they should be left to political accountability and conscience. By the same token, current immigration enforcement priorities (applicable quite apart from the DACA and DAPA programs) merely focus enforcement efforts for the time being on cases the

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or under review, and concluded that, in light of these constraints, the best course of action is to prioritize sectors that emit more air pollutants").

208 See, e.g., Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1911, 1929 (2015).

209 See, e.g., Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 420–33 (2007) (discussing importance of agency guidance documents to regulatory beneficiaries).

210 Any direct challenge would present standing difficulties under current doctrine, see *supra* text accompanying notes 46–52, but a number of courts have adjudicated cases involving claimed reliance on the policies, see, e.g., *United States v. Washington*, 887 F. Supp. 2d 1077, 1098 (D. Mont. 2012) (rejecting criminal defendant's claimed reliance on marijuana nonenforcement policy). Courts have reviewed criminal enforcement policies under the APA when the party raising them had standing to do so. See, e.g., *Roane v. Holder*, 607 F. Supp. 2d 216, 227 (D.D.C. 2009) (deeming reviewable despite *Heckler* a general policy with respect to enforcement of federal narcotics statutes against federal lethal injections).

211 2013 Cole Memorandum, *supra* note 65, at 1–2 (stressing that marijuana remains illegal but listing priorities that will guide enforcement).

212 Price, *Enforcement Discretion*, *supra* note 10, at 757–59.

213 See *infra* Section III.A for further discussion of this point.

executive branch judges to be most important.<sup>214</sup> As OLC explained, the priorities accord with the limited general guidance Congress has provided with respect to enforcement,<sup>215</sup> plausibly identify the most important cases for emphasis given severely limited resources, and once again avoid any definite assurance of nonenforcement to any particular immigrants outside the priority categories.<sup>216</sup> While some again might question whether the priorities are correct, or whether they reflect the best effort at enforcement the government could undertake, these questions are not judicially manageable by conventional criteria.

In more technical areas—determining what levels of food impurity should trigger enforcement, for example<sup>217</sup>—judicial review to ensure reasoned consideration of relevant scientific information and stakeholder interests may be more manageable.<sup>218</sup> But in many cases that is so because the policy effectively interprets an indefinite background legal standard—and does so in a way that, absent direct review of the policy itself, will never come before courts for judicial review in the context of a concrete enforcement action.<sup>219</sup> Even in such contexts, insofar as the agency’s policy ultimately reduces to a judgment that conduct is unlawful but nonetheless low priority, courts should review that determination of relative importance with great deference to the agency’s more politically accountable judgments.<sup>220</sup> In the related, but arguably more consequential, context of agency denials of rulemaking petitions, recent decisions have given wide deference to stated justifications rooted plausibly in resource constraints and overall statutory objectives, so long as Congress provided no specific deadline for the agency’s

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214 See OLC Immigration Opinion, *supra* note 14, at 7–11.

215 *Id.*; see also *supra* note 172 (discussing statutory directives).

216 OLC Immigration Opinion, *supra* note 14, at 7–11.

217 See *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir. 1987) (deeming putative policy with this character a substantive rule).

218 For a general proposal to rely on substantive rather than procedural review of enforcement policies and other guidance documents, see Seidenfeld, *supra* note 53.

219 Cf. *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 677 (D.C. Cir. 1994) (“As general statements, [enforcement policies] are more likely to be direct interpretations of the commands of the substantive statute rather than the sort of mingled assessments of fact, policy, and law that drive an individual enforcement decision and that are, as *Chaney* recognizes, peculiarly within the agency’s expertise and discretion.”).

220 Cf. Bhagwat, *supra* note 15, at 185 (arguing that reviewing courts should “modulate [their] level of scrutiny” depending on whether an enforcement policy depends on statutory interpretation or substantive policy, as opposed to resource-allocation and prioritization).

action.<sup>221</sup> By analogy, much the same degree of deference should apply to general enforcement priorities.<sup>222</sup>

Some have argued, to the contrary, that courts should probe beyond the face of policies to ensure they were adopted in a good-faith effort to advance statutory objectives.<sup>223</sup> On this view, the executive branch faithfully executes statutes when it genuinely tries to effectuate them; in contrast, it violates its take-care obligation when it deliberately underenforces laws it dislikes for policy reasons. In principle, this view of faithful execution is correct: the Take Care Clause obligates the executive branch to enforce the law as it is and not as executive officials wish it to be.<sup>224</sup> Nevertheless, framing the judicial inquiry in overtly subjective terms would compound problems of judicial unmanageability rather than alleviate them.

In other contexts the Supreme Court has sought to base decisions on objective features of laws rather than political labels.<sup>225</sup> Likewise, in formulating the political question doctrine more generally, the Court has indicated that judicial abstention may be warranted based on “the impossibility of a

221 See, e.g., *WildEarth Guardians v. EPA*, 751 F.3d 649, 655–56 (D.C. Cir. 2014) (upholding denial of rulemaking petition based on plausible, demonstrated resource-allocation justification for focusing on other regulatory objectives). The Supreme Court’s earlier decision in *Massachusetts v. EPA* might be understood to permit more probing review of such decisions. For reasons to doubt that interpretation, see Sunstein & Vermeule, *supra* note 157, at 175.

222 In fact, lower courts have generally given great deference to such priority-setting policies when they have reviewed them on the merits. See, e.g., *Nat. Res. Def. Council, Inc. v. FDA*, 760 F.3d 151, 170–71 (2d Cir. 2014) (observing that “[a]gencies have many responsibilities, and limited resources” and “[i]t is rare that agencies lack discretion to choose their own enforcement priorities”); *Nat’l Roofing Contractors Ass’n v. U.S. Dep’t of Labor*, 639 F.3d 339, 341–44 (7th Cir. 2011) (treating conflicting non-binding enforcement policies with respect to workplace safety standard as decisions “belong[ing] to the Secretary, not to the court”); *Jones v. Office of the Comptroller of the Currency*, 983 F. Supp. 197, 204 (D.D.C. 1997) (applying “deferential” standard of review to claim that agency inadequately enforced antidiscrimination laws against banks). *But cf.* *Chiang v. Kempthorne*, 503 F. Supp. 2d 343, 352–53 (D.D.C. 2007) (reviewing policy despite *Heckler* and deeming it arbitrary and capricious because it conflicted with a statutory directive and failed to include discussion of “obvious competing concerns” relevant to the policy).

223 See, e.g., Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 230–32 (2015).

224 See, e.g., *Bd. of Trade of Chicago v. SEC*, 883 F.2d 525, 531 (7th Cir. 1989) (“Agencies ‘take Care that the Laws be faithfully executed’ by doing the best they can with the resources Congress allows them.” (quoting U.S. CONST. art. II, § 3) (citation omitted)); OLC Immigration Opinion, *supra* note 14, at 6 (“[T]he Executive cannot, under the guise of exercising enforcement discretion, attempt to effectively rewrite the laws to match its policy preferences.”); Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 212 (1992) (noting the President’s responsibility to “enforce the law as it has been enacted, rather than as he would have wished it to be”).

225 See, e.g., *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2597 (2012) (upholding “penalty” as valid exercise of congressional taxing power and rejecting argument that “even if the Constitution permits Congress to do exactly what we interpret this statute to do, the law must be struck down because Congress used the wrong labels”).

court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."<sup>226</sup> Here, too, courts should indulge a strong presumption that executive officials have acted in good faith—as in fact the Court did in *Heckler* by presuming executive officials were focused on how agency resources are “best spent” and whether the agency is likely to prevail in enforcement proceedings.<sup>227</sup> Courts, moreover, should recognize that executive officials may have legitimate reasons to take different positions in different contexts.<sup>228</sup> They might take a narrow view of their authority when advocating legislative reform, for example, but reconsider that view after legislative initiatives have failed. Relying on such political statements by senior officials to show bad faith, as one court did in assessing current immigration programs,<sup>229</sup> is at the very least a breach of inter-branch etiquette that risks compromising courts' own political neutrality. If courts lack objective reasons for deeming enforcement policies legally insufficient, they should leave the matter to the political process.

*Heckler* itself did recognize one important outer limit on nonenforcement policies. Despite deeming nonenforcement unreviewable as a general matter, the Court reserved consideration of “a situation where it could justifiably be found that the agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>230</sup> *Heckler's* abdication backstop is itself an important indication that enforcement discretion is not plenary. Agencies must enforce the laws they administer; they cannot sit on their hands simply because they find those laws objectionable. Yet lower courts have rarely found violations of the

226 *Baker v. Carr*, 369 U.S. 186, 217 (1962).

227 470 U.S. 821, 831–32 (1985); *see also* *Reno v. Am.-Arab Antidiscrimination Comm.*, 525 U.S. 471, 489–90 (1999) (presuming executive officials were focused on assessing a prosecution's “general deterrence value” and “relationship to the Government's overall enforcement plan” (quoting *Wayte v. United States*, 470 U.S. 598, 607–08 (1985))). It is true that in the related context of assessing whether an agency has “unreasonably delayed” taking action in violation of the APA, 5 U.S.C. § 706(1), some courts have considered “bad faith” as one factor among others in assessing the reasonableness of the agency's action. *See, e.g.*, *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 510 (9th Cir. 1997); *Telecomms. Research & Action Ctr. v. FCC* (“TRAC”), 750 F.2d 70, 80 (D.C. Cir. 1984); *Islam v. Heinauer*, 32 F. Supp. 3d 1063, 1074 (N.D. Cal. 2014). But they generally have not engaged in an untethered subjective inquiry; they have instead looked for more concrete indications of bad faith, such as “singling someone out for bad treatment or asserting utter indifference to a congressional deadline.” *Babbitt*, 105 F.3d at 510 (quoting *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991)).

228 *Cf.* Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1232–34 (2012) (arguing that, when executive officials defend in court laws that the administration disapproves of as a matter of policy, “judges must provide adequate latitude to permit a vigorous defense to take place without requiring the administration to misrepresent its own views about the wisdom or desirability of the statutory policy”).

229 *Texas v. United States*, 86 F. Supp. 3d 591, 667–68 (S.D. Tex. 2015) (relying in part on presidential announcements regarding policy) *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016).

230 *Heckler*, 470 U.S. at 833 n.4.

abdication standard,<sup>231</sup> and the difficulties applying it again relate to the general problem of nonenforcement's judicial unmanageability, rather than any notion that it exhausts a proper conception of executive responsibility.

The essential problem with abdication is that instead of eliminating the unmanageable line-drawing problem, the abdication standard simply pushes the line further down. How much abdication amounts to *Heckler*-prohibited abdication? If an agency has limited resources and multiple laws to enforce, it necessarily must prioritize enforcement of some laws over others. Yet this reality creates insuperable level-of-generality problems in assessing abdication. If the agency brings no enforcement actions under one statute or provision but nonetheless prosecutes other violations vigorously, has it abdicated its responsibility under the first statute? Or has it instead faithfully executed its statutory responsibilities as a whole? Perhaps over time the agency should aspire to give some effect to each and every provision it enforces, but in practice doing so will likely prove impossible in any context in which new violations are constantly arising. On the contrary, the agency may properly prioritize new violations it judges to be more serious for the same reasons it prioritized past cases that it judged to be more serious.<sup>232</sup> The Justice Department might well choose always to focus more resources on terrorism offenses than marijuana possession; immigration authorities might consistently concentrate more resources on removing immigrants who commit crimes than those who do not.<sup>233</sup>

In *Heckler*, the Court cited the D.C. Circuit's decision in *Adams v. Richardson* as an apparent example of abdication.<sup>234</sup> Yet *Adams* may then be the exception that proves the rule: in *Adams* the court set aside an agency's apparent practice of giving no force whatsoever over an extended period to civil rights laws prohibiting disbursement of federal funds to segregated schools.<sup>235</sup> Outside of such extreme facts—a demonstrably well-funded agency failing totally, over an extended period and at a high level of general-

231 See, e.g., *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 168–70 (2d Cir. 2004) (finding no abdication where agency relied on another agency's regulatory efforts to address issue).

232 See, e.g., *Salmon Spawning & Recovery All. v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1128–29 (Fed. Cir. 2008) (applying *Heckler* to reject challenge to agency's alleged total failure to enforce ban on importing endangered species against illegal salmon imports); *Am. Disabled for Attendant Programs Today v. U.S. Dep't of Hous. & Urban Dev.*, 170 F.3d 381, 384–85 (3d Cir. 1999) (rejecting abdication claim based on agency's alleged total failure to enforce particular regulation).

233 Cass Sunstein and Adrian Vermeule have recently proposed extending *Heckler*'s anti-abdication principle to agency delays addressing regulatory concerns. Under this proposal, which the authors themselves describe as “vague and not easily subject to judicial administration,” an agency could not invoke resource allocation “repeatedly to keep a particular action at the back of the queue forever.” Sunstein & Vermeule, *supra* note 157, at 162. Whatever the force of this proposal in the regulatory context, it has limited utility in the enforcement context in which the abdication concept originated. The Justice Department and other agencies do effectively keep particular types of violations at the back of the queue forever, precisely because other more pressing infractions are continually arising.

234 470 U.S. at 833 n.4 (citing 480 F.2d 1159 (D.C. Cir. 1973) (en banc)).

235 *Adams*, 480 F.2d at 1163–65.

ity, to implement a policy whose importance has objective constitutional underpinnings<sup>236</sup>—*Heckler's* abdication principle will rarely provide a principled way out of the problem of judicial unmanageability with respect to nonenforcement.<sup>237</sup>

In sum, at least in enforcement contexts characterized by severe resource-allocation challenges and a built-in expectation of heavily discretionary enforcement, judicial review of priority-setting agency enforcement policies will typically present unmanageable legal questions, in the peculiar sense that term has acquired in the political question context. The problem is not (or at least not necessarily) that the executive branch holds a core Article II prerogative to decline implementation of statutory policies. On the contrary, the Take Care Clause imposes a core obligation of faithful execution, and judicial review normally seeks to ensure faithful implementation of statutory policies. Insofar as an agency is simply prioritizing some violations over others in its enforcement efforts, however, courts lack the institutional legitimacy and competence to second-guess agency choices, and proposals to probe executive good faith or prevent abdication fail to provide a meaningful way out of this conundrum. Courts, accordingly, should rarely look past a facially reasonable justification, framed in terms of resource allocation and the agency's overall statutory mission, for focusing criminal or civil enforcement efforts in one area rather than another, if that is all the policy effectively does. Defining when this form of nonenforcement goes too far—when it crosses the boundary from faithful execution to deliberate undercutting of statutory objectives—is an inevitably imprecise undertaking; it is often more a matter of mindset and degree than any bright-line formulation. For that very reason, it is also judicially unmanageable: absent more specific statutory direction, courts lack principled, objective guideposts for determining that an agency must focus on one set of violations rather than another.

Limiting judicial review in this manner carries considerable potential costs to congressional supremacy in lawmaking: as the marijuana example well illustrates, it potentially allows enforcement agencies to make choices of enormous practical significance based on vague incantations of resource limitations and presumed enforcement discretion. For this reason, I have argued elsewhere that executive officials generally should not presume authority to make broad categorical exclusions from enforcement based on policy disagreement with the underlying substantive law.<sup>238</sup> But whether or

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236 *Id.* The nonenforcement in *Adams*, moreover, involved denial of funds, rather than pursuit of more affirmative penalties. The court suggested this feature of the policy made concerns about resource constraints and judicial unmanageability less compelling: "It is one thing to say the Justice Department lacks the resources necessary to locate and prosecute every civil rights violator; it is quite another to say HEW may affirmatively continue to channel federal funds to defaulting schools." *Id.* at 1162.

237 *Cf.* *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 168 (2d Cir. 2004) (concluding Nuclear Regulatory Commission would have abdicated its responsibility "only if it has established a policy not to protect adequately public health and safety with respect to nuclear plants").

238 Price, *Enforcement Discretion*, *supra* note 10.



not that view of executive responsibility is persuasive, the key point here is that limitations on judicial review have an independent basis. Reviewing nonenforcement decisions and policies will often tax courts' institutional legitimacy and competence, and such concerns about judicial capacity may abundantly justify existing limits on judicial review of nonenforcement. Framing judicial review's limits in these terms, however, carries important normative implications for current debates, implications to which I now turn.

### III. IMPLICATIONS

Beyond its descriptive value, reframing the problem of judicial review of executive nonenforcement in terms of judicial incapacity rather than executive prerogative carries a number of implications. Without attempting to fully explore all possibilities, the following discussion briefly addresses several important normative implications. First, framing the unreviewability of nonenforcement in terms of judicial incapacity highlights that the executive branch may hold obligations of faithful execution, as a matter of conscience and political accountability, that extend beyond any responsibility courts will enforce. Second, the framework supports refocusing *Heckler's* presumption of unreviewability so as to permit review of enforcement policies that formally or functionally alter legal obligations in ways that go beyond the sort of purely negative judgment that *Heckler* deems unmanageable. Third, the framework supports a more active judicial role in approving DPAs than courts have played to date. Finally, and most tentatively, the framework supports rethinking standing doctrine to track problems of judicial unmanageability and likely congressional intent rather than an amorphous conception of constitutionally adequate injury.

#### A. *Judicial Power and Executive Duty*

The most direct and important implication of framing law enforcement as a political question is to highlight the gap between judicial power and executive duty. As the Supreme Court has emphasized with respect to other political questions, the decision that some legal obligation is not judicially enforceable is "very different" from determining that no legal obligation has been breached.<sup>239</sup> Indeed, one key purpose of deeming the question political is to impose accountability more squarely on the branch that made the determination in the first instance. Here, too, to the extent executive law enforcement choices are political questions, either because of textual assignment or absence of judicially manageable standards (or both), the reasons owe as much or more to institutional limitations on courts as to any persuasive conception of executive authority.

Certain executive nonenforcement decisions, or even entire nonenforcement policies, may violate ideal understandings of faithful execution and yet nonetheless evade judicial correction. In particular, disingenuous

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239 U.S. Dep't of Commerce v. Montana, 503 U.S. 442, 458 (1992) (footnotes omitted).

nonenforcement—policies and practices designed to weaken or undermine statutory policies rather than simply to focus resources to achieve greater compliance overall—may in principle defy an appropriate conception of executive responsibility. Such underenforcement indeed typified many regulatory agencies' practices during the Reagan and Bush Administrations. Reagan's EPA, for example, slashed overall enforcement rates dramatically while formally abolishing the agency's Office of Enforcement and transferring its functions to the agency's legal office; civil rights and OSHA enforcement also declined dramatically, in ways political opponents in Congress criticized and resisted.<sup>240</sup> Similarly, the Bush Administration apparently continued invalidated environmental safe harbors as a matter of enforcement practice even after a federal court deemed them inconsistent with the statute.<sup>241</sup> Even the current administration's marijuana enforcement policies, while framed in heavily caveated and noncommittal terms that I have elsewhere characterized as consistent with an appropriate executive mindset,<sup>242</sup> might come to violate an appropriate fidelity to statutory policies. The administration has already extended these policies beyond core marijuana offenses of possession and distribution to related financial crimes. In practice, moreover, despite their caveated character, the policies may well be hardening into the sort of perceived ironclad assurance of nonenforcement that executive officials generally should not presume authority to make.

Although all these examples present forms of potentially illegitimate policy-based nonenforcement of federal laws, they are also all examples of the sort of executive foot-dragging that I have argued courts have great difficulty correcting. That is true in part because in some cases ultimate redress might require compelling in-court prosecution, a remedy I have argued violates the separation of powers. But it is also true because judicial second-guessing of executive actions would involve questions of relative importance and appropriate managerial focus that courts have generally deemed unmanageable. Even apart from problems of reviewability addressed here, standing limits and other procedural doctrines may limit courts' ability ever to hear a case challenging such executive choices. Yet even without judicial oversight, the executive branch retains an obligation, as a matter of "accountab[ility]" and "conscience,"<sup>243</sup> to execute congressional enactments faithfully, however imprecise and contested the content of that obligation may be.

On some level, this understanding is no doubt intuitive to many executive branch officials. Conscientious executive officials approach law enforcement responsibilities with a sense of obligation to the law, tempered by appreciation for the very real practical discretion they exercise (and guided,

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240 For discussion of these examples, see Price, *Politics of Nonenforcement*, *supra* note 17, at 1125–27.

241 See sources collected in Price, *Enforcement Discretion*, *supra* note 10, at 762–63.

242 *Id.* at 756–59.

243 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165–66 (1803).

of course, by directives from any more senior officials).<sup>244</sup> At the same time, this framing captures important features of public debates over enforcement. Although partisan animosity has made debates over Obama Administration policies particularly fevered, past debates under Republican administrations have also been inflected by assertions of legal obligation, in much the same way that debates over other political questions (such as war powers and foreign affairs) include legal dimensions notwithstanding courts' reluctance to consider the issues.<sup>245</sup>

More concretely, the framework supports independent elaboration of legal limits on enforcement discretion by the executive branch itself. OLC's important recent immigration opinion did just that. It expressly recognized the gap between executive obligation and judicial review with respect to enforcement, and indeed denied approval to one proposed program that transgressed boundaries it independently articulated. As the Office correctly observed, "Limits on enforcement discretion are both implicit in, and fundamental to, the Constitution's allocation of governmental powers between the two political branches," even if those limits are "not clearly defined" and "the exercise of enforcement discretion generally is not subject to judicial review."<sup>246</sup> Whether or not its bottom-line conclusions are persuasive (an issue I do not address here<sup>247</sup>), independent executive consideration of the issue is important in this context, as with respect to other political questions.

Courts can do their part, too. In particular, courts might reinforce the appropriate executive mindset by being clearer about the reasons for judicial passivity with respect to executive nonenforcement. In *Heckler* and other key cases, the Supreme Court has repeatedly invoked nonenforcement's judicial

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244 The parenthetical point might seem to go without saying, but some immigration enforcement officials recently attempted suing to invalidate guidance from their superiors. See David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 181–83 (2012) (discussing lawsuit). For discussion of enforcement officers' apparent failure to follow priorities established by superiors before DACA and DAPA, see Cox & Rodriguez, *supra* note 63, at 191–93.

245 See, e.g., *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice: Hearing Before the Subcomm. on the Constitution, Civil Rights & Civil Liberties of the H. Comm. on the Judiciary*, 110th Cong. 2 (2007) (prepared statement of Rep. Jerrold Nadler) ("If the rule of law is to have any meaning, if the civil rights laws this Committee produces are to have any value, then we must be assured that those laws will be enforced without fear or favor or political contamination."); H.R. REP. NO. 113-561, pt. 1, at 2 (2014) (complaining that the President has "ignored certain statutes completely, selectively enforced others, and bypassed the legislative process to create his own laws by executive fiat"); H.R. REP. NO. 97-968, at 11 (1982) (asserting that the "[t]he power conferred by the Constitution under [the Take Care Clause] is primarily to empower the President simply to carry out the laws enacted by Congress" and that Congress may "evaluat[e]" through oversight "the administration of the laws passed by Congress which the President is to 'faithfully' execute").

246 OLC Immigration Opinion, *supra* note 14, at 5.

247 For differing perspectives, see sources cited *infra* notes 309–14.

unmanageability—its “general unsuitability for judicial review”<sup>248</sup>—as a central basis for limited judicial intrusion on nonenforcement. At the same time, many have presumed that limited judicial review implies absolute executive discretion. But this equation is false. The central import of the political question doctrine is that judicial remedies do not always exhaust legal and constitutional obligations. As one scholar observes in another context, “In a world in which enforcing the Constitution is seen as overwhelmingly the responsibility of the courts, assignment of constitutional questions wholly outside of the judicial branch too easily becomes equated with denying that those questions have any real constitutional basis.”<sup>249</sup> Here, too, a clear holding that enforcement choices are political questions, in the sense that they belong institutionally to the executive branch rather than the courts, could help encourage an appropriate sense of internal obligation within the executive branch.<sup>250</sup>

### B. Refocusing Heckler

A second important implication relates to *Heckler’s* presumption of unreviewability under the APA. If judicial unmanageability provides the most cogent explanation for viewing nonenforcement decisions as “committed to agency discretion by law,” and if problems of judicial unmanageability further support highly deferential review of even more general enforcement priorities, then by the same token courts should interpret the APA to permit more intensive scrutiny when problems of judicial unmanageability are absent. In particular, insofar as review is otherwise available, *Heckler* should not prevent courts from policing in at least limited ways the most important substantive limit on enforcement discretion: that as a default matter, enforcement discretion is an authority to ignore but not authorize, to allocate effort but not to change effective governing law.<sup>251</sup> At least two types of policies may raise this concern in a judicially manageable fashion: those that purport to change legal obligations formally as an exercise of enforcement discretion,

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248 *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

249 Metzger, *supra* note 208, at 1911; *cf.* *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (holding that although courts have “no leave to intrude” on agency decisions regarding allocation of resources from a lump-sum appropriation, “we hardly need to note that an agency’s decision to ignore congressional expectations may expose it to grave political consequences”).

250 *Cf.* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 327 (2002) (“Placing some interpretive power with the political branches also insures [sic] that those branches will, as a general matter, be more attentive to constitutional concerns.”); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 776 (2008) (“[J]udicial supremacy is problematic because it will discourage non-judicial actors from taking their own, independent constitutional interpretation seriously.”).

251 Price, *Enforcement Discretion*, *supra* note 10, at 674–75; *cf.* Cox & Rodriguez, *supra* note 63, at 143 (noting general agreement that “the President cannot decline to enforce altogether a law that is constitutional”).

and those that do so functionally in ways that go beyond the practically inevitable priority-setting inherent in resource-constrained enforcement.

### 1. Formal Changes in Law

To begin with, *Heckler* has no relevance to policies and administrative actions that formally alter law rather than simply decline to enforce it. Policies that purport to change general legal obligations require a basis in delegated interpretive or rulemaking authority, not mere enforcement discretion. Accordingly, to fall within *Heckler*'s presumption, a policy must be framed in terms of the problems of unmanageability that support *Heckler*'s APA interpretation—they must establish priorities for current enforcement, not definite assurance that prohibited conduct will be considered lawful.

The Supreme Court recently drew this distinction forcefully in *Utility Air Regulatory Group v. EPA (UARG)*.<sup>252</sup> The Court there invalidated, as inconsistent with unambiguous statutory text, an EPA rule regulating certain greenhouse gas emissions but adjusting upward (by a factor of roughly a thousand) statutory pollution thresholds for required permits.<sup>253</sup> The Court then explained that enforcement discretion failed to provide authority for this “Tailoring Rule.”<sup>254</sup> “The Tailoring Rule,” the Court explained, “is not just an announcement of EPA’s refusal to enforce the statutory permitting requirements; it purports to *alter* those requirements and to establish with the force of law that otherwise-prohibited conduct will not violate the Act.”<sup>255</sup> Indeed, such substantive effect was essential to the rule’s operation, as the statute in question permits private as well as public enforcement of substantive requirements; private citizens could thus sue to enforce statutory thresholds if the agency did not.<sup>256</sup> Yet if the agency lacked interpretive authority to adopt the rule, as the Court held (whether correctly or not),<sup>257</sup> then the agency also lacked authority to achieve the same substantive result through nonenforcement. “An agency confronting resource constraints,” the Court held, “may change its own conduct, but it cannot change the law.”<sup>258</sup>

In *UARG*'s peculiar statutory context, this holding reinforced the Court’s conclusion that a broader regulatory program as a whole was inconsistent with applicable statutes. In other cases, however, this principle may

252 *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014).

253 *Id.* at 2446.

254 *Id.* at 2445.

255 *Id.*

256 *Id.*

257 *See id.* at 2449–50 (Breyer, J., dissenting). For two conflicting critical assessments of the decision in light of current congressional gridlock, see Michael S. Greve & Ashley C. Parrish, *Administrative Law Without Congress*, 22 *GEO. MASON L. REV.* 501, 502 (2015) (arguing that congressional incapacity gives rise to several troubling administrative practices), and Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 *U. PA. L. REV.* 1, 7 (2014) (arguing that congressional incapacity supports greater deference to agency interpretations).

258 *UARG*, 134 S. Ct. at 2445.

support invalidating unduly permissive rules and policies that purport to excuse conduct prohibited by applicable substantive law. Doing so requires no unmanageable assessment of relative importance; it involves only straightforward legal interpretation (under applicable principles of deference). To be sure, even if its interpretation is invalid, the agency might nonetheless choose not to enforce in particular cases. But judicial intervention is nevertheless meaningful, as it restores the deterrent effect of the background law. Furthermore, without such invalidation, regulated parties might well have a due process right to rely on the agency's statement of law, notwithstanding its invalidity.<sup>259</sup> Judicial review of such rules and policies thus may powerfully enforce the basic principle that enforcement discretion is an authority to ignore but not authorize.

For much the same reason, as some courts have recognized, administrative decisions to grant waivers, licenses, and permits are not nonenforcement and therefore fall outside *Heckler's* presumption.<sup>260</sup> By definition, these actions affirmatively change legal obligations; they legalize conduct that would otherwise violate applicable statutes or regulations.<sup>261</sup> To be sure, whether to enforce legal prohibitions following the denial of a waiver or permit, or against parties who fail to apply for them in the first place, may present questions of enforcement discretion within *Heckler's* scope.<sup>262</sup> But waiver and permitting decisions themselves do not implicate the particular problems of resource-allocation and judicial unmanageability addressed above.

These principles, finally, may be relevant to some statutory schemes that, in context, seem designed to require affirmative approval for conduct rather than simply providing for after-the-fact enforcement. At the least, this possibility may account for an otherwise perplexing (and controversial) decision by the D.C. Circuit, *Cook v. FDA*.<sup>263</sup> Addressing facts oddly similar to *Heckler's*, the *Cook* court held that the FDA's announced policy of allowing importation of lethal-injection drugs to state officials administering capital punishment was reviewable despite *Heckler* and legally invalid. But while

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259 See, e.g., *United States v. Penn. Indus. Chem. Corp.*, 411 U.S. 655, 670 (1973) (recognizing due process defense to prosecution where defendant relied on "longstanding, official administrative construction" of statute).

260 See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (distinguishing "affirmative act[s] of approval under a statute"); *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1214 (11th Cir. 2015) (license grant reviewable).

261 See generally David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 274 (2013) ("[W]aiver immunizes; nonenforcement merely looks the other way."); Eric Biber & J.B. Ruhl, *The Permit Power Revisited: The Theory and Practice of Regulatory Permits in the Administrative State*, 64 DUKE L.J. 133, 144 (2014) (discussing definition of licenses and permits and applicable APA provisions).

262 See Biber, *Judicial Review*, *supra* note 16, at 498–99 (drawing this distinction).

263 733 F.3d 1 (D.C. Cir. 2013). For criticism, see, for example, Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 457 (2015) ("The DC Circuit came very close to simply declining to follow controlling Supreme Court precedent on reviewability of agency action in [*Cook*].").

*Heckler* involved domestic production and distribution of the allegedly unapproved and unsafe drugs, *Cook* involved their importation from unregistered facilities overseas. Parsing the specific statutes governing drug importation, the *Cook* panel concluded that, notwithstanding *Heckler*, the FDA held a mandatory duty, first, to sample drugs imported from unregistered overseas facilities and, second, to “refuse[ ] admission” to any that “appear[ed]” to be an unapproved new drug or violate certain other statutory requirements.<sup>264</sup>

Assuming the court correctly construed these statutory requirements, *Cook* thus involved a choice to affirmatively allow otherwise forbidden prospective conduct, that is, importation of unapproved drugs from an unregistered facility. In contrast, *Heckler*, as the *Cook* court recognized, involved retrospective application of punitive and coercive remedies to alleged existing legal violations—the distribution and use of allegedly misbranded and unapproved new drugs. The statutory scheme in *Cook*, unlike in *Heckler*, thus effectively created a permitting regime—a regime under which the conduct in question was prohibited unless authorized, rather than tolerated unless punished.<sup>265</sup> The *Cook* court expressly recognized that the FDA could continue to “exercise enforcement discretion to allow the domestic distribution of a misbranded or unapproved new drug, as the Supreme Court recognized in [*Heckler*].”<sup>266</sup> Such a policy simply invites those using and distributing the drug to take their chances that the agency will not in the future shift priorities and prosecute them. But the FDA could not issue a blanket policy statement, as it had done in *Cook*, exempting the imports from review and approval and thus allowing the drugs’ automatic importation.<sup>267</sup> By removing the default barrier to importation that Congress imposed, such a policy changes prospective legal obligations in a manner that a retrospective enforcement policy of the sort the Supreme Court considered in *Heckler* does not.

So understood, *Cook*, like *UARG*, illustrates the key outer boundary to *Heckler*: the boundary between retrospective priority-setting, which courts cannot manageably assess, and affirmative legal permission, which they can.

## 2. Functional Changes in Law

More difficult cases arise along the margins between nonenforcement and affirmative permission—actions that may functionally change law, even if they do not do so formally. As we have seen, any announced nonenforcement policy has this effect to some degree; by lowering the perceived risk of enforcement, such policies may free regulated parties to engage in prohibited conduct. The marijuana policies again powerfully demonstrate this

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<sup>264</sup> *Cook*, 733 F.3d at 3.

<sup>265</sup> Cf. John Harrison, *Libertarian Administrative Law, or Administrative Law?*, 82 U. CHI. L. REV. DIALOGUE 134, 147 (2015) (“Because refusal of admission is relatively inexpensive, it is easy to believe that the FDA is required to refuse admission to every single drug it determines is misbranded or unapproved.”).

<sup>266</sup> *Cook*, 733 F.3d at 9–10.

<sup>267</sup> *Id.*

effect. As some hapless defendants have discovered, the policies do not provide any binding assurance of nonenforcement.<sup>268</sup> Nor do they prevent other incidental legal burdens, potentially including civil liability, that track underlying criminal prohibitions.<sup>269</sup> Even so, these policies have dramatically altered private behavior, in a manner that even an undisclosed policy producing the same pattern of enforcement results likely would not have done.

Courts, I have argued, generally lack manageable standards for assessing the validity of such policies, despite their real-world effects, but that is true only insofar as such policies simply exercise overtly and formally a form of priority-setting that would be practically inevitable internally and informally in any event. As policies climb the ladder away from this inevitable priority-setting towards more affirmative assurances of nonenforcement, this calculus may change: courts may sometimes manageably assess whether adequate authority exists for the executive policy. That is true, to a limited degree, with respect to at least two types of policies.

First, even if they do not purport formally to change legal requirements, nonenforcement policies that are overly definitive—policies framed in terms of categorical assurances rather than precatory priorities—raise particular concerns about functional change in legal obligations. I have argued elsewhere that default separation of powers principles support a general presumption against categorical (as opposed to case-by-case) nonenforcement and that this presumption remains a useful heuristic in assessing faithful execution even when full enforcement is impossible.<sup>270</sup> *UARG* inadvertently illustrates this point. The Court there held that the Tailoring Rule could not be justified as enforcement discretion because citizen-suit provisions in the statute effectively ousted the agency's enforcement discretion, permitting it to tailor substantive prohibitions only by interpreting them away, rather than simply not enforcing them.<sup>271</sup> But suppose the statute provided only for official enforcement. In that case, a tailoring rule regarding agency enforcement would effectively replace background substantive requirements as the law regulated parties would need to follow. Yet if resource constraints can justify only a change in an agency's "own conduct," but not "the law," how could such a policy constitute faithful execution of the statute?<sup>272</sup>

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268 See, e.g., *Oakland v. Lynch*, 798 F.3d 1159, 1161–62 (9th Cir. 2015).

269 See William Baude, *State Regulation and the Necessary and Proper Clause*, 65 *CASE W. RES. L. REV.* 513, 517 (2015) (discussing burdens derived from "unenforced federal law" that civil racketeering liability and other restraints may impose).

270 Price, *Enforcement Discretion*, *supra* note 10, at 674–77.

271 *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

272 *Id.* Some decisions have overcome *Heckler's* presumption of unreviewability and found "law to apply" when the agency itself has imposed binding rules on its enforcement practices. See, e.g., *GoJet Airlines, LLC v. FAA*, 743 F.3d 1168, 1173–74 (8th Cir. 2014) (deeming *Heckler* presumption overcome "if the agency has made clear its intent that a policy statement or set of enforcement guidelines impose binding limitations on the exercise of its enforcement discretion"). These decisions, however, have typically involved essentially procedural restraints with only incidental effects on substantive obligations and



To avoid this problem, a degree of precatory indeterminacy in enforcement policies is often an important expression of fidelity to background substantive law. Pasting a sign below a 55-mile-per-hour speed limit that says “enforced only against drivers exceeding 65 miles per hour” changes the effective law (from the perspective of regulated parties at least) in a more significant way than either an undisclosed internal police guideline or a less definitive policy. In principle, then, framing enforcement policies is not an entirely ungoverned choice between rules and standards, as some have argued.<sup>273</sup> In crafting substantive statutes or rules or common-law doctrines, the choice between rules and standards involves a straightforward tradeoff between the imprecision and unpredictability of standards, on the one hand, and the inevitable over- and under-inclusiveness of rules, on the other.<sup>274</sup> In contrast, a nonenforcement policy by definition does less than the background law requires; the only question is how much less is permissible and why.

This intuition, indeed, underlies case law mentioned earlier that seeks to identify legislative rules requiring notice-and-comment procedures based in part on whether the rule appears practically binding.<sup>275</sup> Though heavily criticized as an interpretation of the notice-and-comment exceptions,<sup>276</sup> this case law does at least indirectly enforce the requirement of indeterminacy in

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moreover have generally involved rules aimed at achieving broader enforcement and compliance rather than eliminating enforcement. *See, e.g., id.* at 1173–74 (reviewing whether agency complied with rules regarding enforcement following voluntary disclosure of aircraft maintenance issue but describing rule as “prescribing the agency’s procedures, not its substantive standards for enforcing the regulations at issue”); *Block v. SEC*, 50 F.3d 1078, 1085 (D.C. Cir. 1995) (discussing rule requiring hearing in certain circumstances but deeming it inapplicable); *Greater L.A. Council on Deafness, Inc. v. Baldrige*, 827 F.2d 1353, 1361 (9th Cir. 1987) (requiring investigation following filing of complaint where regulation created “no ambiguity concerning the Department’s duty to investigate a complaint”). *But cf. Shell Oil Co. v. EPA*, 950 F.2d 741, 765 (D.C. Cir. 1991) (deeming reasonable an agency rule precluding enforcement of legal requirements not included in permit under statute but noting agency’s intent “to include all of the applicable statutory requirements in each permit and to enforce each permit fully”).

273 *See Cox & Rodriguez, supra* note 63, at 176, 180–83.

274 *See id.* (describing tradeoffs).

275 *See, e.g., Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 252–53 (D.C. Cir. 2014) (noting focus of analysis on “actual legal effect” of policy and whether the agency has applied it “as if it were binding on regulated parties”); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (deeming enforcement policy a non-legislative rule because it was “replete with indications that the Secretary retained his discretion to cite production-operators as he saw fit” and gave regulated parties no reason to think that “failure to meet their responsibilities will, except in the instances described in the guidelines, categorically go unsanctioned”). For an argument that policy documents generally should avoid “fixed criteria” for decisions, see Robert A. Anthony, *A Taxonomy of Federal Agency Rules*, 52 ADMIN. L. REV. 1045, 1047 (2000) (“The agency must treat the document as tentative and prospective, without present binding effect on private persons, and the agency must keep an open mind and be prepared to reconsider the policy as individual cases arise.”).

276 For one critical assessment, see Seidenfeld, *supra* note 53, at 245–47.

nonenforcement policies: agencies avoid framing such policies in definitive terms, because doing so increases the likelihood that courts will require costly notice-and-comment procedures.<sup>277</sup> In at least some contexts, however, the issue may be substantive as well as procedural. If conduct falls within a statutory prohibition that the agency cannot plausibly interpret not to apply, then notice-and-comment procedures may well be beneficial with respect to the agency's formulation of enforcement policy, but they cannot provide authority that would otherwise be lacking to implement an overly definitive assurance of nonenforcement.<sup>278</sup>

Courts accordingly should set aside otherwise reviewable nonenforcement policies that are framed in entirely categorical terms and cannot be justified as interpretation. To give one example highlighted in a recent essay, were the IRS to announce, as it has in one policy, that it "will not assert" that any taxpayer has underreported income by failing to include certain received benefits, and that "[a]ny future guidance on the taxability of these benefits will be applied prospectively,"<sup>279</sup> then courts should set aside the policy as substantively invalid unless it can be justified as a valid interpretation of underlying tax laws.<sup>280</sup> Doing so might in the end affect only the framing of such policies; the agency might respond with a policy framed in more precatory terms, describing enforcement as a low priority rather than a definite guarantee. But framing matters in nonenforcement policies: a risk-averse taxpayer might well choose to comply in the latter case but not the former. What is more, the more precatory formulation might help encourage an appropriate mindset among agency personnel about the limits of their authority to rewrite effective requirements that Congress has

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277 See *id.* at 384 (noting that "agencies often write [policy statements] in nonmandatory language to avoid having them struck down as legislative rules").

278 The one caveat to this statement is that proceeding through notice and comment could elevate the level of deference the agency's interpretation of its statutory authority would receive. See *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 845 (1984) (holding that courts should defer to reasonable agency interpretations of agency-administered statutes); *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001) (holding *Chevron* deference may not apply to policy documents adopted without notice and comment); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) (holding that *Chevron* deference may apply to agencies' resolutions of "statutory ambiguity that concerns the scope of the agency's statutory authority").

279 INTERNAL REVENUE SERV., ANNOUNCEMENT 2002-18, FREQUENT FLYER MILES ATTRIBUTABLE TO BUSINESS OR OFFICIAL TRAVEL; see also generally Lawrence Zelenak, *Custom and the Rule of Law in the Administration of the Income Tax*, 62 DUKE L.J. 829, 834 (2012) (contrasting this assertion with "simple underenforcement of the law without any indication (beyond the mere underenforcement) that the IRS acquiesces in widespread noncompliance with the Code").

280 For discussion of the merits of this interpretive issue, see Zelenak, *supra* note 279, at 837–38 (arguing this notice is not supported by valid interpretation), and Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 333–48 (2011) (arguing opposite).

imposed.<sup>281</sup> In some contexts a more precatory policy might also create a broader opening for regulatory beneficiaries to petition for enforcement in unusual cases.

All that said, courts should enforce this principle in only the clearest cases. Framing nonenforcement priorities in relatively categorical terms may sometimes carry important benefits. In particular, such policies may enable greater consistency of implementation and hierarchical control throughout a far-flung agency.<sup>282</sup> Furthermore, insofar as policies fall along a spectrum of definitiveness, determining where to draw the line—how categorical is too categorical?—may itself be unmanageable. Indeed, some scholars have faulted the “practical effect” analysis for legislative rules on precisely this basis.<sup>283</sup> In assessing the agency’s ultimate authority, moreover, courts should be loath to look past the face of the policy to its actual implementation, as some courts have done in assessing the binding effect of putatively non-legislative rules.<sup>284</sup> Relatively categorical implementation of even indefinitely framed priorities may often strike the best balance possible between legitimate competing objectives—maintaining internal discipline and signaling particular regulatory concerns, on the one hand, and avoiding excusing unlawful conduct outside the agency’s priorities on the other.<sup>285</sup> Much as with the choice whether to formulate a policy in the first place, the balance of these tradeoffs is likely not an inquiry that courts can objectively manage.

A second type of policy, however, may take the problem of categorical assurance a step further by providing assurances that are not only categorical but also prospective—that is, expressly applicable to future as well as past or current conduct. Although immigration is unique in many ways (some addressed below<sup>286</sup>) and this characterization is itself disputed in current litigation, DACA and DAPA in effect have this character. These programs invite large categories of undocumented immigrants to apply for deferred action, a formally revocable (but likely practically effective) promise of non-removal for a specified period (here three years).<sup>287</sup> Although the programs involve a degree of case-by-case consideration, they appear designed to make defer-

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281 Cf. *Zelenak*, *supra* note 279, at 851 (worrying that unchecked authority to create statutory exceptions could lead tax administrators to “believe they have the power and the authority to disregard *any* Code section when doing so would further their notion (*not* Congress’s notion) of good tax policy”).

282 See *Cox & Rodriguez*, *supra* note 63, at 194–95; *Metzger*, *supra* note 208, at 1929.

283 See *Manning*, *supra* note 98, at 916 (“[B]ecause an agency’s power to adopt meaningfully binding nonlegislative rules thus turns on distinguishing interpretation from policymaking, the resulting inquiry involves a question of degree perhaps no less elusive than the inquiries described above.”).

284 See *Nat’l Mining Ass’n v. McCarthy*, 758 F.3d 243, 253 (D.C. Cir. 2014).

285 Cf. *Cox & Rodriguez*, *supra* note 63, at 198 n.268 (acknowledging the possibility of formally precatory but practically binding enforcement policy but doubting its viability); *Seidenfeld*, *supra* note 53, at 384 (noting that the precatory character of guidance documents generally “does not hide how the agency intends for the rule to operate”).

286 See *infra* text accompanying notes 309–14.

287 See *Cox & Rodriguez*, *supra* note 63, at 206.

ral the rule rather than the exception for the covered groups.<sup>288</sup> Moreover, under a preexisting regulatory interpretation of the statute, granting deferred action renders immigrants eligible for work authorization (among other benefits), which would otherwise be prohibited.<sup>289</sup>

As even some proponents recognize, the structure of these policies—affirmative assurance of nonenforcement to a broad subset of parties engaged in what is arguably a continuing violation of law<sup>290</sup>—raises concerns as a model of enforcement discretion precisely because resource constraints, and resulting underenforcement, are so pervasive in modern criminal justice and administration.<sup>291</sup> DACA's and DAPA's beneficiaries are enormously sympathetic and should be low priorities for removal under any sensible immigration enforcement policy.<sup>292</sup> Furthermore, were the Court to accept the government's characterization of the programs as nothing more than conventional priority-setting, all the problems of judicial manageability addressed earlier would justify a limited judicial role. Yet the peculiarly definitive form of nonenforcement involved in these policies might also distinguish them from such more conventional policies. At the least, if resource constraints and organic agency enforcement discretion were sufficient by themselves to justify exercising nonenforcement authority in the form asserted in these cases, a future administration with different policy predilections might likewise excuse ongoing violations in any number of politically contested areas of law—pollution limits or tax underpayments or federal firearms prohibitions, for example.<sup>293</sup>

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288 For discussion of the programs' rule-like character, see *id.* at 176–77.

289 Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c)(14) (2014).

290 Some have argued the relevant violation occurs only at the point of unlawful entry or visa expiration and thus is not continuing. Cox & Rodriguez, *supra* note 63, at 199–200. While it is true that deterrence concerns may carry less weight with respect to undocumented immigrants who entered the United States long ago, the Supreme Court has characterized removal as a remedy for “an ongoing violation of United States law.” *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999).

291 Cox & Rodriguez, *supra* note 63, at 176 n.200 (recognizing policies as “novel”).

292 Reprehensible current political rhetoric in some quarters about the imperative of removing all undocumented immigrants fundamentally misunderstands the discretionary character of enforcement within the immigration system as it has evolved. Establishing priorities for enforcement of substantive laws is a basic and inevitable aspect of administration when full enforcement is impossible, and at least some degree of discretion should be presumed even when full enforcement is possible. The question DACA and DAPA present is whether their unusually definitive and prospective character, coupled with the ancillary changes in legal relations effected by granting deferred action, necessitates more specific legal authority than the sort of organic agency enforcement discretion that permits general priority-setting and that *Heckler* effectively insulates from judicial scrutiny.

293 See David A. Martin, *Concerns About a Troubling Presidential Precedent and OLC's Review of Its Validity*, BALKINIZATION (Nov. 25, 2014, 9:30 AM), <http://www.balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html> (describing DAPA as “setting a dangerous precedent that will be used by future Presidents to undercut other regulatory regimes”).

Reviewing courts should therefore seek immigration-specific authority for DACA and DAPA. Doing so might properly entail reliance on somewhat unconventional considerations such as past executive practice and congressional ratification (the approach OLC employed),<sup>294</sup> and executive officials should perhaps receive deference with respect to judgments about the ultimate scale of the programs and their utility in concentrating resources more effectively on higher-priority objectives. Nevertheless, as lower courts have recognized, there is ultimately nothing unmanageable about reviewing general enforcement policies for “legal sufficiency.”<sup>295</sup> Accordingly, to the extent the particular form of categorical and prospective relief provided by these programs requires affirmative statutory authority beyond an agency’s default organic enforcement discretion (and to the extent the policies are otherwise reviewable and pertinent issues are properly presented in the litigation<sup>296</sup>), *Heckler* should present no obstacle to assessing, however deferentially, whether such authority exists.<sup>297</sup>

Prior precedent, concededly, has not always recognized this distinction. But by the same token previous cases highlight the issue’s ramifications well beyond the immigration context. Consider, for example, the D.C. Circuit’s recent decision in *Ass’n of Irrigated Residents v. EPA (AIR)*.<sup>298</sup> In that case, a divided panel applied *Heckler* to uphold a Bush Administration environmental program that invited a broad class of polluters to enter identical consent decrees precluding enforcement, even for future violations, for two years or more.<sup>299</sup> The policy in question applied to “animal feeding operations,” a type of farm operation that appeared likely to produce pollution exceeding statutory limits under the Clean Air Act.<sup>300</sup> The consent decrees nonetheless barred future enforcement suits for both past and ongoing violations in

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294 OLC Immigration Opinion, *supra* note 14, at 23–24.

295 *Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994).

296 As noted, the current challenge to these policies presents additional issues, including ripeness and finality, that I do not attempt to resolve here. Nor do I take any specific position with respect to standing in immigration-related litigation, apart from tentative reflections on standing doctrine in general below. See *infra* Section III.D. In the Fifth Circuit, a dissenting judge further questioned whether the programs’ substantive (as opposed to procedural) validity was properly before the court and whether the states had validly challenged the preexisting regulatory interpretation rendering deferred action recipients eligible for work authorization. *Texas v. United States*, 809 F.3d 134, 188 (2015) (King, J., dissenting).

297 Because my aim here is to use these programs as examples of a type of action that should be reviewable despite *Heckler*, I assume here that the APA, as interpreted in *Heckler*, in fact governs review of DAPA and DACA. While the government has argued that a specific immigration statute bars review, see 8 U.S.C. § 1252(g) (2012) (denying jurisdiction over “any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter”), the Fifth Circuit deemed this provision inapplicable to APA challenges to the programs brought by states. *Texas*, 809 F.3d at 164–65.

298 494 F.3d 1027 (D.C. Cir. 2007).

299 *Id.* at 1030–33.

300 *Id.* at 1028.

exchange for relatively slight civil penalties and participation in an emissions-monitoring study.<sup>301</sup> As one judge complained in dissent, this program “replace[d] the enforcement scheme in three congressional statutes with an unauthorized system of nominal taxation of regulated entities.”<sup>302</sup> It thus altered prospective legal obligations on a general basis. To be sure, in any single enforcement action, courts may well have had no manageable criteria to second-guess an agency’s choice to resolve the suit by consent decree.<sup>303</sup> But here the sum was greater than its parts: by categorically offering general terms to all covered farm operations, the agency effectively altered the legal regime for an entire industry, and indeed did so in a way that legally tied the agency’s hands so as to prevent shifting to more robust enforcement while the decrees remained in force. The court should have evaluated on the merits whether EPA’s statutes provided sufficient authority for the program and whether the program was indeed reasonably calculated to achieve long-term statutory compliance, as the agency claimed.<sup>304</sup> It should not have simply waved the suit away as a challenge to agency enforcement discretion.

OLC, in contrast, recognized the need for more specific indications of congressional approval in its opinion upholding DAPA.<sup>305</sup> DACA and DAPA are distinguishable from the program in *AIR* insofar as deferred action, unlike a consent decree, is not legally binding; the agency in principle may revoke it at any time. If the programs operate as intended, however, they will practically bind future enforcement; that is one important reason for providing deferred action rather than relying only on internal priorities.<sup>306</sup> Moreover, insofar as providing deferred action enables work authorization (among other benefits), the policy effects a prospective change in future legal liabilities and obligations.<sup>307</sup> Much as in *AIR*, the sum here is greater than its

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301 *Id.* at 1029–30.

302 *Id.* at 1037 (Rogers, J., dissenting).

303 *See* *Balt. Gas & Elec. Co. v. FERC*, 252 F.3d 456, 461–62 (D.C. Cir. 2001) (holding a case-specific settlement unreviewable).

304 *See Ass’n of Irrigated Residents*, 494 F.3d at 1044–46 (discussing design of program). For criticism of the program, which apparently proved largely ineffective, see J. Nicholas Hoover, *Can’t You Smell That Smell?: Clean Air Act Fixes for Factory Farm Air Pollution*, 6 *STAN. J. ANIMAL L. & POL’Y* 1, 14–16 (2013), and Sarah C. Wilson, Comment, *Hogwash! Why Industrial Animal Agriculture Is Not Beyond the Scope of Clean Air Act Regulation*, 24 *PACE ENVTL. L. REV.* 439, 466–71 (2007).

305 OLC Immigration Opinion, *supra* note 14, at 22–24 (noting the program “raise[s] particular concerns about whether immigration officials have undertaken to substantively change the statutory removal system rather than simply adapting its application to individual circumstances” and seeking guidance from “Congress’s history of legislation concerning deferred action”).

306 *See* *Cox & Rodriguez*, *supra* note 63, at 191–93 (discussing difficulties controlling enforcement without programs).

307 Whether this change should ultimately be attributed to the policies or the underlying regulation is a difficult issue that I do not attempt to resolve here. The key point here is that the interaction between the policy and the regulation gives this exercise of non-enforcement authority legal consequences that more conventional prosecutorial discretion—turning a blind eye to some violations so as to focus on others—does not.

parts: while courts might have no objective basis to question deferral with respect to any particular removable immigrant, the scale and generalized character of these programs, coupled with the prospective nature of the promised nonenforcement and the change in legal relations effected by work authorization, creates particular concern about the programs' consistency with underlying substantive laws being enforced. Courts may address that concern without falling afoul of the problems of unmanageability underlying *Heckler*. Invalidating the programs, after all, would not necessarily result in enforcement in any particular case; nor indeed would it preclude adoption of enforcement priorities that limit the effective risk of removal for immigrants within the affected categories.<sup>308</sup>

Immigration law holds many peculiarities, and several immigration-specific theories of authority have by now been advanced. OLC itself found sufficient legislative support for DAPA (but not a further proposed program) in past congressional ratification of analogous executive actions.<sup>309</sup> Others have faulted OLC's analysis and advanced a broader theory of "de facto delegation" to justify the administration's action.<sup>310</sup> Some view the preexisting regulatory interpretation of the statute as dispositive,<sup>311</sup> or emphasize the inevitably prospective character of immigration nonenforcement (in which failing to remove someone effectively means allowing them to stay).<sup>312</sup> Whatever the correct view of the merits (a point I do not address here<sup>313</sup>), *Heckler* does not prevent courts from addressing them. At the very least, *Heckler* should not prevent evaluation of challengers' claims that the programs in question exceed the form of conventional, retrospective priority-setting that *Heckler* properly exempts from APA review. Here, as with respect to some overly definitive nonenforcement policies, courts can manageably police the

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308 Admittedly, in this particular case, prior efforts to focus enforcement efforts through such internal guidelines proved ineffective, apparently because of recalcitrant defiance of the guidelines by low-level enforcement personnel. Cox & Rodriguez, *supra* note 63, at 191–93. Distressing as such disobedience is, it seems doubtful whether such internal managerial difficulties should affect an agency's ultimate legal authority to adopt a particular policy, though it might bear on whether the agency was otherwise "arbitrary and capricious" in doing so.

309 OLC Immigration Opinion, *supra* note 14, at 24.

310 Cox & Rodriguez, *supra* note 63, at 203 (arguing that in current immigration law "a perfect world is not a world of perfect enforcement" because "immigration law's formal prohibitions do not accurately reflect the structure of the immigrant screening system").

311 *Texas v. United States*, 809 F.3d 134, 188 (2015) (King, J., dissenting).

312 OLC Immigration Opinion, *supra* note 14, at 20–21.

313 I have previously expressed skepticism about the legal authority for DACA, which OLC did not address in its opinion. Price, *Enforcement Discretion*, *supra* note 10, at 759–61; see OLC Immigration Opinion, *supra* note 14, at 18 n.8. For some theories supporting DACA, see Cox & Rodriguez, *supra* note 63 (de facto delegation); Martin, *supra* note 293 (emphasizing DACA group's small size and blamelessness). For an argument that authority for DAPA is lacking, see Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1194 (2015).

outer bounds of organic executive nonenforcement authority.<sup>314</sup> Doing so is important because without such immigration-specific analysis, the example set by these programs could readily migrate into many other areas of law, such as the environmental enforcement regime considered in *AIR*, where concerns about regulatory capture and shortchanging of regulatory beneficiaries would carry greater force.

### C. Reviewing Deferred Prosecution Agreements

A third implication of the framework is that Congress may enable a broader judicial role with respect to nonenforcement if it so chooses. Insofar as problems of judicial manageability result ultimately from the indeterminacy of statutory priorities rather than any more fundamental limit on judicial power, nothing in the Constitution precludes Congress from authorizing broader judicial review, so long as Congress stops short of requiring judicially compelled prosecution. Congress, moreover, might impose limits on executive enforcement discretion either by doing so directly (a possibility *Heckler* expressly held open<sup>315</sup>) or by authorizing judicial elaboration of faithful-execution standards. In at least one important context—DPAs—Congress has effectively done just that, yet many courts have persisted in rubber-stamping the parties' proposals, presumably out of a misplaced fear of interfering with prosecutorial discretion.

As described earlier, DPAs enable the government to file criminal charges against an alleged wrongdoer and yet defer actual prosecution without falling afoul of Speedy Trial Act deadlines in exchange for the defendant's acceptance of specified conditions.<sup>316</sup> DPAs thus differ from plea

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314 In addition (or in the alternative), insofar as the rules establishing DAPA and DACA are procedurally valid without notice-and-comment procedures, the policies might properly be subject to more probing arbitrariness review than would be appropriate for more conventional nonenforcement policies. Mark Seidenfeld has proposed a framework for substantive review of guidance documents in general. He argues that "reasoned decision-making of guidance documents could mandate that agencies explain actions in terms of factors that are relevant and alternatives that are plausible given the state of knowledge available to the agency when it acted." Seidenfeld, *supra* note 53, at 388. Whether or not his proposal should apply more generally, it might carry particular force with respect to policies such as these, which in some sense constitute a peculiar hybrid between enforcement and substantive lawmaking. Again, even if DACA and DAPA could survive such scrutiny, *AIR* demonstrates its potential value in more conventional enforcement contexts where judicial review might help ensure the agency is acting in a manner reasonably calculated to bring about maximum eventual compliance with substantive law. Cf. Cox & Rodriguez, *supra* note 63, at 215–19 (highlighting "the basic failure of administrative law to address the central role that enforcement discretion plays in important regulatory arenas" and suggesting that some mechanism for ensuring public input short of notice-and-comment procedures would be desirable). The Fifth Circuit held that DAPA was procedurally invalid without notice-and-comment procedures. *Texas*, 809 F.3d at 177. For criticism of the view that DAPA is a legislative rule, see Cox & Rodriguez, *supra* note 63, at 216 & n.313. 315 470 U.S. 821, 838 (1985).

316 See *supra* notes 69–77 and accompanying text.



agreements and judicially approved settlements in that they do not involve a calculated compromise of the two sides' risks and liabilities. Instead, these agreements leverage the government's discretion not to prosecute so as to induce prospective changes in the targeted firm's or individual's behavior.<sup>317</sup> Presumably for this reason, courts have shown even greater deference to DPAs than is typical of settlements and plea deals (which are themselves reviewed with great deference).<sup>318</sup> Yet such absolute judicial passivity is misplaced. By law DPAs are authorized only for a specified purpose—to enable “the defendant to demonstrate his good conduct.”<sup>319</sup> No separation of powers difficulty, nor any problem of judicial unmanageability, prevents courts from giving content to this statutory standard.

What practical meaning might this standard carry? The Speedy Trial Act's legislative history makes plain that Congress contemplated use of this device to divert minor, non-violent offenders from criminal punishment, so as to avoid the stigma of conviction and facilitate their rehabilitation.<sup>320</sup> Particularly in light of that background, “good conduct” in this context most naturally means rehabilitation, that is, a demonstrated commitment to avoid further crimes of the sort alleged in the underlying charges. A Senate Judiciary Committee report on the Act indicated as much. It referred approvingly to state and federal experiments with “pretrial diversion or intervention programs in which prosecution of a certain category of defendants is held in abeyance on the condition that the defendant participate in a social rehabili-

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317 See Rachel E. Barkow, *The Prosecutor as Regulatory Agency*, in Barkow & Barkow, *supra* note 75, at 177, 180 (arguing that DPA and NPA conditions may be “fairly characterized as regulations” because they “directly regulate the company's operations going forward”).

318 See Golumbic & Lichy, *supra* note 69, at 1300–01 (noting that “district courts routinely rubber stamp DPAs the same day they are presented for approval”). District judges have claimed authority to review DPAs' terms to a limited degree. *United States v. Fokker Servs. B.V.*, 79 F. Supp. 3d 160, 167 (D.D.C. 2015), *vacated and remanded*, *United States v. Fokker Servs. B.V.*, Nos. 15-3016, 15-3017, 2016 WL 1319266 (D.C. Cir. Apr. 5, 2016); *United States v. Saena Tech. Corp.*, Crim. No. 14-66, 2015 WL 6406266, at \*1 (D.D.C. Oct. 21, 2015); *United States v. HSBC Bank USA, N.A.*, No. 12–CR–763, 2013 WL 3306161, at \*3 (E.D.N.Y. July 1, 2013). Just as this Article was going to press, the D.C. Circuit reversed one district-court decision rejecting a DPA. The appellate court held that the Speedy Trial Act “confers no authority in a court to withhold exclusion of time pursuant to a DPA based on concerns that the government should bring different charges or should charge different defendants.” *Fokker Servs.*, 2016 WL 1319266, at \*1. The court appeared to reserve questions about whether approval could be denied on other grounds. *Id.* at \*8, \*11 (declining to address “the precise contours of [the] authority of a court to confirm that a DPA's conditions are aimed to assure the defendant's good conduct” or whether “a court has authority to reject a DPA if it contains illegal or unethical provisions”).

319 18 U.S.C. § 3161(h)(2) (2012) (excluding from STA calculations “[a]ny period of delay during which prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct”).

320 See S. REP. NO. 93-1021, at 36–37 (1974) (describing the purpose of the Speedy Trial Act); see also generally ANTHONY PARTRIDGE, *FED. JUDICIAL CTR., LEGISLATIVE HISTORY OF TITLE I OF THE SPEEDY TRIAL ACT OF 1974* 116–18 (1980) (compilation of legislative history materials).

tation program.”<sup>321</sup> Evidently presuming that the government would otherwise prosecute the defendants in question, the Committee observed: “Of course, in the absence of a provision allowing the tolling of the speedy trial time limits, prosecutors would never agree to such diversion programs.”<sup>322</sup> Nevertheless, the Committee explained the requirement of judicial approval—deliberately added to the bill as a change from earlier versions—as a necessary constraint on potential abuse. By “requir[ing] that exclusion [of time] only be allowed where deferral of prosecution is conducted ‘with approval of the court,’” the Committee explained, the statute “assures that the court will be involved in the decision to divert and that the procedure will not be used by prosecutors and defense counsel to avoid the speedy trial time limits.”<sup>323</sup>

While it may not be entirely clear what rehabilitation means in the corporate context, this statutory structure plainly does not leave defining “good conduct” up to the executive branch alone. Though now restricted by internal Justice Department guidance, some past DPAs have included terms bearing no evident relation to assuring future compliance with the statutes being enforced.<sup>324</sup> In the most notorious cases, the agreements have required endowing a law school professorship as a remedy for suspected price-fixing, promising to retain a specified number of jobs in the state to remedy accounting fraud charges, and installing slot machines (to ensure state gambling revenue) as a remedy for alleged fraud and corruption.<sup>325</sup> On the other hand, some commentators have faulted many DPAs for doing too little to assure genuine reform within the targeted firm.<sup>326</sup> As one thorough recent study reports, “many corporate prosecution agreements do not impose serious structural reforms.”<sup>327</sup> A more active judicial role could prevent abuses in both directions—both those that leverage threats of prosecution to impose unrelated conditions, and those that grant deferrals with insufficient assurance of genuine rehabilitation.<sup>328</sup>

The framework developed here makes clear why such judicial elaboration of appropriate DPA standards violates no constitutional prerogative of the executive branch. Judicial oversight of executive nonenforcement is normally unmanageable, in the peculiar sense the term has developed in politi-

321 S. REP. NO. 93-1021, at 36 (1974).

322 *Id.* at 37.

323 *Id.*

324 Internal Department guidance now instructs that agreements should not include terms requiring payments to private parties unless the party was “a victim of the criminal activity” or is “providing services to redress the harm caused by the defendant’s criminal conduct.” OFFICE OF THE U.S. ATT’YS, U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-16.325 (2010).

325 See GARRETT, *supra* note 69, at 76–77.

326 *Id.*

327 *Id.* at 276.

328 Brandon Garrett, for example, argues that judges should oversee implementation of structural reform requirements in DPAs, rather than leaving the task to outside monitors (as is most common today). *Id.* at 192–93.

cal question cases, because Congress has foisted enforcement choices onto the executive branch that courts lack any objective yardstick to assess. But by the same token the Constitution poses no obstacle to common-law judicial standard-setting in contexts where Congress provides for it. In other words, if courts normally abstain from policing executive enforcement choices because they lack legitimacy and institutional competence to do so, the rationale for such judicial passivity disappears when Congress legitimates a more robust judicial role. To be sure, any judicially developed standards might well give significant deference to executive judgments, particularly with respect to the strength of the government's case and the appropriate balance between forbearance and punishment with respect to fines and other punitive measures. But whatever else it intended when it passed the STA, Congress expressly provided for a judicial role in policing the novel practice of DPAs. Article II affords no reason for courts to refrain completely from exercising this power.

#### D. *Rethinking Standing*

Finally, and most tentatively, the framework developed here has implications for long-running debates over Article III standing to challenge government inaction. In its leading decisions on standing to challenge executive inaction, the Court has associated Article III limitations on cognizable injury with Article II authorities of the executive branch. In particular, the Court has suggested that complaints shared by the public as a whole are properly matters for resolution by politically accountable executive officials, not federal courts.<sup>329</sup> Yet standing limits at best insulate executive enforcement decisions from judicial oversight only indirectly. As Heather Elliott observes, "The question whether a particular plaintiff has standing is essentially unrelated to the question whether Congress violates the Constitution by enlisting the courts to fight its battles with the executive branch."<sup>330</sup>

At least in the nonenforcement context, viewing law enforcement as a political question responds more directly to concerns about improper judicial oversight of fundamentally executive functions. In *Lujan*, for example, the Court objected to plaintiffs "complaining of an agency's unlawful *failure* to impose a requirement or prohibition upon *someone else*."<sup>331</sup> Yet prohibiting compelled prosecution addresses this concern on the merits with respect to particular enforcement suits, while recognizing that most nonenforcement decisions are judicially unmanageable protects such decisions more generally

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329 See, e.g., *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) ("The doctrine of standing . . . serves to prevent the judicial process from being used to usurp the powers of the political branches." (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013))).

330 Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 497 (2008).

331 Scalia, *supra* note 52, at 894 (citing *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974)); see also *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 562 (1992) (noting difficulty of proving standing where "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*").

from judicial second-guessing. Even under *Lujan*, after all, standing doctrine permits complaints about executive failure to enforce laws in particular cases, provided the complaining party can establish a concrete, redressable injury traceable to the government's inaction. The political question framework developed here thus addresses more directly when judicial interference is unwarranted. If the Court believes nonenforcement should be left to political (rather than judicial) accountability in a broader set of circumstances, either because of an executive nonenforcement prerogative or because the problem is judicially unmanageable, it should say so directly and spare litigants the need to debate fine points about the concreteness of their injuries. Recognizing that the central obstacle to meaningful judicial review is often a lack of manageable standards, rather than any more fundamental Article II limit, thus reinforces the longstanding critique that standing doctrine should not preclude legal challenges where Congress has specifically provided for them.<sup>332</sup>

That is not to say that the floodgates should necessarily be opened to litigation challenging executive nonenforcement. Recognizing law enforcement as a political question instead reinforces longstanding arguments for treating standing as an essentially statutory rather than constitutional inquiry.<sup>333</sup> Even today, standing has both statutory and constitutional components. The APA generally limits suits to persons "suffering legal wrong" or "adversely affected or aggrieved by agency action within the meaning of a relevant statute," capacious terms that invite judicial elaboration.<sup>334</sup> Accordingly, in addition to satisfying minimum Article III requirements, plaintiffs challenging government action (or inaction) must establish that their injury falls within the "zone of interests" that the statute aims to protect.<sup>335</sup> Although complete elaboration of this proposal would go beyond the scope of this Article, more robust development of statutory default rules might provide a more coherent set of standing principles, while at the same time preserving ultimate congressional authority to enable broader judicial oversight of executive enforcement decisions.

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332 See, e.g., Gene R. Nichol, Jr., *Justice Scalia, Standing, and Public Law Litigation*, 42 DUKE L.J. 1141, 1160 (1993); Sunstein, *supra* note 224, at 167 (examining the constraint of the "concrete injury" requirement on standing). That is not to say that Congress should be able to give standing to itself. Legislative standing, even if provided for by statute, raises distinct concerns because it would force courts to directly referee inter-branch legal disputes, without any intermediation by a personally affected private litigant. See generally Tara Leigh Grove & Neal Devins, *Congress's (Limited) Power to Represent Itself in Court*, 99 CORNELL L. REV. 571, 573 (2014) ("Congress has the constitutional power to investigate the executive and judicially enforce subpoenas but . . . it cannot defend federal statutes in court.").

333 This claim draws from a rich line of argument, including, in particular, now Judge William A. Fletcher's classic article, *The Structure of Standing*, 98 YALE L.J. 221, 223–24 (1988).

334 5 U.S.C. § 702 (2012).

335 See *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (citing *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

As the Court held, pre-*Lujan*, in *Linda R.S.*, it could be that certain areas of law subject to heavily discretionary, exclusively public enforcement, such as federal criminal law, protect no one in particular but only the public at large, thus leaving no particular individual with standing to challenge nonenforcement.<sup>336</sup> But to the extent that is true, the fault should lie ultimately with Congress rather than the Constitution. As is already true with respect to zone-of-interests analysis, the focus of inquiry should be on whose interests Congress meant to protect, rather than on whether those interests satisfy some abstract notion of concreteness.

### CONCLUSION

Although cases and commentary often describe nonenforcement as an executive prerogative, immune to judicial or congressional control, exercises of executive enforcement discretion are better understood to present a form of political question—an executive obligation subject to incomplete judicial enforcement. In the political question doctrine’s terms, one narrow but important enforcement function, bringing particular civil or criminal enforcement suits in court, is “textually assigned” to the executive branch and thus beyond direct judicial control. Broader enforcement questions, including most administrative nonenforcement and more general nonenforcement practices and policies, frequently involve “judicially unmanageable” questions that courts should leave to political rather than legal accountability. This framework makes clear that judicial doctrines do not exhaust executive obligations with respect to law enforcement. But the framework also highlights contexts, such as review of nonenforcement policies with affirmative elements and judicial approval of DPAs, where courts can play a broader role without Article II difficulty. Finally, the framework supports longstanding arguments that standing should be reoriented towards identifying statutory beneficiaries rather than abstract conceptions of sufficiently concrete injury.

The political question doctrine itself is controversial. Some question the merits of insulating any important legal or constitutional questions from judicial resolution on the merits,<sup>337</sup> while others doubt that denying a judicial

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336 I take no position here on whether states have standing, either under current doctrine or my proposal, to challenge immigration nonenforcement policies, as they are attempting to do in current litigation. As a general matter, courts have taken a very narrow view of the interests protected by immigration statutes. *Compare, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014) (“[W]orkers displaced by lax visa policies from jobs they otherwise would hold fall within the class of individuals whom the INA seeks to protect.”), *with Fed’n for Am. Immigration Reform, Inc. v. Reno*, 93 F.3d 897, 902–03 (D.C. Cir. 1996) (doubting that Congress intended “universal litigative champions” for immigration restrictions), *and Programmers Guild, Inc. v. Chertoff*, 338 F. App’x 239, 244–45 (3d Cir. 2009) (following *Fed’n for Am. Immigration Reform*). Any asserted injury, furthermore, should be causally connected to the specific government action being challenged (here DAPA itself and not the mere presence of undocumented immigrants in the country).

337 *See, e.g., ERWIN CHEMERINSKY, INTERPRETING THE CONSTITUTION 96–101 (1987).*

remedy is meaningfully different from conferring unfettered discretion.<sup>338</sup> The argument presented here sheds light on these debates as well. If the key criteria for political questions may usefully describe and structure judicial inquiries with respect to so familiar an executive function as nonenforcement, then the argument presented here may reinforce the value of distinguishing between executive obligation and judicial enforcement more generally. What is more, elements of the structure I have presented here—a remedial (rather than substantive) limit on judicial authority, and substantial congressional responsibility for the problem's judicial unmanageability—might be relevant to other political questions as well, particularly war powers. At the least, the framework underscores that within our system of coequal branches and separated powers courts cannot enforce every obligation; some should be left to public officials' accountability and conscience. But by the same token, in law enforcement, as in other areas, the political branches should recognize that the limits of judicial supervision are not necessarily the limits of the law.

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338 The classic statement of this view is Henkin, *supra* note 86. For a more recent formulation of the argument, see Gwynne Skinner, *Misunderstood, Misconstrued, and Now Clearly Dead: The "Political Question Doctrine" As a Justiciability Doctrine*, 29 J.L. & POL. 427, 428 (2014) ("[I]n nearly all cases involving a 'political question,' the Court has adjudicated the case by finding that the branch whose conduct was being challenged acted legally.").

