

Enforcement Discretion and Executive Duty

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Recent Presidents have claimed wide-ranging authority to decline enforcement of federal laws. The Obama Administration, for example, has announced policies of abstaining from investigation and prosecution of certain federal marijuana crimes, postponing enforcement of key provisions of the Affordable Care Act, and suspending enforcement of removal statutes against certain undocumented immigrants. While these examples highlight how exercises of executive enforcement discretion—the authority to turn a blind eye to legal violations—may effectively reshape federal policy, prior scholarship has offered no satisfactory account of the proper scope of, and constitutional basis for, this putative executive authority. This Article fills that gap.

Through close examination of the Constitution’s text, structure, and normative underpinnings, as well as relevant historical practice, this Article demonstrates that constitutional authority for enforcement discretion exists—but it is both limited and defeasible. Presidents may properly decline to enforce civil and criminal prohibitions in particular cases, notwithstanding their obligation under the Take Care Clause to ensure that “the Laws be faithfully executed.” Congress also may expand the scope of executive enforcement discretion by authorizing broader nonenforcement. But absent such congressional authorization, the President’s nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders. Presuming such forms of executive discretion would collide with another deeply rooted constitutional tradition: the principle that American Presidents,

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unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations. This framework not only clarifies the proper executive duty with respect to enforcement of federal statutes but also points the way to proper resolution of other recurrent separation of powers issues.

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I. INTRODUCTION

Enforcement discretion—the authority to turn a blind eye to legal violations—is central to the operation of both the federal criminal justice system and the administrative state. Yet its constitutional underpinnings are surprisingly unclear. Courts and the executive branch have described such discretion, particularly in the criminal context, as a core executive authority.¹ But the Take Care Clause—the constitutional provision most often invoked to support this assertion—suggests the opposite: by providing that the President “shall take Care that the Laws be faithfully executed,” it seems to require the President to fully enforce all congressional enactments.² Meanwhile, numerous recent controversies have highlighted the importance of the issue. Under President Obama, the executive branch announced policies of abstaining from investigating and prosecuting certain federal marijuana offenses in states where possession of the drug is legal³ and delaying for substantial periods the enforcement of key provisions of the Affordable Care Act (“ACA”).⁴ Earlier, the Administration adopted a controversial policy of declining to seek removal of certain sympathetic undocumented immigrants who entered the United States as young children.⁵ The Administration

1. See *infra* Part II.A for discussion of examples.

2. U.S. CONST. art. II, § 3.

3. Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013) [hereinafter 2013 Cole Memorandum], available at <http://perma.cc/X35Q-YJYS>; Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1–2 (June 29, 2011) [hereinafter 2011 Cole Memorandum], available at <http://perma.cc/M5A9-6A8C>; Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1–2 (Oct. 19, 2009), available at <http://perma.cc/JEV5-E7AQ>; see also Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2013) [hereinafter 2013 Cole Financial Crimes Memorandum] (extending policy to marijuana-related financial crimes).

4. Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep’t of Health & Human Servs., to State Ins. Comm’rs (Nov. 14, 2013), available at <http://perma.cc/T3VW-66DZ> (indicating that health plans “will not be considered to be out of compliance” with certain laws under specified circumstances); I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013) (providing relief from penalties for employers who fail to provide insurance as required by statute); see also Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014) (discussing additional transition relief provided to certain employers under new regulations).

5. Memorandum from Sec’y Janet Napolitano, U.S. Dep’t of Homeland Sec., to David Aguilar, Acting Comm’r, U.S. Customs & Border Protection, et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), available at <http://perma.cc/DH5S-3NXN>; U.S. DEP’T OF HOMELAND SEC., DHS/USCS/PIA-

also claimed statutory authority to waive key requirements of federal welfare laws, the ACA, and the No Child Left Behind Act.⁶

Although President Obama's policies have sparked particular controversy, his actions are not unique. In fact, the practice of executive policymaking through nonenforcement stretches back across recent administrations. One commentator accused President George W. Bush, for example, of pursuing an agenda of "deregulation through nonenforcement."⁷ The reasons for increasing executive reliance on nonenforcement, moreover, may well be structural. In an era of presidential administration and partisan gridlock, when the public holds the President accountable for failures of national policy yet Congress cannot be relied upon to develop legislative solutions, executive officials are prone to adopt an expansive understanding of their authorities. Nonenforcement may be a particularly attractive policy tool. Since it benefits some and penalizes no one, statutory nonenforcement may permit Presidents to effectively amend statutory policies, at least for the duration of their presidencies, without provoking focused political opposition. But executive nonenforcement authority, if unbounded, could substantially reorder the Constitution's separation of powers framework. By permitting Presidents to read laws, both old and new, out of the Code for the duration of their presidencies, unrestricted enforcement discretion could provide Presidents with a sort of second veto—an authority to remake the law on the ground without asking Congress to revise the law on the books. Developing a clear understanding of the proper scope of executive enforcement discretion and the executive branch's law-enforcement duties is therefore imperative.

This Article undertakes that task. Based on close examination of the Constitution's text, structure, and normative underpinnings, as well as relevant historical practice, I argue that authority for enforcement discretion exists—but it is both limited and defeasible. Presidents may properly decline to enforce civil and criminal

045, PRIVACY IMPACT ASSESSMENT FOR THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) 2–3 (2012), available at <http://perma.cc/U75H-MZP4>.

6. See U.S. DEP'T OF EDUC., ESEA FLEXIBILITY 1 (2012) (authorizing waiver of certain provisions of No Child Left Behind Act); OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., TANF-ACF-IM-2012-03, GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115 (2012), available at <http://perma.cc/V777-P942> (authorizing waiver of part of the Social Security Act); OFFICE OF CONSUMER INFO. & OVERSIGHT, U.S. DEP'T OF HEALTH & HUMAN SERVS., INSURANCE STANDARDS GUIDANCE SERIES—INFORMATION (2010), available at <http://perma.cc/E426-PGAM> (allowing waiver of portions of Affordable Care Act).

7. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010).

prohibitions in particular cases, notwithstanding the Take Care Clause. But this authority is not as sweeping as recent exercises of it might suggest. Without congressional action expanding executive discretion, the President's nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders. These forms of discretion, where they exist, require an affirmative delegation from Congress, because presuming them would conflict with another deeply rooted constitutional tradition: the principle that American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations. Moreover, even the Executive's baseline nonenforcement authority is defeasible: Congress may restrict it by mandating enforcement in specified circumstances.

In the absence of more specific congressional guidance, then, two countervailing presumptions should structure the law of federal enforcement discretion. Executive officials should presume, first, that they hold discretion to decline enforcement in particular cases, but second, that they lack discretion to categorically suspend enforcement or prospectively exclude defendants from the scope of statutory prohibitions. These two presumptions strike a balance that best resolves a deep conflict within the constitutional scheme of separated legislative and executive powers.

On the one hand, some degree of enforcement discretion is a natural incident of the core executive function of applying general laws to particular cases. Indeed, a central normative reason for separating legislative and executive functions, as articulated by Montesquieu, the Federalist Papers, and other foundational sources, is to create a safety valve that protects citizens from overzealous enforcement of general prohibitions.⁸ The Constitution's text can accommodate this understanding of the executive function, even if it does not compel it. The requirement of "faithful[]" execution in the Take Care Clause invites inquiry into the proper scope and rigor of law enforcement that a "faithful" executive agent should perform. Other constitutional provisions, particularly the Bill of Attainder and Pardon Clauses, also may suggest executive authority to tailor general laws to particular cases.⁹

8. See *infra* notes 111–12 and accompanying text (discussing Montesquieu's rationale for the separation of the executive and legislative branches).

9. See *infra* notes 95–107 and accompanying text (noting the Bill of Attainder, Take Care, and Pardon Clauses support idea of executive discretion).

On the other hand, equally strong textual, structural, and normative considerations dictate congressional primacy in substantive policymaking. If the core executive function is to apply general laws to particular cases, the central legislative task is to formulate general laws and policies for the executive and judicial branches to implement. The executive branch thus exceeds its proper role, and enters the legislature's domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations. This understanding, once again, has deep historical roots. English monarchs claimed "suspending" and "dispensing" powers—the authority to license illegal conduct either across the board or for particular individuals. Parliament repudiated these prerogatives in the Glorious Revolution of 1689, and compelling textual, structural, and normative considerations suggest that the Constitution entrenches a similar principle of legislative supremacy.¹⁰

Adding further support to these conclusions, early historical practice appears to conform substantially to this Article's two proposed presumptions. Whereas the federal criminal justice system and the modern administrative state today presume substantial nonenforcement of statutory prohibitions, the opposite was true of the early federal law-enforcement structure. Nevertheless, federal prosecutors and other executive officials claimed from the beginning authority to decline enforcement of federal statutes in particular cases—an important indication that the executive role has always been understood to entail such authority. At the same time, there are important indications that key early federal officials understood that their duty generally was to prosecute provable violations that came to their attention. Hence, although early federal prosecutors declined to prosecute many cases based on equitable, case-specific considerations, they generally appear not to have done so on a categorical or prospective basis. In addition, all three branches appear to have viewed executive enforcement discretion as subject to congressional override.

Today, in contrast, substantial discretion is inevitable in many regulatory contexts. Given the breadth of modern statutory prohibitions and the limitations on available resources for enforcement, federal officials must necessarily leave many statutory violations unpunished. Treating this new reality of inevitable nonenforcement as establishing a new constitutional norm of unbounded executive discretion, however, would be a mistake. A law-

10. See *infra* notes 59–68 and accompanying text (describing the monarchy's power of suspension and its subsequent repudiation).

enforcement system predicated on unrestricted enforcement discretion would defy the text, history, and normative underpinnings of the Constitution. The other two branches, moreover, most likely have not acquiesced in such discretion to a degree that should alter proper constitutional interpretation.

These conclusions have two key implications for modern executive conduct. First, the framework developed here undermines claims that the President holds unrestricted discretion to decline enforcement of statutes in all regulatory contexts. Wide-ranging enforcement discretion may be inevitable in criminal justice and certain other areas where, realistically, resource limitations preclude enforcing all existing prohibitions. But the discretion exercised by executive officials in those contexts provides no support for presidential authority to decline enforcement with respect to any other given civil regulatory regime, such as the ACA. Where broader discretion is neither a practical inevitability nor expressly authorized by statute, executive officials hold discretion only to make case-specific exceptions to enforcement.

Second, even when exercising discretion in contexts like criminal justice, the proper understanding of executive duty should inform executive officials' decisionmaking. To the extent executive officials base nonenforcement decisions on case-specific considerations, their conduct falls comfortably within a long-standing view of the executive function. In establishing more general policies, however, executive officials should understand their task as a matter of priority setting, not policymaking. To be sure, this distinction will be more a matter of mindset and attitude than bright-line determination; the line between a priority and a policy will be unclear in many cases. Nevertheless, the constitutional principle of congressional primacy in lawmaking requires executive officials to focus on effectuating statutory policies rather than undermining them through nonenforcement.

The framework developed here also sheds light on several recurrent separation of powers disputes. It first suggests that the growing practice of executive waivers of statutory requirements—a subject of increasing political and scholarly attention—is not strictly impermissible but does require explicit statutory authorization. Without a clear statutory basis, an executive waiver of statutory requirements is a presumptively impermissible suspension of federal law. Second, the framework reinforces arguments that judges should narrowly construe criminal statutes in order to cabin executive discretion. Finally, it illuminates the long-standing debate over the constitutionality of independent prosecutors. Specifically, the

framework suggests that, because of the rise of discretionary law enforcement, the President may be required to supervise prosecutorial decisionmaking today, even if such supervision was not required at the Founding.

The analysis presented here fills an important gap in the literature. While scholars have debated at length the executive branch's responsibility to enforce statutes the President considers unconstitutional (an issue addressed only in passing here),¹¹ until recently the analytically distinct issue of policy-based nonenforcement attracted only a few relatively brief and impressionistic treatments.¹² More recently, in the most thorough treatment to date, Professors John Yoo and Robert Delahunty address the scope of the President's duty under the Take Care Clause, with particular focus on President Obama's immigration policy.¹³ But while these authors correctly emphasize the historical repudiation of the power to suspend and dispense with statutory mandates, they give insufficient weight to countervailing considerations that support a presumption of case-by-case enforcement discretion. At the same time, they neglect entirely the history of federal law-enforcement practice. Thus, despite acknowledging the possibility of congressional intent to permit equitable exceptions to enforcement in at least some statutory

11. See, e.g., CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS 21 (1998) (arguing that the President lacks authority to refuse to enforce unconstitutional laws); Aziz Z. Huq, *Enforcing (But Not Defending) 'Unconstitutional' Laws*, 98 VA. L. REV. 1001, 1007 (2012) (proposing that the executive branch only decline to enforce unconstitutional laws within certain categories); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183, 1186–87 (2012) (arguing that the executive branch should enforce laws it believes are unconstitutional); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1616 (2008) (arguing that the Constitution requires the President not to enforce unconstitutional statutes).

12. See, e.g., Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2311 (2006) (identifying and analyzing a presidential "completion power"); Arthur S. Miller, *The President and Faithful Execution of the Laws*, 40 VAND. L. REV. 389, 394 (1987) (discussing the role of politics in the President's enforcement of constitutionally ambiguous laws); Peter L. Strauss, *The President and Choices Not To Enforce*, 63 LAW & CONTEMP. PROBS. 107, 110–11 (2000) (examining the role of resource constraints, "a contemporary sense of the important," and other factors in executive enforcement practices). A few articles have analyzed the related question of the proper scope of judicial review of agency inaction. See, e.g., 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, 272–85 (2003) (discussing modern courts' review of agency inaction); Ruth Colker, *Administrative Prosecutorial Indiscretion*, 63 TUL. L. REV. 877, 888–99 (1989) (detailing federal courts' review of discretionary agency decisions); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 669–71 (1985) (discussing judicial review of agency inaction).

13. Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013).

contexts, Yoo and Delahunty propose too rigid a conception of the President's law-enforcement obligations.

An important recent article by David Barron and Todd Rakoff explores the practice of statutory waivers. But despite reaching conclusions broadly consistent with the framework developed here, Barron and Rakoff do not explore in detail the contours of executive discretion where no statute expressly authorizes waiver.¹⁴ Similarly, a recent analysis of the President's proper role in overseeing the executive branch's enforcement decisions gives only brief attention to the President's baseline nonenforcement authority.¹⁵ A forthcoming article on "presidential inaction" gives more focused attention to the issue and again reaches conclusions broadly similar to those presented here.¹⁶ That article, however, concentrates on functional reasons for enhancing separation of powers constraints on presidential nonenforcement; it does not consider the full range of textual, normative, and historical considerations that properly inform the scope of executive enforcement discretion.¹⁷

A distinct body of work addresses prosecutorial discretion and the related problem of overcriminalization. But this vast literature has generally focused only on normative issues and the prospects for tailoring various judicial doctrines to improve accountability or correct perceived abuses of prosecutorial discretion.¹⁸ The underlying

14. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267 (2013) (discussing Congress's delegation of waiver authority to agencies). For another more critical appraisal of this practice, see R. Craig Kitchen, *Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text*, 40 HASTINGS CONST. L.Q. 525, 526 (2013).

15. See Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1111–15 (2013) (asserting that "policy disagreement cannot be the sole reason for nonenforcement").

16. See Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. (forthcoming 2014) (manuscript at 15), available at <http://perma.cc/BJZ2-5DPN> (identifying as "problematic" on separation of powers grounds "a President's determination, on policy grounds, that a specific law should no longer be enforced" (footnote omitted)).

17. *Id.* (manuscript at 5) (describing the theory of separation of powers as "at its heart a functional story" and arguing that this theory "must be updated to account for the possibility of presidential inaction").

18. For recent examples in this genre, see, for example, Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity Into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 418–19 (2009) (proposing adjustments to Fourth Amendment and equal protection analysis to address "inequitable" law enforcement decisions); Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1660 (2010) (questioning prosecutors' competence to make nonenforcement decisions); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J. L. & PUB. POL'Y 715, 716–21 (2013) (describing problem of "overcriminalization" and evaluating various doctrinal responses); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801–06 (2012) (advocating public disclosure of prosecutorial

constitutional framework for assessing the proper scope of enforcement discretion and the executive's law-enforcement duty has remained comparatively unexplored.¹⁹

This Article remedies this gap in the literature by exploring the constitutional framework for executive enforcement discretion in both civil and criminal contexts. It concentrates on statutes regulating private party conduct, saving for another day questions relating to internal government mandates.²⁰ It also concentrates on the question of executive branch responsibility rather than questions of judicial review. As explained below, the executive branch may have enforcement duties that are not judicially enforceable.²¹ The Article leaves to future work a complete analysis of how extensively the judiciary should review enforcement decisions.

The analysis here proceeds as follows. Part II briefly identifies and describes the issue this Article addresses: whether and to what degree enforcement discretion is a constitutional authority of the executive branch. Part III describes the two relevant constitutional principles—legislative supremacy and executive judgment—that must inform any evaluation of the President's law-enforcement duty. Part III also proposes a framework, based on the twin presumptions identified earlier, for reconciling the two principles. Part IV offers a brief account of the history of federal law enforcement. It explains that, while early practice appears to conform substantially to the dual-presumption framework, much modern practice does not. Part IV then explains why this evolution in practice should not alter the baseline constitutional understanding of executive duty.

enforcement policies); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 103–04 (2013) (lamenting excessive discretion conferred on prosecutors by the breadth of criminal prohibitions); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 789–805 (1999) (discussing means of congressional influence over prosecutorial discretion); Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 544–65 (2012) (discussing federal courts' unnecessarily broad construction of criminal statutes).

19. Rachel Barkow has discussed separation of powers in the criminal context, but without focused treatment of executive duty. See Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1002–09 (2006). While Rebecca Krauss recently traced the conceptual origins of prosecutorial discretion as a separation of powers issue, she did not consider the full range of normative and historical issues considered in this Article. See Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Development*, 6 SETON HALL CIR. REV. 1, 22–28 (2009); see also John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443–46 (1974) (suggesting origins of prosecutorial discretion in development of plea bargaining as a solution to procedural complexity in trials).

20. See, e.g., *In re Aiken County*, 725 F.3d 255, 263–64 (D.C. Cir. 2013) (separate opinion of Kavanaugh, J.) (concluding that prosecutorial discretion does not permit nonenforcement of “a law mandating that [an agency] take certain non-prosecutorial action”).

21. See *infra* text accompanying note 340.

Part V illustrates the framework's implications by briefly analyzing several contemporary controversies, including disputes over nonenforcement of ACA provisions, marijuana laws, and immigration requirements. Part VI concludes by reflecting on the lessons of the analysis here for constitutional interpretation in general.

II. THE PUZZLE OF ENFORCEMENT DISCRETION

A. *The Practice of Discretion*

Both the federal criminal justice system and the modern administrative state depend critically on executive discretion over investigations and prosecutions. Federal criminal prohibitions were sparse and interstitial in the antebellum years, leaving to states the primary role in criminal law enforcement.²² But since the Civil War, and especially since the crime explosion of the 1960s and 1970s, the breadth and depth of federal criminal law have expanded dramatically.²³ Today, federal criminal law covers a wide range of conduct, far more than could ever realistically be punished.²⁴ Federal statutes, moreover, often prohibit the same (or closely similar) crimes many times over, allowing punishment of a single transaction under multiple overlapping or lesser-included prohibitions.²⁵ Potential sentences are frequently severe, particularly if offenders are convicted of multiple offenses.²⁶

This legal structure presumes, and indeed depends on, prosecutorial charging discretion. In one scholar's words,

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. Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.²⁷

22. For an account of early criminal enactments, see DWIGHT F. HENDERSON, CONGRESS, COURTS, AND CRIMINALS 1801-1829, at 7-8, 30-35 (1985).

23. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517-19, 525 (2001) (discussing increase in breadth and depth of criminal law).

24. See *id.* at 519 (“[D]efendants who commit . . . a single crime can be treated as though they committed many different crimes . . .”).

25. See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008) (discussing the “great breadth” of federal criminal law).

26. See *id.*; Stuntz, *supra* note 23, at 518 (noting that often criminals can be charged with multiple crimes of varying severity).

27. Stith, *supra* note 25, at 1423 (footnotes omitted).

With limited resources and broad charging options, federal prosecutors must choose how to allocate investigative and prosecutorial resources; they must prioritize some offenses at the expense of others. Once they uncover a crime, moreover, they often may choose between a range of charging options. Their choice of charges may have important consequences for the offender's likely sentence and thus for his or her willingness to forgo trial by entering a plea agreement. What is more, because states continue to hold primary law-enforcement responsibility within our federal system, federal prosecutors often can ignore the offense altogether, thus leaving the decision whether to prosecute with state officials.²⁸

So entrenched is the expectation of discretion within this system that it may drive the expansion of substantive prohibitions in the first place, in a sort of vicious cycle. Because legislators expect prosecutors to exercise discretion over which offenders and offenses to prosecute, Congress has little disincentive for passing ever-broader criminal prohibitions. Quite the opposite, a tough-on-crime electorate may create incentives to expand substantive criminal law, while prosecutorial discretion mitigates the costs of such legislation because Congress may anticipate that prosecutors will not in fact prosecute individuals within the scope of the law whom the public would not consider culpable.²⁹ The end result of this "pathological" political structure is ever-increasing prosecutorial discretion: "[L]aw enforcers, not the law, determine who goes to prison and for how long."³⁰

The administrative state, too, is shot through with discretion. Early in the twentieth century, the Supreme Court held that Congress violated the constitutional separation of powers by delegating broad legislative authority to administrative agencies.³¹ But the Court later enabled the New Deal administrative state by curtailing this nondelegation doctrine. Under modern case law, Congress can delegate policymaking discretion so long as it provides some "intelligible principle" to guide the agency's action—and the "intelligible principle" can be as general as advancing the public

28. See *id.* ("[M]ost conduct that violates federal law also violates state law.").

29. For the classic statement of this view, see Stuntz, *supra* note 23, at 546–49. See also WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 2–591 (2011) (discussing rise of official discretion as an organizing feature of criminal justice).

30. Stuntz, *supra* note 23, at 509; see also Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885, 911 (2004) (offering similar account of political dynamics of criminal law).

31. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537–38 (1935) ("[C]ongress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed . . .").

interest in some substantive area.³² Accordingly, agencies today routinely establish policy and even issue binding regulations pursuant to statutes that provide only vague and highly general guidance regarding Congress's desired policy. Even after the agency has established its policy or issued regulations, moreover, it often faces the same mismatch between enforcement resources and the scope of prohibitions that characterizes the federal criminal justice system. Thus, agencies, too, often exercise broad discretion with respect to enforcement of the statutes and regulations they administer.³³

In this environment, not surprisingly, courts and executive-branch lawyers have come to see prosecutorial discretion as a central constitutional function of the executive branch. Courts, indeed, have disclaimed virtually any authority to review executive charging decisions. According to the Supreme Court, "[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case."³⁴ In one much-cited opinion, the Fifth Circuit described prosecutorial discretion as "absolute" and "required in all cases."³⁵ Other courts likewise have held that they "will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process."³⁶ Even when the law provides for a judicial role, courts have been reluctant to exercise it. For example, although the Federal Rules of Criminal Procedure require leave of the court to

32. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001) (detailing prior examples of what qualifies as an "intelligible principle").

33. See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (holding that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").

34. *Nixon v. United States*, 418 U.S. 683, 693 (1974). Selection of defendants for prosecution based on impermissible criteria such as race or the exercise of protected rights may give rise to a defense of selective or vindictive prosecution, but in deference to the Executive's prosecutorial discretion, the Supreme Court has given these defenses extremely narrow scope. See, e.g., *Hartman v. Moore*, 547 U.S. 250, 265 (2006) (requiring proof of the absence of probable cause in § 1983 suits before suspending the presumption of regularity that is granted to charging decisions); *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (requiring "clear evidence" of discrimination to overcome the presumption that the prosecutor has not violated the Equal Protection Clause); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (noting selective prosecution claims require proof of both "discriminatory effect" and "discriminatory purpose"); *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (noting that "mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule").

35. *United States v. Smith*, 375 F.2d 243, 247 (5th Cir. 1967); see also *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) (holding that "as an incident of the constitutional separation of powers . . . the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions").

36. *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978).

dismiss an indictment, information, or criminal complaint,³⁷ courts have interpreted this rule narrowly, in part because of constitutional concerns.³⁸

In the civil context, courts have indicated that, at least theoretically, Congress could regulate executive enforcement discretion. In *Heckler v. Chaney*, the Supreme Court held that “Congress may limit an agency’s exercise of enforcement power if it wishes, either by setting substantive priorities, or by otherwise circumscribing an agency’s power to discriminate among issues or cases it will pursue.”³⁹ The Court also cited with approval the D.C. Circuit’s decision in *Adams v. Richardson*, which held that courts may enjoin an agency from complete nonenforcement of a statute the agency is charged with administering.⁴⁰ Nevertheless, the Court in *Heckler* emphasized “the general unsuitability for judicial review of agency decisions to refuse enforcement.”⁴¹ The Court accordingly adopted a strong presumption against construing statutes as providing for such review.⁴² In a more recent decision addressing immigration enforcement, the Supreme Court emphasized the importance of prosecutorial discretion in that context. Such discretion, the Court observed, “embraces immediate human concerns,” permitting officials to decline immigration enforcement based on “[t]he equities of an individual case” or because of international relations concerns.⁴³

For its part, the executive branch also claims constitutional authority to exercise discretion in both criminal and civil enforcement. The Office of Legal Counsel (“OLC”), the component of the

37. FED. R. CRIM. PROC. 48(a).

38. See, e.g., *In re United States*, 345 F.3d 450, 453 (7th Cir. 2003) (noting that the main purpose of FED. R. CRIM. P. 48(a) is “to protect a defendant from the government’s harassing him by repeatedly filing charges and then dismissing them before they are adjudicated”); *United States v. Cowan*, 524 F.2d 504, 513 (5th Cir. 1975) (“[Rule 48(a)] was not promulgated to shift absolute power from the Executive to the Judicial Branch. Rather, it was intended as a power to check power.”); *United States v. Ammidown*, 497 F.2d 615, 620 (D.C. Cir. 1973) (noting that Rule 48(a)’s purpose is not to transfer a prosecutor’s discretion to the courts but to allow the courts to guard “against abuse of prosecutorial discretion”).

39. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985).

40. See *Adams v. Richardson*, 480 F.2d 1159, 1161–62 (D.C. Cir. 1973) (en banc) (per curiam) (“[T]he agency discretion exception to the general rule that agency action is reviewable under the Administrative Procedure Act . . . is a narrow one . . .”); *Heckler*, 470 U.S. at 821 n.4 (explaining that judicial review might be available if, as in *Adams*, an “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities” (quoting *Adams*)).

41. *Heckler*, 470 U.S. at 831.

42. *Id.* at 832.

43. *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

Department of Justice charged with issuing binding legal opinions for the executive branch,⁴⁴ has described prosecutorial discretion as an “exclusive authority” of the executive branch.⁴⁵ Although some of its opinions have been more measured,⁴⁶ one OLC opinion describes this authority as one with which “neither the Judicial nor Legislative Branches may directly interfere . . . by directing the Executive to prosecute particular individuals.”⁴⁷

B. Discretion Without Limit?

Given that substantial discretionary nonenforcement is inevitable in so many areas of modern federal law, and considering that courts have almost totally abdicated review over such exercises of discretion, it may not be surprising that executive officials have sought to deploy their discretion in a manner consistent with their policy preferences. Recent presidential administrations, indeed, have repeatedly relied on enforcement discretion as a tool of policymaking.

44. 28 C.F.R. § 0.25 (2013).

45. Congress. Subpoenas of Dep’t of Justice Investigative Files, 8 Op. O.L.C. 252, 264 (1984) (citing *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. 454, 457 (1869)); *see also, e.g.*, *The Availability of Crime Victims’ Rights Under the Crime Victims’ Rights Act of 2004*, 2010 WL 6743535 (O.L.C.), at *11 (Dec. 17, 2010) (interpreting victim rights statute in keeping with “our country’s long-standing tradition of governmental control of prosecutions”); *Swift Justice Authorization Act*, 2002 WL 34482989 (O.L.C.), at *10 (Apr. 8, 2002) (“The President’s constitutional duty to ‘take Care that the Laws be faithfully executed,’ U.S. Const. art. II, § 3, similarly vests him with a broad range of prosecutorial discretion with which Congress may not interfere.”); *Waiver of Claims for Damages Arising out of Cooperative Space Activity*, 19 Op. O.L.C. 140, 155 (1995) (describing “a decision not to pursue a certain class of claims” as “an executive decision that is generally within the prerogative of the President”); *Congress. Requests for Info. from Inspectors Gen. Concerning Open Criminal Investigations*, 13 Op. O.L.C. 77, 79 (1989) (“[N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the executive branch by directing it to prosecute particular individuals.”); *Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 126 (1984) (“Although prosecutorial discretion may be regulated to a certain extent by Congress and in some instances by the Constitution, the decision not to prosecute an individual may not be controlled because it is fundamental to the Executive’s prerogative.”); *Application of Conflict of Interest Rules to the Conduct of Gov’t Litig. by Private Att’ys*, 4B Op. O.L.C. 434, 438 (1980) (“[O]n the constitutional level, we have long asserted that the making of litigation judgments (variously described as prosecutorial discretion or litigation management) is a function at the core of the President’s Article II duty to take care that the laws be faithfully executed . . .”).

46. *See, e.g.*, *Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege*, 8 Op. O.L.C. 101, 102 (1984) (suggesting that constitutional issue may arise only when law leaves no “discretion to the Executive to determine whether a violation of the law has occurred”).

47. *Congress. Subpoenas of Dep’t of Justice Investigative Files*, 8 Op. O.L.C. 252, 264 (1984).

For example, the U.S. Department of Justice recently announced that it would generally abstain from enforcing federal marijuana laws in certain types of cases in states where the drug is legal.⁴⁸ The Department of Health and Human Services announced that it would give existing health insurance plans an additional ten months beyond the statutory deadline before imposing penalties for failing to comply with certain requirements of the ACA.⁴⁹ Similarly, the Treasury Department announced that it would postpone for a year the enforcement of statutory penalties for employers who fail to offer health insurance coverage to their employees.⁵⁰ In 2012, the Department of Homeland Security announced a policy, expressly predicated on “prosecutorial discretion,” of declining to enforce removal statutes and employment prohibitions against certain undocumented immigrants who entered the United States as young children.⁵¹ The George W. Bush Administration apparently underenforced certain environmental, product safety, and civil rights laws as a matter of policy; in one case the Environmental Protection Agency stopped enforcing certain air pollution restrictions after the D.C. Circuit declared its regulatory standards too permissive.⁵² Critics also accused the Clinton and Bush Administrations of neglecting enforcement of gun safety laws,⁵³ and the Reagan Administration of deliberately failing to enforce antitrust statutes.⁵⁴

While all these instances of nonenforcement provoked controversy, structural forces may well explain why recent Presidents

48. See *supra* notes 3–4.

49. See Letter to Ins. Comm’rs, *supra* note 4 (“Under this transitional policy, health insurance coverage . . . that is renewed between January 1, 2014, and October 1, 2014 . . . will not be considered to be out of compliance with the market reforms . . .”).

50. I.R.S. Notice 2013-45, *supra* note 4. As this Article was going to press, the Treasury Department issued regulations that further extend this deadline for certain employers. See Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014).

51. See Memorandum from Sec’y Napolitano, *supra* note 5 (“By this memorandum, I am setting forth how, in our prosecutorial discretion, the Department of Homeland Security (DHS) should enforce the Nation’s immigration laws against certain young people . . .”).

52. See Deacon, *supra* note 7, at 808–16 (“What the D.C. Circuit struck down as a clear violation of statutory authority could simply be transformed into an enforcement policy and insulated from judicial scrutiny.”); Love & Garg, *supra* note 16, at 17–18, 21–23 (discussing environmental and civil rights examples). See *infra* Part V.B.2.c for further discussion of the Clean Air Act enforcement policy.

53. AMERICANS FOR GUN SAFETY FOUNDATION, THE ENFORCEMENT GAP 2–5 (2003).

54. See Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming from? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 948 (1987) (“The enforcement record of the Reagan Administration directly corresponds with its repeated assertion that virtually all business activity except horizontal price fixing is good for the American consumer and good for the economy.”).

have so frequently resorted to nonenforcement rather than seeking a change in law. In an era of partisan polarization and legislative gridlock, Presidents often cannot count on Congress to develop legislative solutions to perceived problems, or even to negotiate over such solutions in good faith.⁵⁵ Nevertheless, the public increasingly holds the President accountable for all failures of national policy.⁵⁶ Reliance on all forms of executive authority, without resort to Congress, thus becomes a nearly irresistible temptation for modern Presidents.

Nonenforcement, moreover, may be a particularly attractive means of rewarding favored constituencies. To be sure, a nonenforcement decision may not provide the same legal security as a change in the underlying law. A future administration might reverse the decision and pursue enforcement (subject to any applicable limitations period or due process protection arising from the past promise of nonenforcement). But the rewards to parties spared legal penalties or the associated burdens of legal compliance may nevertheless be substantial. At the same time, nonenforcement may seem to penalize no one. Because the public interest in law enforcement is often diffuse, nonenforcement policies may be less likely to prompt the sort of focused, motivated opposition that more affirmative forms of regulation typically provoke.⁵⁷

Nor are courts likely to reverse any executive nonenforcement decision. Given their characterization of enforcement discretion as an executive prerogative, courts appear quite unlikely to compel enforcement against the President's wishes, even assuming a party with standing to bring a justiciable challenge may be found. Furthermore, given the widespread reliance of both the criminal justice system and the modern administrative state on enforcement discretion, an executive decision not to enforce a particular statutory mandate may well appear relatively unremarkable to the public at large.

And yet nonenforcement carries dangers. For all the same reasons that make it an attractive policy tool—its circumvention of

55. See, e.g., Barron & Rakoff, *supra* note 14, at 306 (“With Congress stalemated . . . policymaking necessarily occurs, if at all, through the exercise of administrative discretion.”); Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277, 280–81 (2011) (“Politics is a partisan warfare: that is our world.”).

56. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2310–11 (2001) (“The American public harbors high and rising expectations about what a President should be able to accomplish.”).

57. For a specific illustration of this danger, see the discussion *infra* Part V.B.2.c of Clean Air Act enforcement under President George W. Bush.

Congress, the limited political constraints on its use, the unlikelihood of judicial reversal—enforcement discretion may also be insidious. If President Obama may postpone enforcement of the ACA's insurance requirements and employer mandate, could a subsequent President ignore the ACA altogether? Could a President lawfully decline to enforce federal drug laws, or capital gains or estate tax requirements? Might a President even do so as a matter of announced policy, thus sparing noncompliant parties any legal risk, at least for the duration of his or her presidency? Construed so broadly, executive enforcement discretion could become a form of second veto—a power to read existing statutes, whenever enacted, out of the Code for the duration of the President's term in office. Developing a proper understanding of the scope of enforcement discretion and the executive's law-enforcement duty is critical to evaluating recent practices and restoring a sound conception of the separation of powers. In fact, although enforcement discretion is a valid executive authority, one with deep historical and normative roots in our constitutional tradition, it is subject to important limits—limits that the executive branch must recognize, even if courts are unlikely to enforce them.

III. THE PROPER CONSTITUTIONAL FRAMEWORK

Identifying the constitutional framework for enforcement discretion requires taking a step back from modern practice, which makes pervasive exercises of discretion inevitable, and returning to first principles. What constitutional principles govern the executive role in enforcing federal law? The constitutional structure carries a central tension on this point. On the one hand, the Constitution obligates the President to “take Care that the Laws be faithfully executed.”⁵⁸ At least insofar as “the Laws” are acts of Congress, this take care duty implies a principle of legislative supremacy in lawmaking: the President's duty is to ensure execution of Congress's laws, not to make up the law on his own. On the other hand, the very separation of executive and legislative powers under our constitutional scheme, as well as the specific assignment of exclusive responsibility for law enforcement to the executive branch, implies that the President is more than a congressional handmaiden. The constitutional scheme, in other words, implies some independent executive authority to assess whether and to what degree any given law applies in any given factual circumstance.

58. U.S. CONST. art. II, § 3.

The analysis that follows in this Part explores this structural tension and the proper means of resolving it. Section A discusses the President's duty under the Take Care Clause, and Section B discusses the executive function within the separation of powers. Section C then describes how these two principles may be reconciled by applying two countervailing presumptions: (1) a presumption against presidential authority to license legal violations or categorically abstain from enforcement, and (2) a presumption in favor of presidential authority to decline enforcement for case-specific reasons of justice or equity. Finally, Section D addresses the question of defeasibility: it explains that, as a general matter, both these presumptions are subject to statutory modification or override, leaving to Congress ultimate authority over the scope of discretion exercised by the executive.

A. Presidential Subordination to Law

The first key constitutional principle relevant to assessing executive claims of enforcement discretion is legislative supremacy. Under our constitutional scheme, Congress's role is to enact laws. The President's role, in turn, is to execute those laws; he cannot make up the law on his own.

This scheme affords the President no general authority to nullify laws he does not like by failing to implement them. On the contrary, the plain text of the Take Care Clause requires the President to ensure "faithful[]" execution of laws that Congress enacts. The overall architecture of the Constitution, moreover, underscores Congress's primacy in lawmaking. The President's prescribed role in the legislative process is to sign or veto bills that both houses of Congress vote to approve.⁵⁹ Congress may even override the President's veto and enact laws that the President opposes.⁶⁰ The Constitution also requires the President to "recommend to [Congress's] Consideration such Measures as he shall judge necessary and expedient"; on "extraordinary Occasions," he may even call Congress into session to consider legislation.⁶¹ The Constitution thus defines the President's role in lawmaking and obligates him to recommend legislation when he considers it necessary. With respect to enacted laws, however, his sole duty is to take care that the laws in effect are executed.

59. U.S. CONST. art. I, § 7, cl. 2.

60. *Id.*

61. U.S. CONST. art. II, § 3.

Allowing the President to disregard duly enacted laws with which he disagrees would upend this scheme by giving the President a form of second veto over laws, whenever enacted, that he does not wish to see enforced during his presidency. Further, such broad nonenforcement authority would permit the President, with his single national constituency, to determine whether existing laws should remain national policy during his presidency. It would thus contradict the refined constitutional mandates regarding state-by-state geographic allocation of representatives and senators. All in all, as the Supreme Court has put it,

In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.⁶²

Background normative expectations make the President's duty to enforce congressional statutes even clearer. From a modern perspective, the principle of legislative supremacy reflected in the Take Care Clause is straightforward and intuitive, but it also implicates a long history of struggle in England and the United States over executive power. English monarchs historically claimed authority not only to veto bills presented to them for approval but also to suspend (either permanently or temporarily) the operation of existing statutes, or grant dispensations prospectively excusing particular individuals from compliance.⁶³ In an era when Parliament met infrequently and the monarch in any event was considered the

62. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 587 (1952); see also *id.* at 655 (Jackson, J., concurring) ("With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.").

63. See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM U. L. REV. 259, 278–79 (2009) ("Two of the Crown's asserted prerogatives had empowered kings to suspend the operation of statutes and to grant individuals the dispensation of not being bound by statutes."). These prerogatives were subject to evolving, and sometimes disputed, limitations. Outside of the emergency context, in which the suspending power was considered virtually unlimited, it appeared established by the seventeenth century that the royal dispensing and suspending powers generally applied only to statutes, not common law, and that they applied only to laws barring *malum prohibitum*, not laws covering *malum in se*. See CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, *SUBJECTS & SOVEREIGNS* 25, 29 (1981) (explaining the limitations to a monarch's dispensing and suspending powers); Carolyn A. Edie, *Tactics and Strategies: Parliament's Attack upon the Royal Dispensing Power 1597-689*, 29 AM. J. LEGAL HIST. 197, 198–99 (1985) ("There were limits upon the crown's powers."). Some also believed that the suspending and dispensing powers did not apply to qualifications for office, although this issue became a specific point of controversy. See Dennis Dixon, *Godden v. Hales Revisited—James II and the Dispensing Power*, 27 J. LEGAL HIST. 129, 142 (2006) ("By the early seventeenth century, it was well established that acts of parliament could disable individuals from holding office, and that these prohibitions could be beyond the reach of the dispensing power.").

ultimate source of all law, suspensions and dispensations were useful and broadly accepted lubricants for the legal system. They enabled the monarch to moderate statutory mandates when changed circumstances or a shift in royal policy so required.⁶⁴ In the seventeenth century, however, as intense religious and political controversies during England's civil wars unraveled traditions of deference to the monarch, royal suspensions and dispensations became a source of acute conflict between Parliament and the Crown.⁶⁵

The issue came to a head during the reign of King James II. King James enraged Protestants in Parliament by using his suspending and dispensing powers to exempt officials from statutory restrictions on office holding by Catholics and Protestant dissenters. In important test litigation, the King had to stack the King's Bench by replacing half its judges to obtain a ruling upholding his dispensing authority.⁶⁶ When the Archbishop of Canterbury and other high church officials were prosecuted for seditious libel for denying the validity of the King's suspending power, the jury acquitted them in the celebrated *Case of the Seven Bishops* in 1688.⁶⁷ Finally, in the Glorious Revolution of 1689, William III and Mary II replaced King James on the throne. As part of the new constitutional settlement, the monarch was henceforth denied suspending and dispensing powers. The very first two articles of the English Bill of Rights of 1689 state that "the pretended power of suspending of laws, or the execution of laws, by regal authority, without consent of parliament, is illegal," and that "the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."⁶⁸

64. See WESTON & GREENBERG, *supra* note 63, at 29 ("The dispensing power was, then, a valuable instrument of legal flexibility . . .").

65. See Reinstein, *supra* note 63, at 279–81 ("It is difficult to see how the suspending and dispensing prerogatives could exist in a system of parliamentary supremacy."); WESTON & GREENBERG, *supra* note 63, at 1–7 (discussing emergence of the "theory of parliamentary sovereignty" and the "conviction that the community but not the king constituted the human source of law and political authority").

66. *Godden v. Hales*, (1686) 11 How. St. Tr. 1166 (K.B.); see also Reinstein, *supra* note 63, at 279–80 ("A stacked King's Bench upheld James II's use of the dispensing power on a doctrine of royal supremacy over the laws . . .").

67. (1688) 12 How. St. Tr. 183 (K.B.); see also Reinstein, *supra* note 63, at 279–80 (stating the facts of the *Case of the Seven Bishops* and recounting that "the jury acquitted the bishops to general national acclaim").

68. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., Sess. 2, c. 2 (1689). For general background on the declaration, see STEVE PINCUS, 1688: THE FIRST MODERN REVOLUTION 292–93 (2009).

The repudiation of royal authority to suspend or dispense with statutes was thus a central achievement of the English Revolution. As such, it formed an important backdrop to the American constitutional enterprise.⁶⁹ Drawing from this English model, several states during the American revolutionary period adopted constitutions including prohibitions on executive suspension of laws.⁷⁰ Indeed, even today a number of state constitutions retain such provisions.⁷¹

69. On the role of the Glorious Revolution in American constitutional understanding, see generally SEAN WILENTZ, *THE RISE OF AMERICAN DEMOCRACY* 4–6 (2005) (“The radicalism of the seventeenth century belongs to the genealogy of American democracy.”); JACK N. RAKOVE, *ORIGINAL MEANINGS* 20 (1996) (“[T]he vocabulary of American constitutional thinking was profoundly shaped by the great disputes between the Stuart monarchs and their opponents (in Parliament and out) which reached a momentous climax in the Glorious Revolution of 1688–89.”).

70. See generally Steven G. Calabresi et al., *State Bills of Rights in 1787 and 1791: What Individual Rights Are Really Deeply Rooted in American History and Tradition?*, 85 S. CAL. L. REV. 1451, 1534–35 (2012) (reporting that six state constitutions had such provisions in 1787, and two more adopted them by 1791).

71. See, e.g., ALA. CONST. § 21 (“no power of suspending laws shall be exercised except by the legislature”); ARK. CONST. art. I, § 12 (“No power of suspending or setting aside the law or laws of the State, shall ever be exercised, except by the General Assembly.”); DEL. CONST. art. I, § 10 (“No power of suspending laws shall be exercised but by authority of the General Assembly.”); IND. CONST. art. I, § 26 (“The operation of the laws shall never be suspended, except by the authority of the General Assembly.”); KY. CONST. § 15 (“No power to suspend laws shall be exercised unless by the General Assembly or its authority.”); LA. CONST. art. III, § 20 (“Only the legislature may suspend a law”); MAINE CONST. art. I, § 13 (“The laws shall not be suspended but by the Legislature or its authority.”); MASS. CONST. pt. I, art. XX (“The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.”); MD. CONST., Decl. of Rights, art. 9 (“That no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.”); N.C. CONST. art. I, § 7 (“All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised.”); N.H. CONST., Bill of Rights, art. XXIX (“The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for.”); OHIO CONST. art. I, § 18 (“No power of suspending laws shall ever be exercised, except by the General Assembly.”); ORE. CONST. art. I, § 22 (“The operation of the laws shall never be suspended, except by the Authority of the Legislative Assembly.”); PA. CONST. art. I, § 12 (“No power of suspending laws shall be exercised unless by the Legislature or by its authority.”); S.C. CONST. art. I, § 7 (“The power to suspend the laws shall be exercised only by the General Assembly or by its authority in particular cases expressly provided for by it.”); S.D. CONST. art. VI, § 21 (“No power of suspending laws shall be exercised, unless by the Legislature or its authority.”); TEX. CONST. art. I, § 28 (“No power of suspending laws in this State shall be exercised except by the Legislature.”); VT. CONST. art. XV (“The power of suspending laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this constitution, or the Legislature shall provide for.”).

At the Constitutional Convention, the delegates unanimously rejected a proposal to grant the President suspending authority.⁷² Some scholars have even suggested that the Framers intended the Take Care Clause to codify the repudiation of royal suspending and dispensing prerogatives.⁷³ At the Philadelphia Convention, early drafts of the Constitution would have conferred explicit law-enforcement power on the President.⁷⁴ The final version of the Constitution, however, omits any such provision and instead includes the Take Care Clause, which by its terms imposes a law-enforcement duty rather than an affirmative authority.⁷⁵ The evolution of the Take Care Clause from a power-granting to a duty-imposing provision underscores that the Framers intended Congress to have policymaking supremacy.⁷⁶ What is more, although there appears to

72. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 103–04 (Max Farrand ed., 1966). See generally RICHARD BEEMAN, PLAIN, HONEST MEN 140 (2009) (describing debate over the executive veto).

73. See, e.g., MAY, *supra* note 11, at 16 (“[The Take Care Clause] is a succinct and all-inclusive command through which the Founders sought to prevent the executive from resorting to any of the panoply of devices employed by English kings to evade the will of Parliament.”); Delahunty & Yoo, *supra* note 13, at 803 (“join[ing] [the] view” of scholars who argue the Take Care Clause has the purpose of precluding presidential suspending or dispensing powers); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 726 n.113 (“[The Take Care Clause] supposedly was the Constitution’s analogue to the English and state constitution prohibitions on dispensing and suspending the laws.”); Robert J. Reinstein, *An Early View of Executive Powers and Privilege: The Trial of Smith and Ogden*, 2 HASTINGS CONST. L.Q. 309, 320–21 n.50 (1975) (“It seems reasonable to conclude that the abolition of the suspending power, in section 1 of the [English] Bill of Rights, is mirrored in our Constitution’s [Take Care Clause].”); Reinstein, *supra* note 63, at 280 (“The prohibition on the suspending and dispensing powers was encoded in Article II’s [Take Care Clause].”).

74. The Virginia Plan described the President as having “a general authority to execute the National laws,” and a later proposal by James Madison would have granted him the “power to carry into effect the national laws.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 72, at 21; 3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 38 (1900).

75. The Committee on Detail—a body charged with harmonizing the agreed-upon provisions into a well-written whole—initially made this change. See generally Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 66–65 (1994) (discussing drafting history of Take Care Clause). The language of the Take Care Clause closely resembles comparable provisions in the state constitutions of New York, Pennsylvania, and Vermont at the time. N.Y. CONST. of 1777 art. XIX; PA. CONST. of 1776, § 20; VT. CONST. of 1777, ch. 3, § 28. The “take care” formulation, though peculiar to modern ears, appears to have been common in royal instructions to colonial governors and other royal power-granting instruments, as well as in instructions issued by the Continental and Confederate Congresses. See Roger G. Natelson, *The Original Meaning of the Constitution’s “Executive Vesting Clause”—Evidence from Eighteenth-Century Drafting Practice*, 31 WHITTIER L. REV. 1, 14–15 & n.59 (2009) (“[T]he framers of the 1780 Massachusetts and 1784 New Hampshire constitutions largely copied . . . from the language of royal commissions; and the instructions drafted by the Continental and Confederation Congresses resembled in form the former royal instruction.”).

76. See Lessig & Sunstein, *supra* note 75, at 66–68 (recounting drafting history).

be no contemporaneous evidence indicating that the Framers intended the Take Care Clause to abrogate executive suspending or dispensing powers,⁷⁷ one key member of the Constitutional Convention later indicated that the clause was meant to carry this implication.⁷⁸

On the other hand, the First Congress failed to include in the Bill of Rights any express prohibition on executive suspensions of law, despite proposals from several state ratifying conventions that the Constitution be amended to include such a provision.⁷⁹ Yet any negative inference from Congress's failure to act on these proposals seems weak. It seems more likely that James Madison and other members of the First Congress failed to include an antisuspension provision in the Bill of Rights precisely because they thought the Constitution already made it clear enough that the President lacked such powers.⁸⁰ During ratification debates, even the Constitution's Anti-Federalist opponents did not claim the President would hold suspending and dispensing powers.⁸¹ As one scholar observes, "Given the common Anti-Federalist strategy of claiming that the presidency 'would be a kingship in everything but name,' this silence is overwhelming in its implications."⁸²

In any event, in the decades after ratification, courts invoked the absence of suspending and dispensing powers as a virtual truism. The 1806 case *United States v. Smith* is illustrative. In *Smith*, the prosecution alleged that the defendant had launched a private military expedition against a foreign nation with which the United

77. See Prakash, *supra* note 73, at 726 n.113 ("While the [Take Care Clause] prohibits the suspending or dispensing of the law . . . there appears to be no evidence explicitly linking the clause (or its antecedents) to this purpose.").

78. 2 THE WORKS OF JAMES WILSON 829, 878 (Robert Green McCloskey ed., 1967) (describing clause as providing that the President holds "authority, not to make, or alter, or dispense with the laws, but to execute and act the laws").

79. See generally MAY, *supra* note 11, at 23–26 (discussing the Founders' failure to prohibit a presidential suspension power in the Bill of Rights of 1791).

80. For evidence in support of this conclusion, see *id.* at 25–26.

81. *Id.* at 26–29.

82. *Id.* at 28 (quoting FORREST McDONALD, THE AMERICAN PRESIDENCY 193 (1994)). The only explicit mention of a suspending power in the Constitution is in the Habeas Suspension Clause, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. CONST. art. I, § 9, cl. 2. The placement of this provision in Article I of the Constitution is generally understood to signify that suspension of habeas rights requires legislation by Congress, a conclusion that appears consistent with the Framers' hostility to an executive suspending power. For background on this clause and the Framers' understanding of it, see generally Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 1016–17 (2012) ("By its very design, the [Suspension Clause] holds out the specific lever by which the Constitution can adapt in times of emergency to give the Executive expanded powers to detain persons within protection outside the criminal process.").

States was at peace, in violation of a criminal statute prohibiting such military adventurism.⁸³ The defendant, claiming that the President had secretly authorized his conduct, sought to compel testimony from the President and other senior officials.⁸⁴ But Justice Patterson, presiding over the trial as Circuit Justice, deemed the proffered testimony irrelevant.⁸⁵ In his view, even assuming the defendant's allegations were true, the President had no such authority to authorize statutory violations.⁸⁶

In support of his holding, Justice Patterson invoked both the general normative principle of legislative supremacy and the specific absence of any presidential dispensing power. Though acknowledging that the President might terminate an after-the-fact prosecution or grant a pardon even in a case of presumed guilt, Justice Patterson deemed such actions "very different from a power to dispense with the law."⁸⁷ "The law," he observed, "like the beneficent author of our existence, is no respecter of persons; it is inflexible and even-handed, and should not be subservient to any improper consideration or views."⁸⁸ Granting the President discretion to exempt particular individuals from general statutory prohibitions, in other words, would conflict with the basic commitment to the rule of law in the United States, "which we have been always led to consider as a government not of men, but of laws, of which the constitution is the basis."⁸⁹

Justice Patterson expanded on the same theme later in the opinion and linked it to principles of legislative supremacy:

The president of the United States cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids. If he could, it would render the execution of the laws dependent on his will and pleasure; which is a doctrine that has not been set up, and will not meet with any supporters in our government. In this particular, the law is paramount. Who has dominion over it? None but the legislature; and even they are not without their limitation in our republic.⁹⁰

Justice Patterson, in short, held that the President had no license to ignore the statute, because doing so would be contrary both to his constitutional obligation to execute Congress's laws and to the basic constitutional principle that, in a republic, laws apply uniformly,

83. 27 F. Cas. 1192, 1201 (C.C.N.Y. 1806). For general background on this case, see Reinstein, *supra* note 73, at 309–10.

84. 27 F. Cas. at 1228.

85. *Id.* at 1231.

86. *Id.* at 1230.

87. *Id.* at 1229–30.

88. *Id.* at 1229.

89. *Id.*

90. *Id.* at 1230.

without regard to persons, and are not “dependent on [the] will and pleasure” of government officials.⁹¹

The full Supreme Court employed similar reasoning in its famous 1838 decision *Kendall v. United States*.⁹² There, the Court addressed an asserted presidential authority to disregard a statutory duty to pay certain sums to a contractor for the postal service.⁹³ The Court pithily rejected the President’s claim: “To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.”⁹⁴ The Court, moreover, linked its conclusion to the presumed absence of any suspending or dispensing power in the Constitution. According to the Court, recognizing executive authority to disregard the payment obligation in *Kendall*

would be vesting in the President a dispensing power, which has no countenance for its support in any part of the constitution; and is asserting a principle, which, if carried out in its results, to all cases falling within it, would be clothing the President with a power entirely to control the legislation of congress, and paralyze the administration of justice.⁹⁵

More recently, as noted earlier, the Court has continued to insist that the President lacks independent lawmaking authority within the constitutional scheme.⁹⁶ Historical tradition and subsequent precedent suggest, therefore, that the Constitution prohibits the President from categorically suspending enforcement of federal statutes or prospectively licensing legal violations.

B. Executive Enforcement Discretion

Congressional supremacy in lawmaking, nevertheless, is not the whole story. While the congressional scheme dictates that the President must execute the laws that Congress enacts, it does not require that this function be performed robotically. On the contrary, the very separation of legislative and executive functions implies that

91. *Id.*

92. *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

93. *Id.* at 612.

94. *Id.* at 613.

95. *Id.*

96. *Steel Seizure*, 343 U.S. 579, 587–88 (1952); see also *Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 435 (1990) (“The Executive Branch does not have the dispensing power on its own . . . and should not be granted such a power by judicial authorization.” (citing *Kendall*, 37 U.S. (12 Pet.) at 613) (internal citation omitted)); see also *supra* Part III.A (discussing the holding of *Steel Seizure* and arguing that allowing the President too broad a nonenforcement power would effectively place him in the position of making law based on his policy preferences).

enforcing the laws may be a matter of judgment, a task of applying general laws appropriately—“faithfully”—in particular factual circumstances. This understanding has deep normative and historical roots, too, and is thus equally central to understanding the President’s law-enforcement duty. Other recent accounts of executive enforcement discretion, however, have failed to recognize this principle and accordingly have proposed overly rigid conceptions of executive duty.⁹⁷

Just as much as it implies congressional supremacy in lawmaking, the Constitution’s separation of powers supports, or is at least consistent with, a division of labor between the legislative and executive branches: Congress enacts general laws, and the executive branch, along with the judiciary, applies them in particular circumstances. As the Supreme Court observed in one early case, “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”⁹⁸ This executive task of applying law to fact necessarily entails some degree of judgment. Unless the division of legislative and executive functions is pure formalism, the establishment of an executive branch independent from the legislature must signify a measure of discretionary executive control over enforcement.

At least one other constitutional provision reinforces this inference: the clause in Article I providing that “[n]o Bill of Attainder . . . shall be passed.”⁹⁹ Historically, bills of attainder were parliamentary mandates of punishment for particular individuals.¹⁰⁰ By precluding laws that impose punishment without executive or judicial action, the Bill of Attainder Clause ensures that punitive legislation will carry some degree of generality, leaving to the Executive identification of individual violators for punishment.

The Take Care Clause itself may also support an inference of executive enforcement discretion. As a general matter, as we have seen, this clause codifies a principle of executive subordination to law. Nevertheless, the Clause’s qualified language—requiring the President to ensure “faithful[]” execution of the laws—invites inquiry into background normative expectations about proper performance of

97. See, e.g., Delahunty & Yoo, *supra* note 13, at 799–800 (positing that the Take Care Clause requires the President to enforce the laws “without failure” and “exactly”).

98. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810).

99. U.S. CONST. art. I, § 9, cl. 3.

100. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984) (defining a bill of attainder as “‘a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial’” (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977))).

the executive function. To be sure, the term “faithfully,” particularly in eighteenth-century usage, seems principally to suggest that the President must ensure execution of existing laws in good faith, a meaning consistent with the Clause’s core purpose of ensuring congressional supremacy.¹⁰¹ Yet the word also implies that executing laws “faithfully” could be different from executing them strictly.¹⁰²

The term, in other words, evokes a notion of “faithful agency,” in which the agent’s proper discharge of his or her duties may depend on an implicit understanding of the principal’s expectations as much as on any explicit directives. What exactly would Congress, or the public, consider a faithful performance of the President’s duties? Parallel language in the President’s constitutionally required oath of office reinforces this suggestion. By requiring Presidents to swear that they will “faithfully execute the Office of President of the United States”¹⁰³—without even specifying any precise object of this “faithful[ness]”—the Constitution suggests that proper performance of the executive function may require adherence to notions of justice, equity, and the public interest, even at the expense of complete enforcement of each and every statutory mandate.

Finally, the Pardon Clause may also imply some degree of enforcement discretion, at least in the criminal context. This clause grants the President the “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”¹⁰⁴ In both the modern and historic understanding, a “pardon” excuses an offender’s crime, while a “reprieve” delays imposition of an adjudicated punishment.¹⁰⁵ The executive branch and Supreme Court have construed the Pardon Clause to permit not only these specific forms of clemency but also commutations (reductions in punishment), amnesties (general pardons for a category of offenders), and remissions of fines or penalties.¹⁰⁶ The Supreme Court, moreover,

101. See 1 NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (defining “faithfully” to mean “[w]ith strict observance of promises, vows, covenants or duties; without failure of performance; honestly; exactly,” as in “[t]he treaty or contract was faithfully executed”).

102. Cf. Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 STAN. L. REV. 1005, 1034–35 (2011) (arguing that the adverb “faithfully” imports into the Take Care Clause limitations on available means of enforcement contained in other constitutional provisions, such as the Fourth Amendment).

103. U.S. CONST. art. II, § 1, cl. 8.

104. U.S. CONST. art. II, § 2, cl. 1.

105. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570 nn.38 & 40, 580 (2001).

106. See *id.* at 570 nn.39–42 (collecting cases recognizing such other forms of clemency as valid exercises of the President’s authority under the Pardon Clause).

has endorsed the executive practice of issuing pardons even for unadjudicated offenses.¹⁰⁷ The Pardon Clause thus permits the President to bar punishment for any completed criminal offense, whether or not the offender has undergone trial and conviction.

To some degree, the Pardon Clause cuts both ways. The express provision of pardoning authority might imply that the President should rely on this back-end clemency power, and not any front-end discretion over enforcement, to exempt offenders from criminal prohibitions. Clemency is different from nonenforcement in important ways. At least until the statute of limitations runs out, the executive branch generally can revisit a decision to decline investigation or prosecution. A pardon, in contrast, is final and binding.¹⁰⁸ Similarly, while nonenforcement may occur quietly or even surreptitiously, executive clemency requires an overt presidential act,¹⁰⁹ and pardons are often politically controversial.¹¹⁰ Thus, contrary to one D.C. Circuit judge's recent suggestion that unrestricted prosecutorial discretion follows ineluctably from the pardon power,¹¹¹ the Pardon Clause might in fact suggest that no discretion over enforcement should be presumed absent a specific exercise of pardon authority. That said, the Pardon Clause does at least suggest that some authority to moderate the rigor of the law by excusing particular violations is an appropriate component of the executive function. To that degree, at least, the clause reinforces other

107. *See Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866) (indicating that the President's pardon power "may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment").

108. *See id.* ("[W]hen the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.").

109. A pardon, to be sure, need not be publicly announced, but of course, it has no effect if kept secret from courts and other officials. *See United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160–61 (1833) (describing a pardon as "the private, though official act of the executive magistrate, delivered to the individual for whose benefit it is intended").

110. Two famous examples of such categorical pardons are President Andrew Johnson's pardoning of confederate sympathizers and President Jimmy Carter's amnesty for Vietnam-era draft evaders. Both policies caused considerable political controversy. *See generally* Todd David Peterson, *Congressional Power over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1240–47 (2003) (providing background on both examples). More generally, commentators have suggested that the political unpopularity of pardons in a tough-on-crime culture explains steady decreases in use of the federal pardon power. *See, e.g.*, Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1348–49 (2008) (discussing decline in executive clemency during period dominated by "tough-on-crime politics"); Margaret Colgate Love, *Of Pardons, Politics, and Collar Buttons: Reflections on the President's Duty to be Merciful*, 27 FORDHAM URB. L.J. 1483, 1494–1500 (2000) (discussing reasons for decline in pardons, including the "politics of crime control").

111. *In re Aiken County*, 725 F.3d 255, 263–64 (D.C. Cir. 2013) (Kavanaugh, J.).

textual and structural indications that the President may exercise some degree of judgment over proper enforcement of federal laws.

In addition to these particular textual and structural inferences, deeply rooted normative expectations about separation of powers support a presumption of presidential discretion to decline enforcement in particular cases. As modern scholars have observed, the separation of legislative and executive functions may protect individual liberty by requiring at least two independent decision points before individuals suffer legal sanctions: First, Congress must enact a valid prohibition through the constitutional process of bicameral passage and presentment to the President. Second, the executive branch must pursue an enforcement action against an individual defendant.¹¹² Interposing an independent executive decisionmaker between the legislature and the individual thus may help prevent unjustified or undeserved legal punishment. Even if legislators want to punish particular individuals or legislate with particular targets in mind, the separation of executive and legislative functions ensures an opportunity for executive officials to independently evaluate the factual and moral merits of each particular case before prosecuting any particular alleged violation. Of course, discretion also carries dangers of favoritism, discrimination, and arbitrariness, but on this account, the executive branch's independent political accountability helps ensure evenhanded and appropriate enforcement decisions.

This understanding of the executive role is not a modern construct; it has deep roots in our constitutional tradition. In the ratification debates, proponents of the Constitution articulated the separation of powers rationale for executive discretion in their defenses of the President's pardon power. In the *Federalist* No. 74,

112. See, e.g., Barkow, *supra* note 19, at 1017 ("Under the scheme established by the Constitution, each branch must agree before criminal power can be exercised against an individual. Congress must criminalize the conduct, the executive must decide to prosecute, and the judiciary (judges and juries) must agree to convict." (footnotes omitted)); Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536–38 & n.102 (1991) (advocating liberty-protective understanding of separation of powers). Courts have also acknowledged this principle. See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) ("The Framers' inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty."); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *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 . . .").

Alexander Hamilton observed, “The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.”¹¹³ Even the most refined statutory code, in other words, requires some safety valve in application for exceptional cases. As future Supreme Court Justice James Iredell put it during the North Carolina ratification debates, “It is impossible for any general law to foresee and provide for all possible cases that may arise; and therefore an inflexible adherence to it, in every instance, might frequently be the cause of very great injustice.”¹¹⁴

Framing-era views of separation of powers more generally reflect the same understanding. In a famous passage quoted by James Madison in the *Federalist* No. 47, Montesquieu asserted that separation of legislative and executive functions is vital to preventing “tyrannical” enforcement of tyrannical laws: “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”¹¹⁵ Blackstone made the same point in quite similar language: “In all tyrannical governments the supreme magistracy, or the right of *making* and *enforcing* the laws, is vested in one and the same man,” with the consequence that “there can be no public liberty,” because “[t]he magistrate may enact tyrannical laws, and execute them in a tyrannical manner.”¹¹⁶

These assertions, which are echoed in other key Framing-era sources,¹¹⁷ presume that enforcement discretion is a proper aspect of the executive function. Were the President obliged to enforce all congressional statutes to the hilt, the separation of executive and

113. THE FEDERALIST NO. 74, at 364 (Alexander Hamilton) (Lawrence Goldman ed., Oxford University Press 2008).

114. 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Jonathan Elliot. ed., 1836), available at <http://perma.cc/Q6YD-MW7D>.

115. 1 MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (J.V. Prichard ed., Thomas Nugent trans., 1914) (1748), quoted in THE FEDERALIST NO. 47, at 241 (James Madison).

116. 2 WILLIAM BLACKSTONE, COMMENTARIES *146–47.

117. An important example is James Wilson’s 1790–1792 *Lectures on Law*. Wilson, a key member of the Constitutional Convention and a future Supreme Court Justice, echoed Montesquieu:

Let us suppose the legislative and executive powers united in the same person: can liberty or security be expected? No. . . . May [such a magistrate] not then—and, if he may, will he not then . . . enact tyrannical laws to furnish himself with an opportunity of executing them in a tyrannical manner?

1 WORKS OF JAMES WILSON, *supra* note 78, at 298.

legislative functions would do nothing to moderate tyrannical laws. The separation of legislative and executive functions helps prevent tyranny precisely because a discretionary decision by executive officers intervenes between the enactment of the prohibition and its application to any particular individual.

Early in the country's history, future Chief Justice John Marshall articulated this view of separation of powers even more directly. Marshall's statement related to the political firestorm in 1799 over President John Adams's decision to extradite a sailor named Jonathan Robbins (also known as Thomas Nash) who allegedly participated in a mutiny on a British vessel but claimed to be a U.S. citizen.¹¹⁸ Adams's decision was controversial not only because of Robbins's claimed American citizenship but also because the President had earlier terminated the prosecution of another allegedly mutinous sailor by directing the local federal prosecutor to enter a writ of *nolle prosequi* dismissing the sailor's indictment.¹¹⁹ In congressional floor debates, Marshall, who was then serving in the House as a Representative of Virginia, defended both the extradition of Robbins and the decision not to prosecute the other sailor.¹²⁰ He argued,

It is not the privilege, it is the sad duty of courts to administer criminal judgment. It is a duty to be performed at the demand of the nation, and with which the nation has a right to dispense. If judgment of death is to be pronounced, it must be at the prosecution of the nation, and the nation may at will stop that prosecution. In this respect the President expresses constitutionally the will of the nation; and may rightfully, as was done in the case at Trenton, enter a *nolle prosequi*, or direct that the criminal be prosecuted no farther. This is no interference with judicial decisions, nor any invasion of the province of a court. It is the exercise of an indubitable and a Constitutional power.¹²¹

Elsewhere in the speech, Marshall further observed that, in contrast to a private lawsuit "instituted by an individual," "a public prosecution carried on in the name of the United States can, without impropriety, be dismissed at the will of the Government."¹²²

Marshall thus articulated, in strikingly modern terms, the normative theory that the President, as the constitutional representative of "the nation," may decide which criminal violations to

118. For general background, see Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229, 235–38 (1990) (describing the Robbins affair and the resulting "legal and political contretemps").

119. *See id.* at 278 (describing the circumstances surrounding the writ of *nolle prosequi* on William Brigstock's murder charges, including informal negotiations over extradition). For further discussion of writs of *nolle prosequi*, see *infra* Part IV.A.2.a.

120. 10 ANNALS OF CONG. 596 (1800).

121. *Id.* at 615.

122. *Id.* at 609.

pursue and which to ignore. Even more clearly than Madison, Montesquieu, or Blackstone, Marshall asserted that the executive function entails exercising independent judgment regarding whether the “will of the nation” requires prosecution of a particular defendant who violated Congress’s general enactments. Marshall, moreover, went beyond a merely normative argument for executive enforcement discretion; he described discretion instead as an “indubitable” and “Constitutional” authority of the President.

As a partisan intervention in a contentious political debate, Marshall’s assertions should perhaps be taken with a grain of salt.¹²³ Nevertheless, Marshall’s statement, in conjunction with the more general statements in the Federalist Papers and other foundational texts, illustrates the deep historic roots of the modern intuition that some degree of discretion in enforcement is essential to the just operation of criminal justice and the administrative state. This normative understanding supports presuming that the President may “faithfully” execute federal laws by applying them in a manner sensitive to individual circumstances, even if that means declining enforcement of statutory prohibitions in particular cases because executive officials believe punishment is factually or morally unwarranted.

In light of this background, the more rigid conception of executive law-enforcement duty advanced by some scholars takes the principle of legislative supremacy too far. Yoo and Delahunty, for example, argue that “the Constitution’s Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases.”¹²⁴ In their view, congressional failure to provide adequate resources for full enforcement may excuse a breach of this duty.¹²⁵ Yoo and Delahunty also concede that, at least in the immigration context, some degree of case-by-case nonenforcement may be “tolerable” on the assumption that it “furthers congressional policy” or “represents what Congress itself would have decided in [the particular] case.”¹²⁶ In principle, however, Yoo and Delahunty maintain that even “equitable exceptions from statutory

123. There is no record of the principal floor speech opposing Marshall’s position, but the debate otherwise appears to have focused principally on the President’s power over foreign affairs and treaty interpretation, not prosecutorial discretion. See Wedgwood, *supra* note 118, at 335–36 & n.407 (stating that Albert Gallatin’s opposing speech is not reported in the Annals of Congress but summarizing the main points of his speech based on information gleaned from Gallatin’s personal papers).

124. Delahunty & Yoo, *supra* note 13, at 784 (emphasis added).

125. *Id.* at 845–51.

126. *Id.* at 842–43.

law that were not themselves based on another statute or on treaty law” are “breaches of duty” and “not valid exercises of Article II authority.”¹²⁷

To support this position, Yoo and Delahunty rely principally on the text of the Take Care Clause and the historical repudiation of executive suspending and dispensing powers.¹²⁸ Yet their argument exaggerates the specificity of the constitutional text and overreads the Constitution’s historical background, neglecting the contrary evidence that the executive function necessarily entails—and has always been expected to entail—some authority to moderate the rigors of the law through prudent enforcement. Nor do Yoo and Delahunty offer any account of early law-enforcement practice, although, as we shall see later, early practice undermines any originalist argument that the Framers did not expect executive officials to exercise enforcement discretion.¹²⁹ The Constitution does not require the President to be a robot. Some degree of executive discretion is as much a part of the constitutional scheme as is the President’s subordination to enacted laws.

C. Dual Presumptions

Two constitutional principles, then, are relevant to the scope of executive enforcement discretion and the President’s law-enforcement duty. On the one hand, Congress is supreme in lawmaking. On the other, the executive function of applying law to fact appropriately entails some degree of enforcement discretion. How can these conflicting principles be reconciled?

With respect to any particular statutory scheme, these two countervailing principles support two presumptions. First, the textual, normative, and historical considerations that justify some degree of enforcement discretion dictate a presumption that the Executive may “faithfully” execute federal laws while still declining enforcement in particular cases where executive officials believe punishment is either factually or morally unwarranted. Yet this presumptive discretion is subject to important limits, which take the form of a second, countervailing presumption. Notwithstanding their case-by-case discretion, executive officials lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons.

127. *Id.* at 842.

128. *Id.* at 798–808.

129. *See infra* Part IV.A.

These dual presumptions give force to both constitutional principles discussed in the previous two Sections without overriding either. Presuming discretion to decline enforcement in particular cases for reasons of justice or equity gives force to the principle that the executive function should not be robotic because the separation of lawmaking and enforcement powers is intended to preserve liberty. If nonenforcement authority were unbounded, it would become an authority to remake the law, in violation of the principle of legislative supremacy. Presuming, however, that executive enforcement discretion extends only to case-specific considerations harmonizes such discretion with the principle of legislative supremacy by barring two especially direct infringements on the legislative function.

Prospective nonenforcement—that is, an announced promise of declining enforcement of a law in the future—is a particular offense to legislative supremacy because it undermines the deterrent effect of the law. Similarly, categorical nonenforcement for policy reasons usurps Congress’s function of embodying national policy in law; it effectively curtails the statute that Congress enacted, replacing it with a narrower prohibition. What is more, these two forms of executive action most closely approximate the two forms of executive power that the historical background suggests the Framers sought specifically to prohibit: prospective licensing resembles the royal dispensing power, while categorical nonenforcement resembles an executive suspension of statutory law. By presuming that executive discretion does not extend to these particular forms of nonenforcement, the legal framework preserves congressional primacy in lawmaking while simultaneously allowing executive discretion in enforcement.

To be sure, even a firm policy or promise of nonenforcement may not provide the same legal security as a change in the underlying statutory law. In principle, a future President (or even the same one) might resume statutory enforcement. In that sense, at least, even categorical or prospective nonenforcement may not constitute a true suspension or dispensation, as historically defined. Yet this difference is often more apparent than real. As a practical matter, the government is unlikely to punish violations that it itself invited with an announced policy.¹³⁰ It seems inconceivable, for example, that the government will later seek to collect employer penalties for noncompliance with the ACA’s employer mandate despite having

130. *Cf. Madison Consultants v. FDIC*, 710 F.2d 57, 59 n.1 (2d Cir. 1983) (observing that the Securities and Exchange Commission “has rarely taken action” after issuing a so-called no-action letter indicating that a planned course of action is lawful).

announced that “no [such] payments will be assessed for 2014.”¹³¹ Enforcement under such circumstances might even violate due process.¹³² Furthermore, during the period of nonenforcement, limitations periods may run, memories may fade, and evidence may disappear, creating legal or practical obstacles to future punishment of past violations.

More fundamentally, even if enforcement suspension is only temporary, it still strips the law of practical effect for a certain period, thus violating the principle of legislative supremacy in policymaking.¹³³ The Take Care Clause, after all, requires faithful execution of “the Laws” on an ongoing basis,¹³⁴ and the English Bill of Rights prohibited executive officials from suspending not only “laws” but also “the execution of laws.”¹³⁵

The boundary between case-specific and prospective or categorical nonenforcement may not be clear in all cases. In the modern environment of broad statutory regulations and limited enforcement resources, some degree of policy-based priority setting by enforcement officials is inevitable in many contexts. In Part V below, I address the practical challenges faced by contemporary law-enforcement officials and explain how this framework may inform the proper understanding of executive duty in the modern context. In Part IV, moreover, I suggest, based on an examination of early federal law-

131. I.R.S. Notice 2013-45, *supra* note 4. For further discussion of this policy, see *infra* Part V.A.2.

132. See, e.g., *In re Aiken County*, 725 F.3d 255, 263 n.6 (D.C. Cir. 2013) (Kavanaugh, J.) (noting this possibility); cf. *United States v. Pelletier*, 898 F.2d 297, 302 (2d Cir. 1990) (“[D]ue process requires that the government adhere to the terms of any plea bargain or immunity agreement it makes.”).

133. Cf. *Barron & Rakoff*, *supra* note 14, at 274 (observing that an “affirmative policy” of nonenforcement “renders the underlying legal requirement effectively void for all cases within the ambit of the policy for as long as the policy remains in effect”).

134. U.S. CONST. art. II, § 3.

135. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., Sess. 2, c. 2 (1689). See also MASS. CONST. pt. I, art. XX (“The power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.” (emphasis added)); MD. CONST. art. 9 (“That no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.” (emphasis added)); N.C. CONST. art. I, § 7 (“All power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised.” (emphasis added)); N.H. CONST., Bill of Rights, art. XXIX (“The power of suspending the laws, or the execution of them, ought never to be exercised but by the legislature, or by authority derived therefrom, to be exercised in such particular cases only as the legislature shall expressly provide for.” (emphasis added)); VT. CONST. art. XV (“The power of suspending laws, or the execution of laws, ought never to be exercised but by the Legislature, or by authority derived from it, to be exercised in such particular cases, as this constitution, or the Legislature shall provide for.” (emphasis added)).

enforcement practice, that these two countervailing presumptions may provide, and at one time did provide, a coherent and normatively attractive framework for law enforcement.

Before turning to that history, however, this Article considers to what degree Congress is free to adjust or override the two presumptions. Is there any constitutional obstacle to Congress authorizing executive suspending and dispensing powers or, conversely, curtailing executive discretion?

D. Defeasibility

In fact, the dual presumptions that shape executive enforcement discretion are both broadly defeasible. While the Executive must retain some core authority to decline enforcement of penalties against parties whom the executive branch judges to be factually innocent, Congress otherwise holds broad authority to regulate executive enforcement discretion. In particular, Congress is free to enact enforcement guidelines or even statutory mandates requiring enforcement in specified circumstances. Likewise, the separation of powers permits Congress to authorize at least some forms of executive suspending or dispensing authority, notwithstanding the constitutional presumption against them.

1. Expanding Discretion

Some have suggested that the constitutional considerations counseling against an executive suspending or dispensing power are so strong as to even preclude Congress from specifically authorizing a presidential suspending or dispensing authority by statute.¹³⁶ More specifically, some have questioned the permissibility of legislative provisions allowing executive officials to waive statutory requirements—a form of effective suspending power that is increasingly common in federal legislation.¹³⁷ In fact, however, such legislation has been commonplace throughout American history, and it raises none of the concerns that support a presumption against

136. See, e.g., Philip Hamburger, *Are Health Care Waivers Unconstitutional?*, <http://perma.cc/ZTA5-7S5Y> (nationalreview.com, archived Feb. 10, 2014) (“[O]nce a law has passed—and therefore is binding—how can the executive branch relieve some Americans of their obligation to obey it?”).

137. See, e.g., Kitchen, *supra* note 14, at 527–31 (discussing the position of negative lawmaking delegations within the modern administrative state and contending “that many waiver delegations unconstitutionally allow the Executive to undo legislative compromise”). For a normative and constitutional defense of this practice, see Barron & Rakoff, *supra* note 14, at 267.

executive suspending or dispensing authority in the absence of congressional authorization.

To begin with, the text and drafting history of the Constitution are consistent with allowing Congress to authorize executive suspending and dispensing powers. As we have seen, although the Take Care Clause codifies a general principle of legislative supremacy, the Framers declined to include a more specific antisuspension provision in the Constitution, despite calls from some state ratifying conventions to do so.¹³⁸ In contrast, several state constitutions to this day expressly repudiate any executive suspending power,¹³⁹ and several did so at the time of the Founding.¹⁴⁰ The absence of such explicit language in the Federal Constitution thus may suggest greater flexibility. What is more, although at least one state court has construed its state constitution to preclude legislative delegation of the suspending power,¹⁴¹ the antisuspension provisions in many state constitutions expressly contemplate such delegations.¹⁴² Accordingly,

138. See *supra* notes 73–75 and surrounding text.

139. See *supra* note 71.

140. See, e.g., VA. CONST. art. I, § 7 and Bill of Rights cl. 28 (1776) (providing that “all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised” and that the state governor “shall not, under any presence, exercise any power or prerogative, by virtue of any law, statute or custom of England”).

141. See Opinion of the Justices, 345 So. 2d 1354, 1356–57 (Ala. 1977) (interpreting state constitutional provision providing “[t]hat no power of suspending laws shall be exercised except by the Legislature” to signify that “[t]he legislature cannot authorize suspension of law by another agency, even where the legislature itself has the power to suspend the law”).

142. See, e.g., DEL. CONST. art. I, § 10 (permitting suspension “by authority” of legislature); IND. CONST. art. I, § 26 (same); KY. CONST. § 15 (same); MAINE CONST. art. I, § 13 (same); MASS. CONST. pt. I, art. XX (permitting suspension “by authority derived from [the legislature], to be exercised in such particular cases only as the legislature shall expressly provide for”); MD. CONST., Decl. of Rights, art. 9 (barring suspension “unless by, or derived from the Legislature” (emphasis added)); N.H. CONST., Bill of Rights, art. XXIX (allowing suspension “by authority derived” from the legislature); PA. CONST. art. I, § 12 (permitting suspension “by [legislature’s] authority”); ORE. CONST. art. I, § 22 (same); S.C. CONST. art. I, § 7 (same); S.D. CONST. art. VI, § 21 (same); VT. CONST. art. XV (permitting suspension “by authority derived from” the legislature); see also, e.g., *Nicolette v. Caruso*, 315 F. Supp. 2d 710, 726 (W.D. Pa. 2003) (holding that challenged action “not constitute suspension of legislation because that action is authorized by the legislature”); *Young v. Fetterolf*, 182 A. 676, 679–80 (Pa. 1936) (rejecting challenge under state antisuspension provision to law delegating suspension power to municipalities); *Commonwealth ex rel. Armstrong v. Collins*, 709 S.W.2d 437, 442 (Ky. 1986) (noting legislature’s authority to delegate suspending power to courts); *State v. Karmil Merch. Corp.*, 186 A.2d 352, 368 (Me. 1962) (holding “[t]here is no suspension of the laws in violation of our Constitution” where law authorized municipalities to establish exemptions); *Mass. Bay Transp. Auth. Advisory Bd. v. Mass. Bay Transp. Auth.*, 417 N.E.2d 7, 13 (Mass. 1981) (noting governor could not suspend law “in the absence of legislative authority”); *Martin v. Oregon R. & Nav. Co.*, 113 P. 16, 19–20 (Or. 1910) (interpreting state constitutional provision to “permit the operation of laws to be suspended by an officer or tribunal of this state, when so authorized by an act of the legislative assembly”), *rev’d on other grounds*, *Or. R.R. & Navigation Co. v. Martin*, 229 U.S. 606

the Federal Constitution's silence on the issue readily permits the conclusion that the laws the President must execute include laws authorizing executive suspensions or dispensations.

Such laws, moreover, have been common throughout the nation's history. To be sure, the significant constitutional debate triggered by one such law in 1807,¹⁴³ and hostility that some Members of Congress expressed towards the law, provides important evidence that Americans in the early Republic felt that the suspending power was potentially dangerous and should not be presumed to reside in the executive branch. Nevertheless, the ultimate outcome of the debate—a vote in favor of the legislation by wide margins—supports the constitutionality of laws allowing executive suspension of their provisions.¹⁴⁴ As the bill's defenders pointed out, a presidential suspending power authorized by statute is entirely consistent with principles of legislative supremacy. Congressional “authorization by law to exercise a discretionary suspension of a law” arguably raises none of the historical concerns regarding the suspending power. Any suspension of the law under such a statute is based on statutory authority and not some extralegal executive prerogative.¹⁴⁵ For this reason, several years after the 1807 debate, the Supreme Court rejected constitutional challenges to a law allowing executive suspension of the statutory repeal of an earlier law.¹⁴⁶ The Court has since upheld other statutory suspension provisions.¹⁴⁷

Other early statutes also authorized dispensing powers. These provisions authorized the President to waive statutory prohibitions for

(1913); *cf.* Opinion of the Justices, 52 N.E.2d 974, 978 (Mass. 1944) (noting suspension by governor was not possible where legislature failed “to provide for the particular case” as required by state constitution’s antisuspension provision).

143. Act of Apr. 22, 1808, ch. 52, 2 Stat. 490.

144. 18 ANNALS OF CONG. 2246 (1808) (recording vote of 60–36 in the House); *see also id.* at 2204 (referring to “the great majority, who are friendly to this bill, who, by adopting it, sanction the constitutionality of the grant of fresh authority to [the President]”); *id.* at 2229 (stressing that the President would lack suspending power without enactment of the bill); *id.* at 2118 (statement by opponent of bill declaring that “it is unconstitutional to vest the President with power to suspend a law”); *id.* at 2125 (statement by opponent calling bill “the most anti-republican doctrine ever advocated on the floor of this House”); *id.* at 2129 (statement by supporter of bill conceding that passing it would mean “throw[ing] a monstrous and unusual power into the hands of the President”).

145. *Id.* at 2202, 2232.

146. *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) (“[W]e can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . , either expressly or conditionally, as their judgment should direct.”).

147. *See, e.g., Marshall Field & Co. v. Clark*, 143 U.S. 649, 680–94 (1892) (collecting historical examples of suspension provisions and upholding law allowing presidential reactivation of tariffs).

particular parties without suspending their effect in other cases.¹⁴⁸ This form of authority, too, is now common, as administrative licensing regimes and other statutory waiver provisions often enable executive officials to authorize licensed parties to engage in conduct that would otherwise be prohibited. While constitutional requirements of due process and equal protection may prevent executive officials from exercising these powers arbitrarily, long-standing practice and precedent supports their overall permissibility.

Some have argued, in contrast, that the Supreme Court's invalidation of a presidential line-item veto in *Clinton v. City of New York*¹⁴⁹ supports a contrary view.¹⁵⁰ The statute at issue in *Clinton* authorized the President to cancel certain spending measures in appropriations statutes, provided he followed specified procedures and did so within a prescribed timeframe after enactment.¹⁵¹ Reasoning that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes," the Supreme Court concluded that this statutory scheme violated the constitutional requirement that bills become law only through the prescribed procedure of bicameralism and presentment.¹⁵² Insofar as *Clinton* implies that any statutory waiver authority is unconstitutional, its holding conflicts with both long-standing practice and earlier precedents and interprets the constitutional text too rigidly. But the Court's opinion need not be understood so broadly.

The *Clinton* Court itself emphasized that the line-item veto enabled the President to unilaterally "change the text of duly enacted statutes," a characterization that may not be applicable to all statutory waiver provisions.¹⁵³ Moreover, the Court distinguished prior cases upholding suspension provisions by emphasizing that the statute did not require the President to act based on any change in circumstances or as a means of effectuating congressional policy. Rather, the law allowed the President to strike the spending item based solely on his own contemporaneous policy judgment.¹⁵⁴ At least

148. See Act of Mar. 26, 1974, 1 Stat. 400 (imposing thirty-day embargo on all shipping but allowing clearances of ships "under the immediate directions of the President of the United States"); Act of Apr. 25, 1808, ch. 47, §§ 6, 11, 2 Stat. 499, 500–01, (authorizing President to waive embargo restrictions); Act of Mar. 12, 1808, ch. 33, § 7, 2 Stat. 473, 475 (broadening scope of waiver provision).

149. 524 U.S. 417 (1998).

150. See, e.g., Kitchen, *supra* note 14, at 531–34 (questioning why the reasoning behind *Clinton*'s holding has not been extended beyond the issue of line-item vetoes).

151. *Clinton*, 524 U.S. at 436–37.

152. *Id.* at 438.

153. *Id.* at 446–47.

154. *Id.* at 443–44.

insofar as a waiver statute lacks these features, *Clinton* should not alter the conclusion that statutory delegation of a suspending or dispensing power to the President is constitutionally permissible.¹⁵⁵

On balance, then, the Constitution supports only a presumption against executive suspending and dispensing powers, not a hard-and-fast prohibition. Particular forms of statutory waiver authority may present constitutional difficulties, as the Supreme Court's invalidation of the line-item veto suggests. But as a general matter, such legislation appears permissible, provided the congressional authorization is sufficiently clear to overcome the constitutional presumption.

2. Restricting Discretion

Statutes regulating or abrogating enforcement discretion are also generally permissible. Like legislation authorizing executive suspending or dispensing powers, such statutes are themselves laws that the President must execute under the Take Care Clause, even if they limit the President's own authority. Although some judicial and executive branch opinions cast doubt on this conclusion, and although some early statements (such as the floor speech by John Marshall quoted earlier) characterize enforcement discretion as a preclusive executive prerogative, the weight of authority supports allowing substantial congressional regulation.

In one limited sense, it is true that executive enforcement discretion must be indefeasible. The executive function must entail some authority to decline prosecution of an individual whom the executive branch determines to be factually innocent. As one OLC opinion puts it, "Congress may not direct the Executive to prosecute a particular individual without leaving any discretion to the Executive to determine whether a violation of the law has occurred."¹⁵⁶ Such legislation would elide entirely the separation of legislative and executive functions, effectively arrogating to Congress the executive judgment of whether a punishable legal violation occurred. Moreover, as OLC has observed, such a law would violate "many of the policies upon which the Constitution's prohibition against bills of attainder was based."¹⁵⁷ Strictly speaking, a law that compels prosecution but

155. For more thorough considerations of reasons to construe *Clinton* narrowly, see Barron & Rakoff, *supra* note 14, at 313–15.

156. Prosecution for Contempt of Congress of an Exec. Branch Official Who Has Asserted a Claim of Exec. Privilege, 8 Op. O.L.C. 101, 102 (1984).

157. Congress. Subpoenas of Dep't of Justice Investigative Files, 8 Op. O.L.C. 252, 265 (1984).

allows for judicial process would not be a bill of attainder, as historic bills of attainder mandated punishment without allowing for such process.¹⁵⁸ Nevertheless, insofar as the prohibition of bills of attainder reflects a principle that the legislature should not make case-specific punishment decisions, such legislation would surely violate it (and thus might well violate due process, even if it does not violate the specific prohibition on bills of attainder).¹⁵⁹ In all events, it seems doubtful that the executive branch could “faithfully” execute a law by enforcing it against someone the executive branch believes to be innocent.

Short of such extreme legislation, however, there is ample room for congressional regulation. Contrary suggestions in a recent separate opinion by Judge Kavanaugh on the D.C. Circuit are thus overstated. According to Judge Kavanaugh, “In light of the President’s Article II prosecutorial discretion, Congress may not *mandate* that the President prosecute a certain kind of offense or offender.”¹⁶⁰ In fact, Congress may enact statutory guidelines for enforcement discretion, or it might even specify conditions under which prosecution would be mandatory, provided the executive branch believed a provable legal violation occurred. In at least one early statute, Congress did just that—it ousted prosecutors’ discretion to decline prosecution of violations brought to their attention by informants.¹⁶¹ Although there appear to be no reported judicial opinions addressing the operation of this statute or the scope of the duty it imposed on prosecutors, its enactment suggests that neither the First Congress nor President Washington saw any constitutional difficulty in a statutory mandate of enforcement for all reported violations of a particular statute.

In addition, at least two early executive-branch legal opinions recognize the permissibility of limitations on executive enforcement discretion. In 1837, the Attorney General opinion *Indulgences on Custom-House Bonds*¹⁶² described the applicable statutory scheme as

158. See *Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 846–47 (1984) (defining a bill of attainder as “a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial” (quoting *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 468 (1977))).

159. See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (“It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”); cf. Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1805 (2012) (arguing that penalties imposed by “legislative decree” rather than “enactment and enforcement of a general and prospective rule” may violate due process).

160. *In re Aiken County*, 725 F.3d 255, 263 (D.C. Cir. 2013) (Kavanaugh, J.).

161. Act of Mar. 3, 1791, ch. XV, § 44, 1 Stat. 199, 209.

162. 3 Op. Att’y Gen. 247 (1837).

affording no discretion to either the collector of customs or the district attorney to avoid initiating suits to recover unpaid balances on certain customs bonds.¹⁶³ In the Attorney General's view, it was "obvious that the [statutory text] was intended to take away all discretion from the collector, and to compel him, in every case where default shall have been made in the payment of a duty bond, instantly to deliver such bond to the district attorney."¹⁶⁴ Likewise, "The district attorney, on receiving the bond, is undoubtedly bound, as a general rule, forthwith to commence a suit"; the attorney's "degree of diligence" could properly be moderated only "by the system of procedure in force in his district, and by other circumstances, which may sometimes justify more or less delay in the actual commencement of suit."¹⁶⁵ Indeed, the Attorney General held that "if, by means of any unauthorized delay in the institution of the suit, the debt, or any part of it, should be lost, [the district attorney] would be personally responsible."¹⁶⁶

Based on the overall statutory architecture, the Attorney General concluded that the Treasury Secretary could oversee a district attorney's conduct of litigation and exercise a somewhat greater degree of discretion.¹⁶⁷ Even the Treasury Secretary, however, could exercise such discretion only in the manner "most likely to effectuate the great end of the law—the most speedy and certain collection of the debt."¹⁶⁸ The Attorney General thus described the statutory scheme as affording only quite limited discretion to the executive branch as a whole, and none at all to the federal prosecutor charged with bringing suit, without suggesting any constitutional difficulty with this arrangement.

Future Chief Justice Roger Taney's celebrated opinion on the *Jewels of the Princess of Orange* supports the same conclusion.¹⁶⁹ Though often cited as authority for an executive prerogative of enforcement discretion,¹⁷⁰ the opinion's conclusions were in fact quite limited. The opinion addressed "whether the President may lawfully direct the district attorney to discontinue" an action seeking forfeiture of certain jewels brought into the United States in violation of federal

163. *Id.* at 249.

164. *Id.* at 248.

165. *Id.*

166. *Id.*

167. *Id.* at 249.

168. *Id.*

169. 2 Op. Att'y Gen. 482 (1831).

170. See, e.g., Waiver of Claims for Damages Arising Out of Cooperative Space Activity, 19 Op. O.L.C. 140, 155 n.28 (1995) (citing *Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 491–92 (1831)).

revenue laws.¹⁷¹ The jewels turned out to be the stolen property of a Dutch Princess, so the Secretary of State asked whether the action might be terminated and the jewels returned to the Netherlands.¹⁷² In a word, Taney answered yes.¹⁷³ He reasoned that the jewels were not properly subject to forfeiture, as their true owner, the Princess of Orange, had done no wrong. He thus concluded that the President must have authority to terminate the enforcement proceedings.¹⁷⁴

As support for his result, Taney observed that “where an offence has been actually committed, and the penalty of the law unquestionably incurred,” the President could block or terminate any prosecution by granting a pardon.¹⁷⁵ Taney then observed,

It would be a singular anomaly in our law, if the power is given thus to put an end to a prosecution against one admitted to be guilty, and yet there should be no power vested anywhere to save a party admitted to be innocent, from a harassing and expensive litigation with the United States, and which, from the distance of its witnesses and the difficulty of collecting his proofs, may often be oppressive and ruinous to him.¹⁷⁶

In Taney’s view, “the power to interpose” in such a case was “evidently embraced by that clause of the constitution which makes it his duty ‘to take care that the laws be faithfully executed.’”¹⁷⁷ Taney thus recognized some executive authority, rooted in the pardon power and the Take Care Clause, to decline prosecution of an offender whom the executive branch determines to be factually innocent of the alleged offense. Yet he indicated that even this authority is potentially subject to legislative limits. According to Taney, federal government attorneys have control over suits on behalf of the United States “except in so far as [their] powers may be restrained by particular acts of Congress.”¹⁷⁸

For its part, the Supreme Court also embraced a limited view of executive authority until comparatively recently. In its 1868 decision in the *Confiscation Cases*—another supposed canonical authority for the constitutional requirement of prosecutorial discretion—the Supreme Court acknowledged congressional authority to modify the default presumption of prosecutorial discretion.¹⁷⁹ The issue in the case was whether the district attorney could dismiss a civil forfeiture suit despite a statutory *qui tam* provision allowing

171. 2 Op. Att’y Gen. at 483.

172. *Id.*

173. *Id.* at 485.

174. *Id.* at 484–85.

175. *Id.* at 485–86.

176. *Id.* at 486.

177. *Id.* (quoting the Take Care Clause, U.S. CONST. art. II, § 3).

178. *Id.*

179. 74 U.S. 454, 457 (1861).

prosecution by private parties.¹⁸⁰ The Court held that dismissal was permitted because the informant had no vested rights in the property to be confiscated by the United States.¹⁸¹ As one general principle supporting its conclusion, the Court invoked the presumption of executive control over prosecutorial decisions. But in so doing, the Court expressly acknowledged that this principle is only a presumption:

Public prosecutions, until they come before the court to which they are returnable, are within the exclusive direction of the district attorney, and even after they are entered in court, they are so far under his control that he may enter a *nolle prosequi* at any time before the jury is empanelled for the trial of the case, *except in cases where it is otherwise provided in some act of Congress*.¹⁸²

Thus, in one of the canonical statements of executive authority over prosecution, the Court acknowledged congressional authority to override the executive branch's presumptive discretion to dismiss particular charges.

In 1911, the Court approved of a statutory scheme designed to do just that. In *United States v. Morgan*, the Court considered a statutory regime that imposed a duty on the district attorney to "institute appropriate proceedings" if the Department of Agriculture determined administratively that the suspect had illegally shipped adulterated or misbranded goods in interstate commerce.¹⁸³ Although the issue squarely before the Court was jurisdictional,¹⁸⁴ the Court observed, without any sense of constitutional difficulty, that the statute "creat[ed] a condition where the district attorney is compelled to prosecute without delay."¹⁸⁵ In fact, although today we might interpret the qualifier "appropriate" in the statutory provision as carrying an implication of prosecutorial discretion, the Court seemed to presume the opposite. Citing the district attorney's general statutory duty to prosecute all federal offenders,¹⁸⁶ the Court implied

180. *Id.* at 454–55.

181. *Id.* at 462. Though the decision is often cited as authority for the proposition that the executive branch must control litigation in the name of the United States, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 139–40 (1976) (so citing case), the Court's actual holding is more limited. Although the statute included a *qui tam* provision, the suit at issue was brought by the district attorney, not the informant, so the question whether the district attorney could intervene to control a privately initiated suit was not presented. *See Confiscation Cases*, 74 U.S. at 458 (stating that "the suit was instituted by the district attorney").

182. *Id.* at 457 (emphasis added).

183. 222 U.S. 274, 279–80 (1911).

184. The Court held specifically that prior administrative notice was not a prerequisite to criminal prosecution. *See id.* at 281–82.

185. *Id.* at 281.

186. *Id.*

that the prosecutor would have had a duty to press charges even if the Department of Agriculture failed to report a violation.¹⁸⁷

The Court's opinion in *Morgan* is striking in the degree to which it presumes that law enforcement in general is automatic, not discretionary. As we shall soon see,¹⁸⁸ by 1911 federal criminal justice was already deep into its love affair with discretion. Nevertheless, the Supreme Court seems not yet to have recognized—much less constitutionalized—this development. The Court's holding in *Morgan*, never overruled by later precedent, casts doubt on the view that later decisions characterizing prosecutorial discretion as a core executive function should be understood to preclude congressional regulation of that executive authority. Indeed, in keeping with *Morgan*, the D.C. Circuit held just this past year that a particular civil regulatory statute conferred no “prosecutorial discretion” on the Food and Drug Administration to decline enforcement of import restrictions on certain drugs.¹⁸⁹ Like the presumption against executive suspending and dispensing powers, the presumption in favor of case-by-case enforcement discretion is only a default rule; Congress can modify or abrogate it with respect to any particular statutory regime.

IV. THE FRAMEWORK IN ACTION

Two countervailing presumptions thus structure executive powers of law enforcement: a presumption in favor of case-by-case prosecutorial discretion and a presumption against across-the-board nonenforcement or prospective licensing of prohibited conduct. Like magnetic force fields organizing metal filings, these dual presumptions should channel executive decisionmaking and determine the President's responsibilities under the Take Care Clause while nonetheless preserving substantial flexibility for Congress to shift executive decisionmaking one way or the other by altering the President's default authorities.

How well does historical practice conform to this constitutional framework? Practice, as much as judicial precedent, is often an important determinant of constitutional meaning with respect to

187. *Id.* (“If, for any reason, the executive department failed to report violations of this law, its neglect would leave untouched the duty of the district attorney to prosecute ‘all delinquents for crimes and offenses cognizable under the authority of the United States.’”). The Court also suggested that grand juries could properly be self-informing and that the government would be obligated to proceed in any cases where the grand jury returned an indictment, even if the government had not sought it. *Id.*

188. *See infra* Part IV.B.

189. *Cook v. FDA*, 733 F.3d 1, 7–10 (D.C. Cir. 2013).

separation of powers. At least insofar as constitutional provisions are ambiguous, practice may reflect a “gloss” on the text that has received popular approval through the political process and forms a baseline understanding of interbranch roles on which both Congress and the President may rely.¹⁹⁰ Yet in this case, practice has evolved significantly over time. Over the course of American history, the basic trajectory of federal law has been towards increasing executive discretion, in both criminal and administrative law. Federal law at the beginning was generally sparse and interstitial, and the federal law-enforcement apparatus was organized around an expectation of complete (or as complete as possible) enforcement of enacted prohibitions. Today, quite the opposite is true. Federal law is a vast leviathan, sprawled on top of equally extensive state regulation. Enforcement discretion thus plays an essential role in moderating the rigors of the law on the books to produce a socially tolerable law on the ground.

While a complete history of this evolution would go well beyond the scope of this Article, focusing on the two poles of the transformation—the earliest years of the Republic and the most recent few decades—may help clarify the constitutional underpinnings of enforcement discretion. Early practice, of course, is often considered especially probative of constitutional meaning.¹⁹¹ Here, early practice is particularly telling because it provides a key counterpoint to modern practice. While enforcement discretion is a central organizing principle of today’s criminal justice system and administrative state,

190. See, e.g., *Am. Ins. Ass’n v. Garamendi*, 539 U.S. 396, 414 (2003) (referring to the “historical gloss” on executive power). See generally Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012) (critically examining proper role of historical practice in interpreting separation of powers).

191. Numerous opinions and commentaries suggest that early historical practice may establish constitutional understandings that acquire binding normative force over time. See, e.g., *Myers v. United States*, 272 U.S. 52, 163 (1926) (relying on consistent practice from 1789 to 1863 to determine President’s constitutional removal authority); David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941, 951 (2008) (relying on early practice in analysis of constitutional war powers); cf. *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring) (“Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis.”).

Those who subscribe to originalist theories of interpretation often cite early practice as evidence of original constitutional meaning (which they of course consider binding for all time). See, e.g., Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1164–65 (2003). Some have also suggested that early practice may “liquidate” the meaning of facially ambiguous constitutional provisions, establishing an understanding that is controlling thereafter. See, e.g., William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1811–12 (2013); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 525–29 (2003).

the same was not true to anywhere near the same extent in the early Republic. On the contrary, the early law-enforcement structure in many ways created incentives for maximum enforcement. Early practice thus provides a perspective on the interbranch division of responsibility that is relatively unclouded by the pervasive delegations of the modern era. At the least, this early practice demonstrates how the dual-presumption framework proposed here could provide a workable model of governance.

Section A below describes early law-enforcement practice in greater detail. Section B then provides a brief account of the transition to modern practice, with its broad and extensive prohibitions and systematic reliance on prosecutorial discretion. Section B also explains why this subsequent historical evolution should not require a change in constitutional understanding.

A. Early Federal Law Enforcement

During the early decades of the Republic, the federal law-enforcement structure was designed in important ways to encourage maximum enforcement of federal prohibitions. Nevertheless, federal prosecutors routinely exercised discretion to decline enforcement in particular cases. At the same time, there are important indications that key early executive officials believed the proper scope of such discretion to be limited, at least ideally, to case-specific considerations.

1. Law-Enforcement Architecture

The Judiciary Act of 1789 established the initial structure of federal law enforcement.¹⁹² This statute created both the office of Attorney General and individual “district attorneys” (predecessors of modern U.S. Attorneys) for each federal judicial district.¹⁹³ Yet the creation of a unified Department of Justice lay far in the future.¹⁹⁴ At the time, the Attorney General’s duty was not to formulate national litigation policies, nor even to supervise the district attorneys. Instead, the statute charged the Attorney General with advising the President and representing the United States in the Supreme Court.¹⁹⁵ Congress did not even adequately compensate the Attorney General for full-time

192. Judiciary Act of 1789, ch. 20, 1 Stat. 73.

193. *Id.* § 35, 1 Stat. at 92–93.

194. See generally Susan Low Bloch, *The Early Role of the Attorney General in Our Constitutional Scheme: In the Beginning There Was Pragmatism*, 1989 DUKE L.J. 561, 567 (discussing the history and development of the Office of the Attorney General).

195. Judiciary Act § 35, 1 Stat. at 92–93.

work; legislators evidently presumed he would supplement his government income with work for paying clients.¹⁹⁶

For their part, the district attorneys had the “duty” by statute “to prosecute in [their] district[s] all delinquents for crimes and offences, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned.”¹⁹⁷ The district attorneys nevertheless had enormous practical independence, as they were spread throughout the country, subject to no statutorily defined chain of command within the executive branch, and often lacked efficient means of communication with national officials.¹⁹⁸ But in contrast to the modern system of U.S. Attorneys, the system’s decentralization did not necessarily mean that Congress or the President expected district attorneys to make independent, discretionary judgments about which federal legal violations to pursue. On the contrary, Congress seems to have designed the federal enforcement system in a manner that minimized such discretion.

Not only did the Judiciary Act, by its terms, mandate prosecution of all offenders,¹⁹⁹ but the compensation system for district attorneys encouraged them to bring forward any plausible case for judicial resolution. As was typical of many American governmental offices during the eighteenth and nineteenth centuries, district attorneys were compensated with fees rather than salary. From the 1790s until 1853, their fees tracked those of their state counterparts.²⁰⁰ Initially, nearly all states awarded fees to public prosecutors simply for bringing a case forward—a system that encouraged prosecutors to bring all citizen complaints to court for adjudication.²⁰¹ Over the course of the nineteenth century, many jurisdictions switched to awarding fees based on convictions rather than prosecutions. In 1853, the federal government adopted this system across the board by enacting a uniform fee system that

196. Bloch, *supra* note 194, at 567 & n.21.

197. Judiciary Act § 35, 1 Stat. at 92–93.

198. See Bloch, *supra* note 194, at 567–68 (discussing the position of early district attorneys relative to the Attorney General and the courts); Harold J. Krent, *Executive Control Over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 286–87 (1989) (discussing the absence of formal centralized control over early federal criminal law enforcement).

199. Judiciary Act § 35, 1 Stat. at 92–93 (establishing “duty” to prosecute all criminal offenses and civil actions).

200. Act of May 8, 1792, ch. 36, § 3, 1 Stat. 275, 277; see also H.R. EXEC. DOC. NO. 32-93, at 20–26 (1852) (discussing effect of statute on compensation in 1850s).

201. See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE* 42 (2013).

principally compensated federal prosecutors for achieving jury convictions.²⁰²

As one scholar has argued, the shift in compensation from case-based fees to conviction-based “bounties” encouraged greater official control over prosecutions; rather than encouraging prosecutors to bring every case forward, the new system rewarded them for vetting cases based on strength and concentrating resources on cases most likely to result in conviction.²⁰³ Whether based on cases or convictions, however, these fee-based compensation arrangements—in contrast to modern salaries—encouraged maximum enforcement (at least of provable cases) rather than discretionary nonenforcement.²⁰⁴ Thus, throughout the antebellum period, Congress arranged compensation for federal attorneys in a manner that ostensibly presumed all provable legal violations should be punished. Incentives for other federal law-enforcement officials, such as customs collectors and revenue officers, were often at least as strong. Such officials often derived compensation from successful collections and forfeitures, although admittedly they also often faced personal liability for unlawful actions or dereliction of duty.²⁰⁵

The early federal law-enforcement system also included opportunities for nonfederal actors—either private parties or state officials—to pursue, or at least initiate, certain federal cases. One scholar reports that, at least during the Republic’s first few decades, “private citizens could appear before a federal or state judicial official and swear out a complaint against a suspected criminal.”²⁰⁶ Such a complaint could lead to the suspect’s arrest and indictment.²⁰⁷ An early Attorney General opinion also indicates that private parties could independently appear before grand juries to advocate the indictment of alleged offenders.²⁰⁸ The Attorney General, indeed, suggested that this procedure could be used to “put [a case] in train for

202. Act of Feb. 26, 1853, ch. 80, § 1, 10 Stat. 161, 161–62.

203. See PARRILLO, *supra* note 201, at 43.

204. See *id.* Tort law in this period did provide countervailing incentives for caution by subjecting federal officers to personal liability for any action deemed *ultra vires* by a court. See generally Jerry L. Mashaw, *Reluctant Nationalists: Federal Administration and Administrative Law in the Republican Era, 1801-1829*, 116 YALE L.J. 1636, 1684 (2007) (“[Officers] were compensated wholly or in part by fees and commissions. This system incentivized diligence and promoted action. The prospect of damages for malfeasance, by promoting caution, made the incentives symmetrical—more or less.”).

205. See, e.g., Act of Mar. 3, 1791, ch. XV, § 41, 1 Stat. 199, 208–09.

206. Krent, *supra* note 198, at 294.

207. *Id.* at 294–95.

208. Respect Due Consuls, 1 Op. Att’y Gen. 41, 42–43 (1794).

judicial determination” even if the district attorney had determined not to press charges.²⁰⁹

Early federal grand jury instructions charged jurors with the duty of investigating and presenting “all offenses” against the United States committed within the judicial district.²¹⁰ In May 1798, Circuit Justice James Iredell expressly instructed a federal grand jury, “You certainly are not confined to prosecutions commenced by the attorney of the United States, or to such evidence as he may lay before you.”²¹¹ Judges, what is more, independently lobbied grand juries to investigate alleged crimes regardless of whether executive officials had requested an indictment.²¹² Individual grand jurors also apparently brought cases to the attention of their peers.²¹³

Some federal statutes even permitted private parties to pursue certain cases without official involvement. These *qui tam* statutes typically allowed the claimant to sue on behalf of the federal government for certain penalties or forfeitures, and to claim a portion of the recovery in the event the suit was successful.²¹⁴ *Qui tam* statutes remain to this day an important means of uncovering violations such as fraud against the government.²¹⁵ But while *qui tam*

209. *Id.* at 43.

210. *See, e.g.*, 3 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789-1800, at 40, 41 (Maeva Marcus & James R. Perry eds., 1990) (May 4, 1795 instruction by Justice William Patterson as Circuit Justice for the District of Pennsylvania, stating: “The duties, gentlemen, designated and enjoined upon you by law, extend to the investigation and presentment of all offences, which have been perpetrated against the United States, within this district, or on the high seas by persons in it.”); *id.* at 28, 30 (Apr. 25, 1795 instruction by Justice James Iredell as Circuit Justice for the District of Connecticut, stating: “your duty is to present offences committed against the United States”); *id.* at 31, 31 (Apr. 27, 1795 instruction by Justice John Blair as Circuit Justice for the District of Georgia, stating: “the good of the community, Gentlemen, requires all your activity and zeal in bringing forward to justice real guilt”); *id.* at 158, 159 (Apr. 1, 1797 instruction by Justice Oliver Ellsworth as Circuit Justice for the District of New York, stating: “You will diligently enquire after all offences cognizable by this court, and due presentment make.”).

211. *Id.* at 258, 260–61 (May 7, 1798 instruction by Justice Iredell as Circuit Justice for the District of South Carolina).

212. Krent, *supra* note 198, at 293.

213. *Id.*

214. *See, e.g.*, Act of July 6, 1797, ch. XI, § 20, 1 Stat. 527, 532 (allowing private informers to recover half the fines, penalties, and forfeitures for violations of parchment duty laws); Act of Mar. 22, 1794, ch. XI, § 4, 1 Stat. 347, 349 (allowing recovery of moiety of fines for illegal slave trading by “such person or persons, who shall sue for and prosecute the same”); Act of Mar. 1, 1793, ch. XIX, § 12, 1 Stat. 329, 331 (allowing informants to recover half of all fines and forfeitures in prosecutions for violation of restrictions on trade and intercourse with Indians, unless the suit is first brought by the United States). *See generally* Krent, *supra* note 198, at 296–97 & n.104.

215. *See* False Claims Act, 31 U.S.C. §§ 3729–33 (2012). For general background on the statute and the recent “rapid growth” in suits under it, see David Freeman Engstrom,

provisions today typically permit federal officials to take over a case or terminate its prosecution,²¹⁶ at least one early qui tam statute did the reverse: it imposed a “duty” on the district attorney “to institute or bring” a suit under the statute “upon application to him” from the private party.²¹⁷ Other statutes did not expressly contemplate public enforcement at all, although the district attorneys could presumably serve as the qui tam relator and collect the relator’s share of the recovery as their compensation (much as they would ordinarily recover a fee as compensation for a public prosecution).²¹⁸ In addition, as a means of ferreting out violations, some statutes afforded rewards to informers who provided evidence that led to a successful civil or criminal enforcement action.

Another form of nonfederal enforcement of federal laws occurred in state court. In some early statutes, Congress granted state courts jurisdiction to hear certain penal suits or criminal cases, as well as jurisdiction to perform certain ancillary law-enforcement tasks such as ordering certain federal arrests.²¹⁹ In at least some cases, federal prosecutions in state court appear to have been conducted by state prosecutors, rather than federal attorneys.²²⁰

Scholars have debated at length the implications of these early law-enforcement practices for the constitutionality of modern-day criminal prosecution by officials outside the presidential chain of command. Some argue that early nonfederal enforcement shows that the Framers did not consider federal law enforcement to be an essential function of the executive branch.²²¹ Others assert that the Take Care Clause requires presidential supervision of law enforcement; they argue that, in practice, early Presidents and

Harnessing the Private Attorney General: Evidence from Qui Tam Litigation, 112 COLUM. L. REV. 1244, 1246–47 (2012).

216. 31 U.S.C. § 3730.

217. Act of Mar. 3, 1791, ch. XV, § 44, 1 Stat. 199, 209. *See generally* Krent, *supra* note 198, at 297.

218. *See, e.g.*, Act of Mar. 22, 1793; Act of Feb. 20, 1792, § 25, 1 Stat. 232, 239 (covering certain postal violations); *cf.* Act of Mar. 1, 1793 § 12 (allowing informant to recover half of all fines and forfeitures “except where the prosecution shall be first instituted on behalf of the United States”).

219. *See* Krent, *supra* note 198, at 304–08 (collecting examples).

220. *Id.* at 306–07 (collecting examples).

221. *See, e.g.*, Lessig & Sunstein, *supra* note 75, at 70–72 (discussing the original intent of the framers when designing the executive branch of government); Krent, *supra* note 198, at 281; Bloch, *supra* note 194, at 563; William B. Gwyn, *The Indeterminacy of the Separation of Powers and the Federal Courts*, 57 GEO. WASH. L. REV. 474, 491–94 (1989); Stephanie A.J. Dangel, *Is Prosecution a Core Executive Function? Morrison v. Olson and the Framers’ Intent*, 99 YALE L.J. 1069, 1070 (1990).

executive officials did maintain control over nonfederal prosecutions.²²²

This debate—to which I return below²²³—largely misses a key implication of early nonfederal enforcement of federal laws. By supplementing federal prosecutors' authority with private enforcement, particularly in cases such as customs violations and frauds against the government where involvement of private informants may be essential to bringing cases to light, Congress added assurance that provable violations would be punished. On some level, to be sure, these *qui tam* provisions reflect an effort to oust the discretion of public prosecutors by providing mechanisms for enforcement even if federal officials decline to pursue a case. As such, they might imply an expectation that public officials would otherwise exercise discretion (or perhaps be derelict in their duties). More importantly, though, these laws confirm Congress's authority to strip prosecutorial discretion and calibrate the intensity of federal law enforcement.²²⁴ By adding belt to suspenders, these statutes reinforced the law-enforcement architecture's overall presumption of complete enforcement.

In sum, multiple features of the early federal law-enforcement architecture either mandated or encouraged complete enforcement of federal laws. Far from being organized around an expectation of official prosecutorial discretion, as is true today, the early system ostensibly presumed that all offenses should be prosecuted. This antebellum legal architecture is revealing in itself insofar as it illustrates the degree to which Congress may shape enforcement arrangements to achieve results quite different from those we intuitively expect today. But it becomes even more revealing when combined with evidence of how the system actually operated in practice.

2. Discretionary Nonenforcement

Notwithstanding the overall structure of early federal law enforcement and its many inducements for complete enforcement, early Presidents and executive officials did exercise discretion. Yet they appear to have done so more sparingly than today. Early federal enforcement officials seem to have routinely dropped cases when they determined that either the offense was unprovable or the offender had

222. See, e.g., Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 526–27 (2005) (commenting on early presidential powers).

223. See *infra* Part V.C.3.

224. See *supra* Part III.D.2.

already been punished. Then, as now, they also often attempted (particularly in the criminal context) to select defendants in a judicious manner calculated to achieve convictions and favorable legal precedents while avoiding acquittals or adverse rulings that might embolden disregard for federal laws.²²⁵ There are important indications, however, that key early federal officials did not understand their exercises of discretion as executive officials may do today—as a form of policymaking, tailoring wide-ranging prohibitions to appropriate public expectations. The early practice thus appears to fit the framework advocated here: federal officials presumed they had discretion to decline enforcement on a case-by-case basis, but this discretion did not extend to suspending all enforcement or licensing violations.²²⁶

a. Evidence of Discretion

To begin with, writs of *nolle prosequi* (or “nol pros”) filed by federal prosecutors to dismiss previously filed criminal charges provide substantial evidence of prosecutorial discretion during the early decades of the Republic. According to an 1829 report to Congress by the John Quincy Adams Administration, federal district attorneys terminated roughly a third of federal prosecutions between 1801 and 1828 by this method.²²⁷ Federal courts seem to have approved of this practice; the sheer volume of case terminations alone (roughly 400 out of 1200 prosecutions) suggests as much. The Supreme Court,

225. For examples of this type of reasoning, see Letter from William Ellery to Alexander Hamilton (Aug. 1–6), *in* 17 THE PAPERS OF ALEXANDER HAMILTON 6–7 (Harold C. Syrett ed., 1962). A report from a customs collector stated:

The District Attorney is clear that the cause is a good law cause, but is under some apprehensions that the Jury may be disposed to favour the defend. as there doth not appear to have been any intention to defraud the Revenue, and that if the United States should loose the Cause it may encourage others to transgress the Law . . .

Id.; MARY K. BONSTEEL TACHAU, FEDERAL COURTS IN THE EARLY REPUBLIC 118–19 (1978) (describing Kentucky district attorney’s careful selection of test prosecution for assault on revenue officer).

226. In addition to other primary and secondary sources cited in the notes, the historical research presented here is based on searches of published correspondence relating to law enforcement, customs and tax collection, and the federal district attorneys from the first three presidential administrations included in the following sources: THE WRITINGS OF GEORGE WASHINGTON (John C. Fitzpatrick ed., 1931–1944); THEODORE J. CRACKEL, THE PAPERS OF GEORGE WASHINGTON (2007); THE WORKS OF JOHN ADAMS (Charles Francis Adams ed., 1850–1856); THE WRITINGS OF THOMAS JEFFERSON (Paul L. Ford ed., 1892–1899); THE PAPERS OF THOMAS JEFFERSON (Barbara B. Oberg & J. Jefferson Looney eds., 2002–2009); PAPERS OF ALEXANDER HAMILTON, *supra* note 225; THE WRITINGS OF ALBERT GALLATIN (Henry Adams ed., 1960).

227. *Statement of Convictions, Executions, and Pardons*, H.R. DOC. NO. 20-146 (Feb. 26, 1829); *see also* HENDERSON, *supra* note 22, at 46, 213 (summarizing report).

moreover, dismissed one case in 1832 because the President had directed entry of a *nol pros* in the federal district court.²²⁸ An 1821 Attorney General opinion likewise declared, “There can be no doubt of the power of the President to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States.”²²⁹ And in one opinion as Circuit Justice, Chief Justice Marshall observed that “[t]he usage of this country has been, to pass over, unnoticed, presentments on which the attorney does not think it proper to institute proceedings.”²³⁰

Judicial acceptance of these dismissals provides important evidence of the understanding of separation of powers during this period. By accepting, apparently without question, federal prosecutors’ decision to dismiss charges even after they had placed them before the court, federal judges indicated an understanding that deciding whether to pursue charges against a particular offender was at least presumptively an executive function. In England, writs of *nol pros* enabled the Crown to terminate prosecutions initiated by private parties that appeared vexatious or threatened Crown interests.²³¹ Although public prosecution was becoming more common, private parties typically initiated criminal prosecutions in eighteenth-century England.²³² In this context, the *nol pros* was essential to protecting governmental interests.²³³

For reasons that remain unclear, colonial and state governments in North America typically employed public prosecutors in criminal cases.²³⁴ To be sure, as discussed earlier, private parties, judges, grand jurors, and other nonofficial prosecutors could sometimes put cases in train for resolution, and in such cases the writ

228. *United States v. Phillips*, 31 U.S. 776, 777 (1832).

229. *Power to Order a Nolle Prosequi*, 5 Op. Att’y Gen. 729, 729 (1821). Contemporary state court cases reflect the same view of prosecutorial discretion. *See, e.g.*, *Commonwealth v. Wheeler*, 2 Mass. 172, 174 (1806) (Parsons, C.J.). So do early treatises. *See, e.g.*, AUGUSTUS A. BOYCE, *MANUAL OF THE PRACTICE IN THE CIRCUIT COURTS OF THE UNITED STATES* 100 (1869); HENRY FLANDERS, *AN EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES DESIGNED AS A MANUAL OF INSTRUCTION* 183 (1860); 2 THOMAS W. WATERMAN, *A TREATISE ON THE PRINCIPLES OF LAW AND EQUITY WHICH GOVERN COURTS IN THE GRANTING OF NEW TRIALS IN CASES CIVIL AND CRIMINAL* 134 (1855).

230. *United States v. Hill*, 26 F. Cas. 315, 316 (C.C. Va. 1809).

231. *See Krauss, supra* note 19, at 16 (examining the historical evolution of prosecutorial discretion); *see also* ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 12 (1981).

232. *See generally* J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 35–41 (1986) (exploring early developments in English criminal courts); JOHN H. LANGBEIN, *THE ORIGINS OF THE ADVERSARY CRIMINAL TRIAL* 11–12 (2003) (discussing the history of adversarial criminal proceedings).

233. *See* GOLDSTEIN, *supra* note 231, at 12.

234. *See* PARRILLO, *supra* note 201, at 1.

of nol pros provided an important mechanism of official control. But insofar as most prosecutions were initiated by executive officials in the first place, the writ of nol pros was arguably unnecessary to protect government interests. The writ, however, was nonetheless absorbed into American practice, at both the state and federal levels, as a means of terminating cases. The ready adoption of the writ thus provides an important indication that a normative expectation of executive control over criminal cases was widely shared at the time.²³⁵

That said, most case dismissals pursuant to writs of nol pros seem to have been oriented toward abandoning unprovable cases, averting duplicative punishment, and avoiding acquittals or legal precedents that might undermine law-enforcement efforts. The dismissals generally seem not to have been oriented towards advancing any particular executive-branch policy independent of enforcement of federal statutes. Although the 1829 Adams Administration report rarely identifies a reason for the nol pros dispositions it documents, where it does so, the reasons relate to the strength of the evidence or the defendant's amenability to punishment.²³⁶ Such reasons included absence of a key witness, want of jurisdiction, or conviction and execution of the defendant in another jurisdiction.²³⁷ In addition, in one case, the 1829 report suggests that the district attorney discharged cases against three offenders in a given year so that the three offenders could be "used as witnesses."²³⁸ But while this statement may indicate that a form of plea bargaining in exchange for testimony took place, such an action would likely have been consistent with an overall objective of enforcing the law by punishing the most serious violators. The report also indicates that certain "penal laws against the cutting of live oak timber and cedar" were a "dead letter" in the then-territory of Florida, "owing to the difficulty of enforcing it [sic]."²³⁹ To the extent this statement indicates that timber laws were not enforced in Florida, the reason for such nonenforcement again appears to relate principally to the

235. See generally Krauss, *supra* note 19, at 19–20 (collecting cases).

236. See H.R. DOC. NO. 20-146 (Feb. 26, 1829).

237. *Id.*; see also *United States v. Amy*, 24 F. Cas. 792, 811 (C.C.D. Va. 1859) (encouraging use of nol pros where federal defendant has been prosecuted for same offense in state court).

238. See H.R. DOC. NO. 20-146, at 189 (indicating in "observations" column for 1819 "3 of the number discharged by U.S. Attorney; used as witnesses").

239. See *id.* at 188. The report similarly indicates that in Kentucky, "[f]or breaches of the Revenue Laws anterior to [the War of 1812], numerous suits were brought, but in not one of them is it believed that judgment was recovered against the defendant, owing, in all probability, to the very strong prejudices that prevailed here against these laws." *Id.* at 170. For further discussion of the situation in Kentucky and other examples of federal laws that proved unenforceable in certain jurisdictions, see *infra* Part IV.A.2.

impossibility of bringing successful cases, not broader considerations of policy or equity. Nonprosecution in such circumstances reflected a judgment that practical obstacles to prosecution made cases unprovable, not an executive decision to supersede or ignore congressional policy.

Thus, in many cases, perhaps most, where federal prosecutors in the early decades of the Republic declined prosecution through use of a *nol pros* or other means, they appear to have exercised their discretion principally to avert punishment in cases where prosecutors concluded that sanctions were factually or legally unwarranted. Such exercises of discretion reinforce the conclusion that the executive function was never understood to be robotic. Executive officials have always exercised judgment regarding which cases are strong enough to pursue. Consistent with this view, published correspondence from the first few presidential administrations includes frequent examples of directives to federal district attorneys to investigate particular offenders or offenses, but only if the facts and law showed a provable offense.²⁴⁰ Likewise, the President or other senior officials in some cases directed district attorneys to consider prosecution and base their decision whether to prosecute on their judgments of the offender's factual or legal guilt.²⁴¹ Yet such exercises of discretion are still

240. *See, e.g.*, Letter from Sec'y James Madison, U.S. Dep't of State, to Nathan Sanford, Dist. Att'y for N.Y. (June 21, 1804), in 7 THE PAPERS OF JAMES MADISON 346 (J.C.A. Stagg ed., 2010) (requesting "that you make enquiry into the truth and particular nature of the facts [stated in a newspaper report], and if in your opinion they constitute an offence subjecting [any individual] to legal prosecution, that you commence the same accordingly"); Letter from Sec'y Timothy Pickering, U.S. Dep't of State, to President John Adams (July 24, 1799), in 9 WORKS OF JOHN ADAMS, *supra* note 226, at 3 (indicating that "I shall give the paper to [the district attorney], and, if he thinks it libelous, desire him to prosecute the editor"); Letter from President John Adams to Sec'y Timothy Pickering, U.S. Dep't of State (July 20, 1799), in 8 WORKS OF JOHN ADAMS, *supra* note 226, at 668 (regarding disclosure of secret British diplomatic correspondence, stating: "I pray you . . . to refer this business to the attorney of the district . . . with instructions to make a diligent inquiry, and strictly to prosecute the persons he may find guilty of any breach of the law of nations, or the land."); Letter from Sec'y Thomas Jefferson, U.S. Dep't of State, to Ambassador George Hammond, Gr. Brit. (June, 13, 1793), in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 270 (noting prior instruction to district attorney "to put [a case] into a proper channel for decision").

241. *See, e.g.*, Letter from Sec'y James Madison, U.S. Dep't of State, to Zebulon Hollingsworth, Dist. Att'y for Md. (Aug. 28, 1804), in 7 PAPERS OF JAMES MADISON, *supra* note 240, at 644 (requesting a "scrupulous inquiry into the truth of [certain] allegations" and a report on options for prosecution); Letter from Sec'y Thomas Jefferson, U.S. Dep't of State, to the U.S. Attorney of Massachusetts (Sept. 2, 1793), in 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 15 (indicating that "[t]he President . . . desires that you will immediately institute such a prosecution against [a specified French consul], as the laws will warrant"); Letter from Sec'y Thomas Jefferson, U.S. Dep't of State, to William Rawle, Dist. Att'y for Pa. (May 15, 1793), in 26 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 40 (directing that "[b]y the inclosed papers you will perceive there is reason to believe that certain citizens of the United States have engaged in continuing depredations on the property and commerce of some of the nations at

broadly consistent with a system premised on total enforcement, as they ultimately spare from prosecution only those who are effectively innocent of any provable offense or who have already received punishment in another jurisdiction.

There are, however, at least a few early examples of discretion based on broader considerations of justice or equity. President Washington, for example, encountered the difficulty of how to respond to efforts by French consuls to outfit vessels in U.S. ports for privateering in France's war with Great Britain.²⁴² The Administration eventually settled on a policy of criminally prosecuting such breaches of U.S. neutrality.²⁴³ Nevertheless, correspondence between then-Secretary of State Thomas Jefferson and the U.S. Attorney for New York indicates that the Washington Administration initially directed prosecutors to ignore noncitizen offenders, based on concerns that such offenders lacked appropriate notice that their conduct was unlawful.²⁴⁴ Similarly, although President Washington directed that participants in illegal military attacks on Native American tribes in Kentucky "be prosecuted with the utmost rigor of the law,"²⁴⁵ a letter from Jefferson to the District Attorney in Kentucky instructed that "[i]t is not the wish to extend the prosecution to other individuals [apart from the group's leader] who

peace with the United States" and indicating "the desire of the Government that you would take such measures for apprehending and prosecuting them as shall be according to law").

242. See generally GORDON S. WOOD, *EMPIRE OF LIBERTY* 185–87 (2009) (providing background on this controversy).

243. See Circular to French Consuls and Vice-Consuls (Sept. 7, 1793), in 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 417 (indicating that French consuls seeking to enlist privateers in the United States will "be submitted to such prosecutions and punishments as the laws may prescribe for the case"). Although Congress later enacted neutrality statutes with criminal provisions, see, e.g., Act of June 5, 1794, 1 Stat. 381, such prosecutions initially depended on the controversial theory that certain violations of federal neutrality or the law of nations were common-law crimes cognizable in federal court. For contemporaneous articulation of this legal theory, see 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 210, at 106 (providing an April 12, 1796 grand jury instruction by Justice James Iredell as Circuit Justice for the District of Pennsylvania).

244. Letter from Sec'y Thomas Jefferson, U.S. Dep't of State, to the U.S. Attorney for New York (June, 12, 1793), in 7 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 296–97:

In the first instance like the present which happened here, the Government, desirous of acting with moderation and of animadverting, through the channel of the laws on as few persons as possible while it was supposed they might have acted without due information, directed prosecutions against such only as were citizens of the U.S.; but the present being a repetition of offence after due notice that it would be proceeded against, you will be pleased to institute such prosecutions before the proper Courts as you shall find most likely to punish according to law all persons, Citizens or Aliens, who had taken such a part in the enterprise commenced as above mentioned, as may be punishable by law.

245. Proclamation by President George Washington (Mar. 19, 1791), in 31 WRITINGS OF GEORGE WASHINGTON, *supra* note 226, at 250.

may have given thoughtlessly into this unlawful proceeding.”²⁴⁶ Secretary of the Treasury Alexander Hamilton likewise directed nonenforcement of a customs statute in one case where he concluded the offense was minor and no fraud was intended.²⁴⁷

Later, President John Adams directed federal prosecutors to terminate by *nol pros* two cases for seditious libel, not because he believed no violation of the Sedition Act had occurred, but because one of these defendants had ceased publishing the offending newspaper²⁴⁸ and the other had agreed to leave the country.²⁴⁹ Adams’s direction to dismiss the case against one of Jonathan Robbins’s fellow mutineers (discussed earlier in connection with future Chief Justice Marshall’s speech as a member of Congress)²⁵⁰ also may have been rooted in case-specific considerations of equity. One scholar speculates that Adams believed prosecution for mutiny was unwarranted in light of evidence that the British had forced the defendant to serve on the ship in question.²⁵¹

In correspondence with the U.S. Attorney for Virginia during the (ultimately unsuccessful) trial of Aaron Burr, President Thomas Jefferson demonstrated a similar understanding of the scope of his discretion. He directed that, following Burr’s anticipated conviction, “you should immediately have committed all those persons against whom you should find evidence sufficient, whose agency has been so prominent as to mark them as proper objects of punishment, & especially where their boldness has betrayed an inveteracy of criminal disposition.”²⁵² Jefferson distinguished, however, “obscure offenders &

246. Letter from Sec’y Thomas Jefferson, U.S. Dep’t of State, to William Murray, Dist. Att’y for Ky. (Mar. 22, 1791), in 19 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 598.

247. Letter from Sec’y Alexander Hamilton, U.S. Dep’t of the Treasury, to Jeremiah Olney (Sept. 24, 1791), in 9 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 236. Hamilton stated in this letter to a customs collector:

There appears to be reasonable ground for a presumption that the importation of the Brandy in kegs proceeded from ignorance of the law, and if no legal process is yet instituted with regard to the forfeiture, it is my wish that you will forbear to proceed further against it.

Id. In addition, one customs collector reported to Hamilton that he had declined, while awaiting further instruction, to institute a prosecution where “the vessel sailed before the Law took place, the master was ignorant of it, and there did not appear to be the least intention of fraud.” *Id.* at 403.

248. Letter from President John Adams to the Attorney General and the District Attorney of Pennsylvania (May 16, 1800), in 9 WORKS OF JOHN ADAMS, *supra* note 226, at 56.

249. Letter from President John Adams to the Young Men of Richmond, Virginia, in 9 WORKS OF JOHN ADAMS, *supra* note 226, at 217–18.

250. See *supra* Part III.B.

251. See Wedgwood, *supra* note 118, at 281–83.

252. Letter from President Thomas Jefferson to George Hay, U.S. District Attorney for Virginia (June 19, 1807), in 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 58.

repenting ones,” whom he instructed the U.S. Attorney to “let . . . lie for consideration.”²⁵³

As a final example—in a list that is not necessarily exhaustive—the Attorney General in 1821 recommended case-by-case moderation for certain slave traders traveling by sea to New Orleans from the newly acquired territory of Florida. An 1807 law banning the importation of slaves after 1808 required sailors shipping slaves coastwise to file manifests showing that their port of departure was within the United States.²⁵⁴ In one case, a Florida sailor violated this provision, yet “[t]he United States attorney and the collector express their belief that there was no intentional guilt” on the sailor’s part, and the evidence indicated that the slaves had not been imported from outside the United States.²⁵⁵ Under these circumstances, the Attorney General recommended that the President discontinue the prosecution.²⁵⁶ In two similar cases, the Attorney General likewise recommended that the President grant the “act of grace” of discontinuing the prosecution, so long as the evidence showed that the “slaves were not imported into Florida, on the eve of the cession, with a view to an ulterior destination to the market of the United States, in violation of the policy of our slave laws.”²⁵⁷

Early practice, then, entailed widespread exercises of discretion to decline enforcement in cases where a violation appeared unprovable to responsible executive officials. Early practice also includes at least a few examples of exercises of enforcement discretion oriented towards avoiding prosecution of offenders considered undeserving of punishment for reasons of justice or equity. This evidence—neglected in Yoo and Delahunty’s recent analysis²⁵⁸—powerfully confirms that the executive function has long been understood to entail some degree of discretion with respect to enforcement of statutory prohibitions.

b. Evidence of Limitations

At the same time, early practice also provides at least limited support for the second presumption—the presumption against

253. *Id.*

254. Act of Mar. 2, 1807, § 10, 2 Stat. 426, 430 (prohibiting the importation of slaves).

255. Letter from Att’y Gen. William Writ, U.S. Dep’t of Justice, to the President of the United States (Nov. 7, 1821), in ATTORNEYS GENERAL—CONSTRUCTION OF PUBLIC LAWS, H.R. DOC. NO. 26-123, at 380–81 (1841).

256. *Id.*

257. *Id.* at 381.

258. See Delahunty & Yoo, *supra* note 13, at 769–835 (surveying history of executive prerogative).

allowing complete suspension of enforcement or prospective licensing of violations. My conclusions on this point are necessarily more provisional and tentative given the limited available evidence, the volume of specific enforcement decisions to account for, and the difficulty of proving a negative hypothesis.²⁵⁹ Definite conclusions regarding the early understanding of federal prosecutors' enforcement duties are further complicated by the intense conflicts during the first decades of the Republic over the proper role and authority of the federal government and the federal judiciary.²⁶⁰ Moreover, as already indicated and as discussed further below, early federal officials did encounter significant impediments to enforcing certain laws. In at least a few instances, these obstacles yielded relatively categorical nonenforcement decisions, albeit more for reasons of prudence and practicality than policy. Those caveats aside, however, published correspondence from the first three presidential administrations includes significant indications that key officials in both Federalist and Republican administrations did not understand their prosecutorial discretion to entail wide-ranging authority to remake the law or supplant the policy reflected in statutes through nonenforcement.

To begin with, given the historic repudiation of royal suspending and dispensing powers and the importance of the Glorious Revolution of 1689 to early American thinking, it seems unlikely that early executive officials would have believed they held broad authority to decline enforcement of federal statutes. The English Bill of Rights, after all, provided that "the pretended power of suspending of laws, *or the execution of laws*, by regal authority, without consent of parliament is illegal."²⁶¹ President Washington articulated precisely this view in his 1792 Proclamation in response to the so-called Whiskey Rebellion (discussed further below). Though noting that "the government" had shown "moderation" in collecting excise taxes that were deeply unpopular in frontier areas, and that Congress had sought "to obviate causes of objection, to render the laws as acceptable as possible," he pointedly observed that the legislature "alone ha[s] authority to suspend the operation of laws."²⁶²

259. For discussion of sources consulted, see *supra* note 214.

260. See *generally* WOOD, *supra* note 242, at 400–32 (describing tension between Republican-controlled Congress and White House and the Federalist-controlled judiciary).

261. An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights), 1 W. & M., Sess. 2, c. 2 (1689).

262. Draft of a Proclamation Concerning Opposition to the Excise Laws (Sept. 7, 1792), in 12 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 330–31 n.1; see also From the Commissioners sent to Western Pennsylvania (Sept. 24, 1794), in 16 PAPERS OF GEORGE

In addition, the overall architecture of federal law enforcement, as described earlier, suggests an understanding that federal statutory law constituted a real code of conduct, to be obeyed in all its particulars and not merely to the extent prosecution could be avoided. Early federal grand jury instructions by Supreme Court Justices riding circuit expressly articulated this understanding. As Justice James Iredell put it,

[I]t is of the utmost consequence that every man should sacredly obey the laws of the country actually in being. They cannot be altered, nor the observance of them in any instance dispensed with, without the authority of the congress of the United States, in any exigence, however great, in any situation, however alarming.²⁶³

There are also more specific indications that executive officials considered themselves obligated to enforce federal statutes. To a degree that seems almost quaint today, early executive officials described enforcement of statutory prohibitions as a duty. President Washington referred to his “duty to see the Laws executed.”²⁶⁴ President John Adams observed that a federal district attorney would “not do his duty” if he failed to prosecute a legal violation that the President considered clear.²⁶⁵ A district attorney indicated in 1795

WASHINGTON, *supra* note 226, at 702, 706 (report from commissioners sent to negotiate end to rebellion indicating their rejection of the suggestion that the President might “suspend the execution of the excise acts until the meeting of Congress”).

263. James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Maryland (May 8, 1797), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 210, at 173, 178 (Maeva Marcus ed., 1990); *see also, e.g., id.* at 176 (“[T]he plainest dictates of duty, and the principles of republicanism itself, . . . require of us all to obey the laws of our country . . .”); James Iredell’s Charge to the Grand Jury of the Circuit Court for the District of Connecticut (Apr. 25, 1795), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 210, at 28, 28 (“Common sense, as well as common justice and the lowest notions of republican government, revolt against the absurd idea that when once a majority constitutionally authorised has passed a law, which all are bound to obey, any may disobey with impunity.”); Oliver Ellsworth’s Charge to the Grand Jury for the Circuit Court of the District of Georgia (Apr. 25, 1796), in 3 DOCUMENTARY HISTORY OF THE SUPREME COURT, *supra* note 210, at 119 (“No transgression is too small, nor any transgressor too great, for animadversion. Happily for our laws they are not written in blood, that we should blush to read, or hesitate to execute them. They breathe the spirit of a parent; and expect the benefits of correction, not from severity, but from certainty.”).

264. Letter from President George Washington to Sec’y Alexander Hamilton, U.S. Dep’t of the Treasury (Sept. 7, 1792), in 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 226, at 143, 144; *see also* President George Washington, Fourth Annual Address to Congress (Nov. 6, 1792), in 32 WRITINGS OF GEORGE WASHINGTON, *supra* note 226, at 205, 209 (“Congress may be assured, that nothing within Constitutional and legal limits, which may depend on me, shall be wanting to assert and maintain the just authority of the laws.”); Proclamation (Mar. 24, 1794), in 33 WRITINGS OF GEORGE WASHINGTON, *supra* note 226, at 304–05 (“[I]t is the duty of the Executive to take care that such criminal proceedings should be suppressed[] [and] the offenders brought to justice . . .”).

265. Letter from President John Adams to Sec’y Timothy Pickering, U.S. Dep’t of State (Aug. 1, 1799), in 9 WORKS OF JOHN ADAMS, *supra* note 226, at 5, 5.

that he “judged it [his] duty” to proceed with prosecution where he believed there was probable cause.²⁶⁶ “I should have esteemed myself culpable if I had neglected to do so,” he observed.²⁶⁷ An 1832 Attorney General opinion similarly described it as “the duty of the district attorneys to attend to the prosecution of all” violations of federal law.²⁶⁸ To be sure, these statements may refer to duty only in the general sense of the executive obligation to maintain law and order. Yet the attitude they suggest toward enforcement of statutory prohibitions contrasts sharply with modern assumptions.²⁶⁹ The current U.S. Attorney’s manual, for example—in what is itself most

266. Letter from Richard Harrison, Dist. Att’y for N.Y., to Sec’y Timothy Pickering, U.S. War Dep’t (Oct. 3, 1795), in 1 AMERICAN STATE PAPERS 626, 626 (Walter Lowrie ed., 1834).

267. *Id.* The letter responded to objections by a foreign government regarding the prosecution.

268. Letter from Att’y Gen. Benjamin F. Butler, U.S. Dep’t of Justice, to the Secretary of War (Mar. 7, 1836), in OPINIONS OF ATTORNEYS GENERAL, H.R. DOC. 31-44, at 995–96 (1851). Several early Attorney General Opinions suggest that it would in fact be improper to terminate a prosecution before courts have considered its merit. See *Interference with the Judiciary*, 1 Op. Att’y Gen. 366, 366 (1820):

The case is now before that department of the government whose appropriate function it is to expound our laws; and, in my opinion, it would be improper, on the part of the Executive, to step in for the purpose of arresting and putting an end to the prosecution, after a respectable court of the United States has pronounced it well-founded.

See also Letter to the President of the United States from William Wirt, Attorney General (Jan. 31, 1821), in ATTORNEYS GENERAL—CONSTRUCTION OF PUBLIC LAWS, *supra* note 243, at 336 (“I am extremely averse to smothering prosecutions in their birth; and, unless the course be recommended either by the judges or the United States attorney for the District—and this, too, officially—I cannot reconcile it to my sense of official duty to advise you to it.”).

269. For further examples, see Treasury Department Circular to the Captains of the Revenue Cutters (June 4, 1791), in 8 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 426, 428 (advising officers of revenue cutters that “it will be your duty to seize Vessels & Goods in the cases in which they are liable to seizure for breaches of the Revenue Laws, when they come under your notice”); Circular Letter from the Secretary of War to the Governors (Jan. 17, 1809), in 11 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 87, 88 (referring to President’s “duty to take the measures necessary to meet” resistance to embargo laws); Letter from President Thomas Jefferson to Sec’y Albert Gallatin, U.S. Dep’t of the Treasury (Aug. 15, 1806), in 10 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 281 (observing that “[w]e have done our duty” by pursuing prosecution); Letter from Sec’y Albert Gallatin, U.S. Dep’t of the Treasury, to President Thomas Jefferson (Nov. 20, 1801), in 35 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 711, 711 (describing correspondence from Secretary of the Treasury Gallatin informing customs collector that “it is your duty to apply to the proper Officer and forcibly represent the circumstances of the case” if there were “strong suspicions of any act of piracy having been committed” in violation of federal law); Letter from Sec’y Albert Gallatin, U.S. Dep’t of the Treasury, to President Thomas Jefferson (Nov. 29, 1801), in 35 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 741 (describing letter from Gallatin to collector advising that evidence that a particular ship was being used for illegal slave trading made it “the duty of the Executive to have a prosecution instituted”); Letter from Sec’y Albert Gallatin, U.S. Dep’t of the Treasury, to President Thomas Jefferson (Feb. 29, 1808), in 1 WRITINGS OF ALBERT GALLATIN, *supra* note 226, at 373–74 (indicating that customs collector’s “duty” was “to enforce the penalties against the owners of every vessel that sailed with knowledge of the first [embargo] law”).

likely an understatement of actual practice—advises that “[m]erely because the attorney for the government believes that a person’s conduct constitutes a Federal offense and that the admissible evidence will be sufficient to obtain and sustain a conviction, does not mean that he/she necessarily should initiate or recommend prosecution.”²⁷⁰

Alexander Hamilton articulated the Framing-era understanding even more directly. As Secretary of the Treasury from 1789 to 1795, Hamilton oversaw the enforcement of federal customs and revenue laws. In many respects, these laws approached modern regulatory regimes in their degree of detail and technicality. Yet Hamilton did not treat these statutes as a mere baseline to be moderated in application through executive enforcement policies. On the contrary, he advised customs and revenue officials that, absent a specific statutory basis for leniency, they had only narrow, case-by-case authority to excuse violations.²⁷¹

One exchange in particular highlights this understanding. Late in 1791, a new statute requiring certain ship captains to keep manifests of their cargo took effect.²⁷² Three months later, the customs collector in Alexandria advised Hamilton that, because these provisions “are not accurately observed in scarcely any one instance,” he had “conceived that where there was no reason to suspect fraud the forfeiture ought not to be sought.”²⁷³ The Secretary reacted negatively: “Sufficient time having been given to the owners and commanders of vessels to provide regular manifests, according to the last collection law, I am of opinion that the clauses [of the statute] should now be enforced.”²⁷⁴

Hamilton followed up with a circular letter to all customs collectors. After first highlighting provisions for leniency included in the statute itself, he further observed that “[t]he terms of every legal

270. U.S. DEPT. OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 9-27.220 (1997).

271. Hamilton claimed authority as Secretary to make binding legal determinations for executive officials regarding interpretation of customs and revenue laws. See Treasury Department Circular to the Collectors of the Customs (July 20, 1792), in 12 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 57–58 (stating “the power of the head of the [Treasury] department ‘to superintend the Collection of the Revenue’”). At least until he obtained statutory authority to delegate supervision of these officials to the Commissioner of Internal Revenue, see Treasury Department Circular to the Collectors of the Customs (Oct. 25, 1792), in 12 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 620–21 (describing discretion vested in the Treasury Secretary), he engaged in extensive correspondence with customs collectors and revenue officers regarding the proper performance of their duties.

272. Act of Aug. 4, 1790, 1 Stat. 145, 155–56.

273. Letter from Charles Lee to Sec’y Alexander Hamilton, U.S. Dep’t of the Treasury (Jan. 11, 1792), in 10 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 509, 509–10.

274. Letter from Sec’y Alexander Hamilton, Dep’t of the Treasury to Charles Lee (Jan. 18, 1792), in 10 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 522, 522.

provision are to be taken in a reasonable and practicable sense, and so as not to involve impossibility or absurdity.”²⁷⁵ Yet he recognized only narrow, case-by-case authority to make exceptions beyond the statute’s particular provisions:

[T]here are cases, in which a provision, though not strictly impracticable, may be so inconvenient as to demand some degree of relaxation. And where the question relates to collateral precautions in Revenue laws, for the security of the Revenue, small deviations from literal strictness may, with due circumspection, be admitted. *I will only observe that such deviations ought to be really necessary ones—such, without which the essential course of business might be disturbed, and oppression ensue—and ought to be as seldom, and as little as possible.*²⁷⁶

In another letter, in response to a beleaguered collector facing complaints from merchants about his “rigorous and severe execution of the Revenue Laws; contrary . . . to the True Intent, & meaning of them,” Hamilton advised, “I have considered it as possible that your ideas of precise conformity to the laws, may have kept you from venturing upon relaxations in cases in which, from *very special* circumstances, they may have been proper. . . . [C]ases do sometimes occur in which a little [discretion] may be indispensable.”²⁷⁷ At the same time, Hamilton emphasized that such “relaxations” should be reserved for “*special* cases” and “*urgent* occasion[s].”²⁷⁸ “I should be cautious,” he observed, in even “making such a remark to many officers—because I should fear an abuse.”²⁷⁹

On occasion, it is true, Hamilton did counsel “moderation” or “caution” in enforcing novel legal requirements.²⁸⁰ In a particularly strong example of such guidance, Hamilton advised that “a great relaxation appears unavoidable” with respect to provisions for seizure of distilled spirits lacking certain certificates.²⁸¹ Determining when certification had truly been required proved difficult because the law

275. Treasury Department Circular to the Collectors of the Custom (June 11, 1792), in 11 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 507, 509.

276. *Id.* (emphasis added); *see also, e.g.*, Treasury Department Circular to the Collectors of the Customs, *supra* note 275, at 57, 60 (recognizing the “admission of exceptions in extraordinary cases” in the “operation of laws”).

277. Letter from Sec’y Alexander Hamilton, U.S. Dep’t of the Treasury, to Jeremiah Olney (Apr. 2, 1793), in 14 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 276, 277.

278. *Id.*

279. *Id.*

280. *See, e.g.*, Treasury Department Circular to the Captains of the Revenue Cutters, *supra* note 269, at 426, 432 (urging “activity, vigilance & firmness,” but also “prudence, moderation & good temper”).

281. Treasury Department Circular to the Supervisors of the Revenue (Sept. 30, 1791), in 9 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 248–49; *see also* Treasury Department Circular to the Supervisors of the Revenue (June 27, 1791), in 8 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 510, 510–11 (urging “great prudence” in enforcement of these same provisions).

had provided for marking and certification of pre-enactment stock held by distillers or importers but not by distributors or other holders of such "Old Stock." In these circumstances, Hamilton "deemed [it] preferable to weaken the efficacy of the provision respecting certificates than to give just cause of complaint of the rigorous execution of the law in a particular in which it is improvident in its provisions."²⁸² Yet even here Hamilton's "great relaxation" consisted only in a form of case-by-case "circumspection." "It is therefore my wish," Hamilton instructed revenue officers, "that the want of Certificates may in general rather be considered as a ground for careful enquiry and examination than of *itself* a *sufficient* cause for seizures."²⁸³ Moreover, with respect to many other provisions causing unjustified "inconveniences" to the public, Hamilton sought (and generally obtained) legislative revisions rather than simply curtailing enforcement.²⁸⁴

It is also true that Hamilton's aspiration to completely enforce federal revenue laws proved impossible to realize in certain particulars. The most significant problems arose along the new nation's violent trans-Appalachian frontier. There, deep-seated popular hostility to federal excise taxes on distilled spirits yielded the most serious challenge to federal law enforcement in the Washington Administration—the so-called Whiskey Rebellion of 1794.²⁸⁵ In frontier areas extending from western Pennsylvania through Kentucky to western North Carolina, distillers violently opposed efforts to enforce the excise law. In one exemplary incident reported to Hamilton, a distiller

opened the Door, let [an excise inspector] in, turned the Key and kept him confined three Days on water only. He then very humanely, assured him that his life Shou'd not be in any danger, but he must submit to the mild punishment of having his Nose ground

282. Treasury Department Circular to the Supervisors of the Revenue (Sept. 30, 1791), *supra* note 281, at 248, 249.

283. *Id.* Hamilton also described circumstances in which "the presumption of fraud from want of certificates will be strong enough to justify a seizure." *Id.*

284. *See generally* Report on Defects in the Existing Laws of Revenue (Apr. 22, 1790), in 6 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 373 (suggesting changes to the power of the Treasury to enforce revenue laws); Report on the Difficulties in the Execution of the Act Laying Duties on Distilled Spirits (Mar. 6, 1792), in 11 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 77 (describing implementation of the whiskey tax).

285. Frontier residents' hostility to the whiskey excise derived in part from historic Anglo-American aversion to excise taxes and in part to whiskey's vital importance in the region as a medium of exchange and nonperishable export commodity. *See generally* THOMAS P. SLAUGHTER, THE WHISKEY REBELLION 11–27, 93–95 (1986) (noting that the whiskey excise was seen by settlers as "an ideologically, culturally, and economically repulsive tax").

off at the Grindstone & the execution was prevented only by one of the Parties, whose heart happened fortunately, to possess a particle of humanity.²⁸⁶

Even when enforcement cases were brought, hostile juries refused to impose liability or even issue indictments.²⁸⁷ Enforcement thus was often a practical impossibility in these jurisdictions; even filling key revenue collection offices proved difficult or impossible.²⁸⁸

Under such conditions, as noted earlier, executive nonenforcement does not necessarily imply a broad understanding of prosecutorial discretion. Nonenforcement under conditions of impossibility may be consistent with an aspiration to treat statutory prohibitions as a real code of conduct by enforcing them as fully as possible. Overall, in fact, the Washington Administration's response to the whiskey crisis highlights the degree to which the President and other key officials felt that enforcing statutes was their constitutional duty.²⁸⁹ Rather than simply moderating the law through nonenforcement policies, the Administration repeatedly proposed statutory changes to address grievances they considered legitimate.²⁹⁰ In 1792, President Washington issued a proclamation invoking "the particular duty of the executive 'to take care that the laws be faithfully executed'" and warning that "all lawful ways and means will be strictly put in execution for bringing to justice the infractors thereof and securing obedience thereto."²⁹¹ Finally, in 1794, after efforts to serve legal process on distillers in western Pennsylvania were met with violence, President Washington gathered a military

286. Letter from Sec'y Alexander Hamilton, U.S. Dep't of the Treasury, to Rep. Daniel Huger (June 22–25, 1792), in 11 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 541, 42; *see also* SLAUGHTER, *supra* note 285, at 117 (describing the excise law as a "dead letter" in western states).

287. *See* TACHAU, *supra* note 225, at 73, 100–01, 105–09.

288. *See* SLAUGHTER, *supra* note 285, at 117–18, 151–52 (describing harassment of tax collectors in Pennsylvania and on the frontier); TACHAU, *supra* note 225, at 70–73. For an internal government report on compliance problems, *see* Letter from Tench Coxe to Sec'y Alexander Hamilton, U.S. Dep't of the Treasury (Oct. 19, 1792), in 12 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 592.

289. *See, e.g.*, Letter from President Washington to Sec'y Hamilton, *supra* note 267, at 331–32 ("It is my duty to see the Laws executed—to permit them to be trampled upon with impunity would be repugnant to it; nor can the Government longer remain a passive spectator of the contempt with which they are treated."); President George Washington, Sixth Annual Address to Congress (Nov. 19, 1794), in 34 WRITINGS OF GEORGE WASHINGTON, *supra* note 226, at 28–33 (describing efforts to enforce the excise law in Western Pennsylvania).

290. *See supra* note 288.

291. Draft of a Proclamation Concerning Opposition to the Excise Laws, *supra* note 262, at 330–31 n.1.

force exceeding in size the Continental Army that fought the Revolutionary War to restore order in western Pennsylvania.²⁹²

Even after this operation, tax resistance continued in certain frontier areas, and executive officials struggled to develop realistic enforcement practices.²⁹³ President Washington ultimately exercised his constitutional pardon power and granted the Whiskey Rebels in Pennsylvania a broad amnesty for past crimes, albeit on the condition that the rebels pledge to obey the law in the future. He also pardoned two defendants convicted of crimes following the crisis.²⁹⁴ In Kentucky, revenue officials had earlier apparently offered (unsuccessfully) to “forbear” from seeking penalties for past violations in exchange for prospective compliance with excise laws.²⁹⁵ In addition, the Treasury Department, concerned in part about “legal difficulties” with claiming excise arrears after the Whiskey Rebellion in areas where collection offices had “not been regularly opened,” adopted an internal practice of generally seeking to collect arrears for only one year before establishment of law and order.²⁹⁶ But even if one views these examples as categorical exercises of nonenforcement power, they arose in extreme circumstances and formed part of a broader effort to

292. See SLAUGHTER, *supra* note 285, at 177–82 (describing organized resistance in western Pennsylvania to officials attempting to serve process); WOOD, *supra* note 242, at 138 (describing military response).

293. See SLAUGHTER, *supra* note 285, at 226 (acknowledging the continued difficulty the federal government faced in administering taxes).

294. See *id.* at 218–20 (discussing amnesty and pardons).

295. See TACHAU, *supra* note 225, at 70. There is also evidence that the government regularly stayed prosecutions and remitted forfeitures against distillers who agreed to “enter” their stills and comply going forward. See SLAUGHTER, *supra* note 285, at 182 (quoting Attorney General William Bradford). A statute, however, authorized remissions, thus providing a statutory basis for this practice independent of inherent executive nonenforcement power. See Act of May 26, 1790, ch. XII, 1 Stat. 122.

296. 17 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 376, 376–77. When the Department extended the same “rule” to Kentucky (where offices had often been vacant), Hamilton emphasized that the policy should be “confidential” and that it should be applied on a case-by-case basis, “leaving [the collection officer] at liberty however to apply or limit the extent of the rule according to local circumstances and the past course of business.” 18 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 196. Hamilton may have had concerns that the statute only required payment of the excise when a revenue collection office was open in the district. Hamilton apparently advised the Commissioner of the Revenue that “prudence and judgment” called for leniency collecting excises that accrued “before officers were appointed or knowledge of the law became widely dispersed.” 26 PAPERS OF THOMAS JEFFERSON, *supra* note 214, at 507. In contrast, where he considered it a “clear point” that certain customs duties under a different statute accrued even before collection houses were established, Hamilton instructed customs officials to seek to collect arrears. 6 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 373, 373–74; see also 6 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 39 (ordering the Collectors of Customs to maintain one suit to collect arrears); 5 PAPERS OF ALEXANDER HAMILTON, *supra* note 225, at 478 (opining that duties should be collected on importations after August 1, 1789).

achieve full compliance with congressional statutes on a prospective basis.

Nor was this enforcement effort limited to the Washington and Adams Administrations. President Jefferson and his Treasury Secretary, Albert Gallatin—himself a settler from western Pennsylvania and a leader in early opposition to the whiskey excise—opposed internal taxes on principle and obtained their repeal in 1802.²⁹⁷ Nevertheless, they continued to enforce the excises while they remained in effect, even taking certain administrative steps to improve efficiency of internal revenue collections.²⁹⁸ In Kentucky, in fact, distillers finally came into substantial compliance with the law during the Jefferson Administration as a result of vigorous enforcement efforts by the local U.S. Attorney.²⁹⁹

The Jefferson Administration's own experiment with achieving the impossible—the embargo of 1807–1809—appears to fit a similar pattern. Over the course of the embargo, Secretary Gallatin issued extensive guidance to customs collectors regarding proper enforcement of the law. Yet this policy guidance had a statutory basis: the embargo statutes by their terms conferred substantial discretion on federal officials.³⁰⁰ One key provision, for example, authorized individual customs collectors to detain cargo whenever “in their opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereon.”³⁰¹ President Jefferson described the breadth of these laws as designed to eliminate any possible evasion by leaving to executive discretion the task of sorting the guilty from the innocent. He wrote to South Carolina Governor Charles Pinckney that

297. Act of Apr. 6, 1802, ch. XIX, 2 Stat. 148; see TACHAU, *supra* note 225, at 119 & n.99, 196.

298. See Letter from Sec'y Albert Gallatin, U.S. Dep't of the Treasury, to Governor Mifflin (Sept. 17, 1794), in 1 WRITINGS OF ALBERT GALLATIN, *supra* note 226, at 27 (encouraging the governor to take greater efforts to enforce the laws and avoid civic uprisings).

299. See TACHAU, *supra* note 225, at 118–26. The Adams Administration's response to the so-called Fries Rebellion of 1799 followed a similar pattern to the Whiskey Rebellion. Faced with resistance to collection of certain federal direct taxes promulgated to fund the Quasi-War, President Adams ordered a military response to restore order, conducted exemplary prosecutions, and then granted pardons to convicted defendants and a general amnesty for other offenders. For background on the Fries Rebellion, see PAUL DOUGLAS NEWMAN, FRIES'S REBELLION: THE ENDURING STRUGGLE FOR THE AMERICAN REVOLUTION, at ix–xii, 142–49, 156–67, 182–85 (2004).

300. See generally Mashaw, *supra* note 204, at 1646–47 (providing an overview of federal officers' leeway in enforcing embargo laws). See also, e.g., Letter from Sec'y Albert Gallatin to President Thomas Jefferson, 1 WRITINGS OF ALBERT GALLATIN, *supra* 226, at 483 (explaining that earlier directive to customs collectors would have been “illegal” if applied as a hard-and-fast rule as opposed to a guideline for identifying suspicious shipments).

301. Third Supplementary Act, ch. 66, § 11, 2 Stat. 499 (1808).

Congress, “having found, after repeated trials, that no general rules could be formed which fraud and avarice would not elude, concluded to leave, in those who were to execute the power, a discretionary power paramount to all their general rules.”³⁰² Nevertheless, the Administration generally did not seek to limit enforcement of embargo violations. On the contrary, Jefferson’s Treasury Secretary urged customs collectors to “detain, investigate and refer in all doubtful cases.”³⁰³ Executive officials appear to have attempted to enforce the law as best they could, even in the face of popular opposition.³⁰⁴

The Jefferson Administration also provides examples of nonenforcement for constitutional reasons, but these cases too are distinguishable from policy-based nonenforcement. President Jefferson and the Republicans bitterly opposed Federalist assertions that federal courts held inherent authority to punish common-law crimes against the federal government.³⁰⁵ Jefferson apparently intended to use his control over executive enforcement to block prosecutions on this basis, but his reason for doing so was his view that there were in fact no federal common-law crimes and thus no valid “law” to enforce.³⁰⁶ Likewise, when Jefferson took office in 1801, he famously discontinued prosecutions under the Sedition Act. Again, however, he did so only because he considered this statute unconstitutional and thus a “nullity.”³⁰⁷ As Jefferson explained in

302. Letter from President Thomas Jefferson to Governor Charles Pinckney (July 18, 1808), in 12 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 102–03.

303. Albert Gallatin, Circular of Apr. 28, 1808, *quoted in* Mashaw, *supra* note 204, at 1662. *See also* Letter from President Thomas Jefferson to Sec’y Albert Gallatin, U.S. Dep’t of the Treasury (May 6, 1808), in 1 WRITINGS OF ALBERT GALLATIN, *supra* note 226, at 464, (“The great leading object of the Legislature was, and ours in the execution of it ought to be, to give complete effect to the embargo laws.”); Letter from President Thomas Jefferson to Sec’y Albert Gallatin, U.S. Dep’t of the Treasury (Aug. 11, 1808), in 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 202 (“I am clearly of the opinion this law ought to be enforced at any expense, *which may not exceed our appropriation.*”). *See generally* Douglas Lamar Jones, “The Caprice of Juries”: The Enforcement of the Jeffersonian Embargo in Massachusetts, 24 AM. J. LEGAL HIST. 307, 311 (1980) (discussing efforts to enforce the embargo in Massachusetts and observing that Jefferson and his allies in Congress were “[a]nimated by the goal of strict enforcement”).

304. *See* HENDERSON, *supra* note 22, at 91–93; Mashaw, *supra* note 204, at 1663.

305. *See* WOOD, *supra* note 242, at 416–18 (describing Federalist efforts to enforce common-law federal offenses).

306. *See id.* at 420 (describing plan to avoid enforcement of common-law crimes through appointment power over prosecutors).

307. 8 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 57. *See also* Letter from Sec’y James Madison, U.S. Dep’t of State, to Alexander J. Dallas, Dist. Att’y for Pa. (July 20, 1801), 1 PAPERS OF JAMES MADISON, *supra* note 240, at 402 (relaying President’s instruction to enter *nolle prosequi* in prosecution). Jefferson later expressed the same view with respect to federal libel prosecutions, which he also considered unconstitutional. 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 253–54. *But cf.* Letter from President Thomas Jefferson to Att’y Gen. Levi Lincoln, U.S. Dep’t of Justice (Mar. 24, 1802), in 9 WRITINGS OF THOMAS JEFFERSON,

correspondence, he believed that his duty to the Constitution superseded his obligation to enforce invalid enactments:³⁰⁸ “[M]y obligation to execute what was law, involved that of not suffering rights secured by valid laws, to be prostrated by what was no law.”³⁰⁹

As this statement makes plain, even Jefferson—despite claiming authority not to enforce laws he considered invalid—recognized a presidential obligation “to execute what was law.” Accordingly, in his directive to the district attorney to nol pros one Sedition Act case, the President stipulated,

You will observe that this interposition of the President is restricted solely to the proceedings under [the Sedition Act], and will please to understand the instruction to prosecute the said [defendant] . . . as still in force, as far as a prosecution in any other form or in any other Court may consist with the Constitution of the United States.³¹⁰

In another case, Jefferson directed a prosecution to proceed to trial, out of deference to the court, even though he considered the prosecution unlawful.³¹¹ “The Executive,” he explained, “ought not to sit in previous judgment on every case & to say whether it shall or shall not go before the judges.”³¹² Jefferson, indeed, seems even to have viewed his pardon power as properly limited to cases in which the alleged conduct “is not that which the law meant to make criminal, and yet happens to be within its letter.”³¹³

supra note 226, at 277 (indicating, without mentioning constitutional issue, that “I would wish much to see the experiment tried of getting along without public prosecutions for *libels*”).

308. *Id.*

309. Letter from President Thomas Jefferson to Wilson Cary Nicholas (June 13, 1809), in 11 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 88.

310. Jefferson relayed this command through Secretary of State James Madison. See Letter from Sec’y Madison to Alexander Dallas, *supra* note 307, at 442.

311. Letter from President Thomas Jefferson to Sec’y James Madison, U.S. Dep’t of State (July 19, 1801), in 1 PAPERS OF JAMES MADISON, *supra* note 240, at 442.

312. *Id.* Jefferson did hold out the possibility of executive intervention, as in the sedition cases, once “the judges shall actually have done wrong.” *Id.*

313. Letter from President Thomas Jefferson to Sec’y Albert Gallatin, U.S. Dep’t of the Treasury (Aug. 14, 1801), in 1 WRITINGS OF ALBERT GALLATIN, *supra* note 226, at 50; see also Letter from President Thomas Jefferson to Sen. Christopher Ellery (May 19, 1803), in 9 WRITINGS OF THOMAS JEFFERSON, *supra* note 226, at 351 (indicating that pardon power is not “abus[ed]” when “used in cases, which tho’ within the words, are not within the intention of the law”). In fact, pardons from this period often seem based on considerations that today would more likely result in nonenforcement or a favorable plea agreement. See, e.g., Letter from Tobias Lear to Sec’y Alexander Hamilton, U.S. Dep’t of the Treasury (Mar. 14, 1793), in 12 PAPERS OF GEORGE WASHINGTON, *supra* note 226, at 318 & n.3 (indicating that Washington pardon granted to smugglers who “suffered by the loss of their goods, and expences attending the suit, enough to answer the intention of the law”); Letter from President John Adams to John Marshall (Aug. 7, 1800), in 9 WORKS OF JOHN ADAMS, *supra* note 226, at 72 (granting pardon to convicted privateer on French ship based on “[t]he man’s generosity to American prisoners, his refusal to act, and resigning his command, when he was ordered to capture American vessels, his present poverty and great distress”); 34 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 240 note (indicating

In sum, while the evidence is not completely tidy, there are significant indications that early Presidents and key executive officials focused on achieving complete enforcement of federal laws, with discretionary nonenforcement reserved for exceptional cases. Such a mindset appears consistent with the second presumption advocated here: a presumption against treating enforcement discretion as a vehicle for remaking statutory policy.

B. The Rise of Discretion

Modern criminal justice and administrative enforcement, in contrast to early federal practice, appear to defy the proper constitutional framework. Prosecutors and administrative agencies today routinely make policy by prioritizing certain offenses over others, effectively exempting categories of offenders from sanctions, and even in some cases prospectively authorizing violations. Federal officials have even adopted public nonenforcement policies in some circumstances; notable recent examples include the Obama Administration's stated policies of immigration nonenforcement and suspension of the employer health insurance mandate.³¹⁴ In light of the presumption against executive suspending and dispensing powers, such executive actions should be permissible only with statutory authorization. How, then, can we account for this rise in discretion? Should the change in practice alter our constitutional understanding, or is modern practice itself constitutionally suspect?

1. Origins of Modern Practice

As every law student learns, the modern administrative state emerged in fits and starts in the Progressive Era and then took hold dramatically in President Franklin Roosevelt's New Deal.³¹⁵ In criminal justice, through a process less widely appreciated, the

that Jefferson granted pardon because of weaknesses in evidence in case and because convict had "already been confined one year before & since his sentence"); 34 PAPERS OF THOMAS JEFFERSON, *supra* note 226, at 460 note (indicating that Jefferson granted pardon where offense was "not within the intentions tho' embraced by the letter of the law").

314. *See supra* notes 45–51 and accompanying text and *infra* Parts V.A and V.B for discussion of these examples.

315. *See, e.g.,* Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 413–19 (2007) (tracing the evolution of New Deal programs); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1189–91 (1986) (describing the growth in federal regulations which accompanied the New Deal). For a revisionist view, see Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1260 (2006) (identifying earlier antecedents to modern administrative law).

modern system of plea bargaining and prosecutorial charging discretion emerged in the nineteenth century and became entrenched in the early twentieth century.³¹⁶ Meanwhile, the expectation of enforcement discretion taken for granted today in the criminal context often seems to feed back into the modern understanding of agencies' administrative authority. In *Heckler v. Chaney*, for example, the Supreme Court justified its presumption of agency enforcement discretion based on the resemblance between agency nonenforcement and "the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" ³¹⁷

On some level, the discretion exercised by executive officials today is simply an extension of earlier practices. From the beginning, federal prosecutors and other law-enforcement officials exercised some discretion to decline enforcement in particular cases. This practice suggests they presumed that the Constitution gave them such discretion unless Congress specified otherwise.³¹⁸ Yet if prosecutorial discretion today is an old wine in new bottles, it has been soured by the transition.

Over the course of the nineteenth century, a combination of factors, including population growth, immigration, urbanization, increasing civil litigation and resulting docket pressure on courts, and an increase in *malum prohibitum* regulatory offenses, made crime relatively more common and the prosecutorial and judicial resources to combat it relatively more scarce.³¹⁹ Prosecutorial discretion emerged, at both the federal and state levels, as a solution to this mismatch. With respect to *malum in se* crimes such as murder, rape, and theft, plea bargaining and prosecutorial discretion provided a mechanism for prosecutors to control crime while reserving resource-

316. For the classic study of plea bargaining's emergence, see GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2004). For discussion of the emergence of prosecutorial discretion as an organizing principle of criminal justice, see Stuntz, *supra* note 23, at 511, and PARRILLO, *supra* note 203.

317. *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II, § 3).

318. See *supra* Part IV.A.2.

319. See, e.g., FISHER, *supra* note 316, at 2, 111–14; STUNTZ, *supra* note 29, at 257–67; Stephen J. Schulhofer, *Criminal Justice, Local Democracy, and Constitutional Rights*, 111 MICH. L. REV. 1045, 1050–56 (2013) (reviewing STUNTZ, *supra* note 29). *Malum prohibitum* crimes are offenses that are criminal only because they are proscribed by positive law. *Malum in se* crimes, in contrast, are those thought to be "wrong in themselves," meaning that they are intuitively criminal as a matter of ordinary morality.

intensive trials for the most difficult or significant cases.³²⁰ At the same time, with respect to *malum prohibitum* crimes, discretion provided a means for enforcers to “sand off the hard edges of modern state power,” as one scholar puts it.³²¹ Prosecutors could avoid unpopular or unjust prosecutions while still giving effect to new prohibitions by bringing exemplary cases.³²²

Even some astute contemporary observers recognized that the quantitative increase in the use of discretion amounted to a qualitative change. A national commission in 1931 observed that “the general duty of enforcing the law in the locality . . . has in many jurisdictions grown into something like a royal dispensing power.”³²³ In the federal context, moreover, it is even possible to identify a key moment of transition.

In 1896, Congress abruptly terminated the system of case-based compensation for federal prosecutors, replacing it with a system of fixed salaries.³²⁴ Congressional debates make clear that Congress intended the change to moderate the perceived overenforcement of stringent or unpopular prohibitions that the prior system of conviction-based bounties had encouraged.³²⁵ As one scholar summarizes, “The core complaint about U.S. Attorneys’ fees, repeated over and over in the 1896 debate, was that they resulted in an excess of prosecutions, which congressmen denounced as ‘frivolous,’ ‘petty,’ ‘technical,’ ‘vexatious,’ ‘trivial,’ ‘unnecessary,’ ‘useless,’ and the like.”³²⁶ The concern, moreover, was not that “U.S. Attorneys were convicting the innocent.”³²⁷ Congressmen complained, rather, that fee-based compensation “incentivized the officers to convict as many people as possible,” whereas they “increasingly felt that *not everybody who was guilty and lawfully convictable ought to be punished as a matter of policy*.”³²⁸ Salaries, many hoped, would solve this problem by removing

320. See, e.g., STUNTZ, *supra* note 29, at 257–67.

321. PARRILLO, *supra* note 203, at 4.

322. This general long-term progression towards greater reliance on enforcement discretion may not have been entirely linear or uniform. See, e.g., *id.* at 231–52 (recounting mid-nineteenth-century increase in incentives for customs enforcement followed by efforts to promote greater discretion). As noted earlier, see *supra* introduction to Part IV, this Article aims to describe the general long-term trajectory without purporting to offer a detailed history of the transition.

323. Nat’l Comm’n on Law Observance and Enforcement, *Report on Prosecution*, 4 U.S. Wickersham Comm’n Reports 20 (1931); see also, e.g., Raymond Moley, *The Vanishing Jury*, 2 S. CAL. L. REV. 97, 98–99, 124–25 (1928) (complaining that the *nol* pros, though intended “only to prevent grave injustice,” was being used with “utmost freedom” by prosecutors).

324. Act of May 28, 1896, ch. 252, § 7, 29 Stat. 140, 180–81.

325. See PARRILLO, *supra* note 203, at 276–77.

326. *Id.* (quoting congressional record statements).

327. *Id.*

328. *Id.*

incentives for overenforcement and by granting prosecutors freedom to evaluate each case on its own merits. Congress thus responded to a problem of its own making—the proliferation of strict and often highly technical federal offenses—not by moderating its substantive enactments but rather by adjusting prosecutors’ compensation to encourage “discretionary non-enforcement and forbearance.”³²⁹

As this debate illustrates, the other two branches have hardly been passive in the accretion of executive authority reflected in the modern practice of enforcement discretion. Prosecutors’ ability to negotiate charges with defendants depends on judicial enforcement of plea bargains, despite the loss in judicial authority resulting from the infrequency of trials.³³⁰ That ability also depends on Congress providing sufficient prosecutorial control over sentences—principally by enacting overlapping offenses with graded severity—to enable prosecutors to threaten severe sanctions at trial and offer a comparatively good deal if defendants choose to plead guilty instead.³³¹ Moreover, once this arrangement took hold, the “pathological” political dynamics of criminal law discussed earlier compounded the problem, producing the wide-ranging prohibitions, and associated wide-ranging prosecutorial discretion, that characterize criminal justice at both the state and federal levels today.³³²

Given these political dynamics, the proliferation of detailed criminal and civil prohibitions does not necessarily mean that Congress expects detailed compliance by the citizenry. Ironically, the breadth and depth of substantive law instead presumes a regime in which executive officials exercise discretion to moderate the rigors of statutory prohibitions, thereby creating a law on the ground that more closely approximates popular preferences than the law on the books. In criminal justice and at least some areas of administrative law, federal officials thus have received what two scholars have aptly described as a “de facto delegation” of broadened discretion.³³³ Although no statute expressly authorizes executive officials to ignore provable violations of federal law, widespread nonenforcement in

329. *Id.* The reform worked. As Parrillo shows, the number of federal prosecutions dropped dramatically immediately following salarization, though the conviction rate remained constant—a result indicating that prosecutors stopped bringing many cases in which convictions were obtainable. *See id.* at 38–42.

330. *See* FISHER, *supra* note 316, at 114.

331. *See* Stuntz, *supra* note 23, at 598–99.

332. *See supra* Part II.A.

333. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 463, 513–14 (2009).

many areas of federal law is so inevitable that Congress must be understood to have acquiesced in it.

2. Dubious Foundations

Nevertheless, congressional acquiescence in substantial nonenforcement in some contexts should not dictate a changed understanding of the President's constitutional duty. Recent scholarship has emphasized the need to assess with care constitutional arguments based on executive practice.³³⁴ Here, several considerations support continued adherence to the baseline constitutional understanding that categorical and prospective nonenforcement of statutes is impermissible without statutory authorization.

For one thing, while early practice fits a normatively attractive understanding of the division of responsibility between the legislative and executive branches, modern practice does not. Substantial nonenforcement of federal statutes clouds public perception of what conduct is unlawful, thus impairing rule-of-law values and diminishing Congress's political accountability for the range of conduct it has proscribed. Such unrestricted nonenforcement, moreover, enables the "pathological" political cycle of overcriminalization and increasing discretion in the first place. The view that Congress's de facto delegation of discretion to prosecutors cures all constitutional concerns thus lets both Congress and the executive branch too easily off the hook. Perhaps continued adherence to the mindset reflected in the New York District Attorney's 1795 letter to George Washington—that enforcement of federal laws was his "duty" and that he "should have esteemed [him]self culpable if [he] had neglected to do so"³³⁵—would have maintained a stronger link between the law on the ground and the law on the books. In the long run, such a mindset thus might have preserved greater political accountability for substantive prohibitions while also enhancing the rule of law.

In any event, interbranch acquiescence in unrestricted executive nonenforcement may not be as strong as it appears. Congress, to be sure, has made enforcement discretion inevitable by enacting overly broad prohibitions and by failing to appropriate adequate resources for full enforcement. The congressional debate in 1896 over prosecutorial compensation suggests that legislators

334. Bradley & Morrison, *supra* note 190.

335. Letter from Richard Harrison to Sec'y Pickering, *supra* note 266, at 626.

expected prosecutors to moderate statutory laws through selective enforcement. Even so, the degree to which Congress has ceded authority to the executive branch to ignore laws altogether is unclear. Recent scholarship has emphasized Congress's relative weakness in defending its interests relative to the Executive.³³⁶ Although the Executive has interpreted Congress's de facto delegation in this context broadly, Congress might well have meant to cede only a greatly enhanced case-specific nonenforcement power. At the least, assessing the degree of Congress's acquiescence in policy-based nonenforcement requires a sensitive examination of the particular statutory context.

Nor is it clear that current institutional arrangements are necessarily an imperative of modernity, as some have suggested. By some accounts, the modern industrial (or postindustrial) world is simply too complicated to be adequately regulated by predefined statutory restrictions.³³⁷ Yet a criminal code that prohibits, for example, interstate transportation of water hyacinth plants³³⁸ and false reports regarding materials used in highway projects³³⁹ seems not to have great trouble with granular refinement. We should not assume that Congress could not have made statutory law a real code of conduct rather than a grant of punitive authority to the executive branch. At a minimum, Congress might have prescribed the scope of prohibitions through explicit delegations of rulemaking power subject to administrative procedure. De facto delegation may not have been inevitable; on the contrary, a mistaken view of executive duty may have been an original sin that made our current system of unbounded discretion possible.

For their part, courts have characterized the task of deciding whether or not to prosecute as a fundamentally executive function, but their statements do not necessarily reflect normative acceptance of unrestricted executive discretion over enforcement. The questions of executive duty and judicial review may well be distinct. By assigning specifically to the President the responsibility to ensure that the laws are executed, the Take Care Clause implies that this function is not a proper task of the other two branches. And with good reason. Within

336. See Bradley & Morrison, *supra* note 190, at 414–15 (“Although Congress and the President may disagree about particular policies, Congress as a body does not systematically seek to protect its prerogatives against presidential encroachment.”).

337. See, e.g., Schulhofer, *supra* note 319, at 1062 (reviewing STUNTZ, *supra* note 29) (describing growth of regulatory crimes as “an inherent consequence of modernity”); PARRILLO, *supra* note 203, at 16, 19 (emphasizing centrality of discretion to modern administration).

338. 18 U.S.C. § 46(a) (2012).

339. *Id.* § 1020.

our adversarial system of justice, the core function of courts is to serve as neutral referees between warring parties on questions of law and fact. Insofar as involvement in the initial decision to bring a case might bias the court in favor of the defendant's guilt (or at least create a perception of bias for the defendant and the public), courts' ability to perform that critical refereeing function might well be impaired. Moreover, as the Court emphasized in *Heckler*, decisions about whether to prosecute, particularly when questions of resource allocation are involved, are generally not amenable to precise, judicially administrable standards. These decisions instead depend on a complex judgment about the case's strength and importance relative to other enforcement priorities. For all these reasons, judicial decisions recognizing the executive branch's "exclusive authority and absolute discretion to decide whether to prosecute a case" should not stand for the proposition that nonenforcement is always consistent with executive duty.³⁴⁰ Quite the opposite is true, as earlier cases like *Morgan* and *Kendall*, and the D.C. Circuit's recent decision in *Cook v. FDA*, make clear: execution of the law may well be an executive duty, even if that duty in many cases is not judicially enforceable.

Executive officials, then, should continue to understand that their constitutional duty is to execute the law, not make it. Nevertheless, the received structure of substantive law, with its overbreadth and structural presumption of discretion, does create practical difficulties. The cat today is very much out of the bag; in many contexts complete enforcement of modern federal law is neither possible nor desirable. How, then, should federal officials understand their duty? The next part of this Article turns to these practical issues.

V. MODERN IMPLICATIONS

What implications does the proper understanding of enforcement discretion and executive duty carry for modern practice? Notwithstanding the rise of discretion, the baseline constitutional understanding reflected in the dual-presumption framework should inform how modern executive officials discharge their responsibilities. It may also clarify the proper resolution of a number of recurrent problems.

The framework developed here has two key implications for modern executive functions. First, executive officials should not presume unbounded discretion to decline enforcement of statutes when the statutory context does not suggest that Congress anticipated

340. *United States v. Nixon*, 418 U.S. 683, 693 (1974).

such discretion. For this reason, as described below, the recent temporary suspensions of the ACA's insurance requirements and employer mandate appear legally dubious and should not serve as a precedent for similar executive action in the future. Second, even in areas like criminal law, where substantial nonenforcement of statutes is inevitable, executive officials should understand their task as a matter of priority setting within the parameters of statutory policy, not one of crafting policy-based exceptions to statutory coverage. In addition to these core implications, a proper understanding of executive enforcement discretion illuminates a number of recurrent separation of powers issues. By way of illustration, the discussion below addresses three key examples: (1) the permissibility of statutory waiver provisions, (2) proper construction of criminal statutes, and (3) the constitutionality of independent federal prosecutors.

A. Constraining Discretion

Given resource constraints and the scope of statutory mandates, substantial nonenforcement of statutes and regulations is inevitable in many modern regulatory contexts. But that is not true in all contexts. Where neither an explicit congressional delegation nor contextual factors suggesting a de facto delegation supports broader exercises of discretion, the President's constitutional duty is to enforce the law, making at most only case-specific exceptions.

Here, two enforcement policies regarding the ACA provide useful illustrations. The executive branch has effectively suspended for specified periods the enforcement of two key ACA provisions—the minimum coverage requirement and the so-called employer mandate. Yet in neither case does the statute provide clear reasons to presume such suspension authority.

I intend the discussion of these recent ACA examples to be illustrative; other similar examples from recent administrations could likely be found. Given the close identification of the ACA with President Obama and the partisan opposition to the law in Congress, executive officials responsible for these policies surely understand themselves to be seeking in good faith to get the law on its feet and achieve its central objectives. No doubt, implementing complex new legislation like the ACA is a challenging task that may be expected to require a certain degree of administrative ingenuity.

Yet the conception of the executive role reflected in these two policies carries dangers. A broad conception of executive nonenforcement power could be a powerful tool for Presidents with

deregulatory goals that conflict with statutory mandates.³⁴¹ Indeed, to the extent future Presidents may be less committed to the ACA than President Obama, proponents of the law might have been better served by policies establishing a practice of literal compliance with the law's terms. In any event, the examples set by these two policies should not be understood to reflect an appropriate norm with respect to executive enforcement of statutes in general.

1. Suspension of Insurance Requirements

The Administration's first ACA nonenforcement policy grants existing health insurance plans an additional nine months beyond the statutory deadline to comply with new minimum coverage requirements.³⁴² The ACA generally requires private health insurance plans with plan years beginning after January 1, 2014 to meet specified minimum coverage requirements; such plans, for example, may no longer deny coverage for preexisting medical conditions.³⁴³ Even before the statutory deadline, however, insurers began canceling noncompliant plans, often citing the ACA as their reason for doing so. In some cases, moreover, plan beneficiaries found that purchasing new, compliant plans would be substantially more expensive. In November 2013, in an apparent effort to prevent such cost increases (and to honor a pledge by the President during pre-enactment debates that "if you like your plan you can keep it"), the Department of Health and Human Services announced that, as a "transitional policy," certain existing noncompliant plans renewed between January 1 and October 1, 2013 "will not be considered to be out of compliance" with the statute.³⁴⁴

The legal basis for this "transitional policy" is not entirely clear. To date it has been articulated only in a brief letter to state insurance commissioners. Under the statute, the states, as primary regulators of insurance markets, hold first-line responsibility under the statute for enforcing these requirements.³⁴⁵ As a backstop,

341. See, e.g., Love & Garg, *supra* note 16, at 41 (noting that an unchecked presidential nonenforcement power "results in bias toward smaller government").

342. See Letter from Gary Cohen, *supra* note 4 (granting "transitional relief" to such existing plans).

343. See 42 U.S.C. § 300gg to 300gg-21 (limiting instances in which issuers may impose preexisting condition exclusions); *id.* § 300gg note.

344. Letter from Gary Cohen, *supra* note 4, at 1.

345. See 42 U.S.C. § 300gg-22(a)(1) ("Subject to [a separate provision preempting certain state laws], each State may require that health insurance issuers that issue, sell, renew, or offer health insurance coverage in the State in the individual or group market meet the requirements of this part . . . with respect to such insurers.").

however, the statute also requires the Secretary of Health and Human Services to enforce the ACA's provisions through civil penalties if the Secretary determines "that a State has failed to substantially enforce a provision (or provisions) in [the law] with respect to health insurance issuers in the State."³⁴⁶ The policy thus appears to be based on an exercise of enforcement discretion. In effect, the policy announces that the Secretary will not assess civil penalties on noncompliant plans within the terms of the policy, even in states that have "failed to substantially enforce" the law's requirements. Indeed, in recognition of the states' primary enforcement role, the letter "encourage[s]" state regulators "to adopt the same transitional policy."³⁴⁷

To the extent the policy has no other statutory basis, it defies the proper understanding of executive duty. This exercise of enforcement discretion extends far beyond the case-specific enforcement discretion that may be presumed with respect to any particular statutory requirement. It amounts, rather, to a prospective suspension of the law for a specified category of insurance plans—precisely the form of executive nonenforcement that is presumptively impermissible. Far from authorizing such categorical non-enforcement, however, the statute appears designed to prevent it. By imposing a duty of enforcement on the Secretary as a backstop in cases of state nonenforcement, the law adds belt to suspenders: it guarantees federal enforcement when state enforcement falls short. What is more, the statute expressly authorizes the Secretary to exercise discretion over the amount of the penalty based on specified factors.³⁴⁸ The statute thus implies that mitigating factors should be considered when determining the amount of the penalty, not whether to assess some penalty in the first place. Finally, even as a matter of policy, nonenforcement appears hard to square with the statute. As some analysts have observed, the success or failure of the new, compliant plans may well depend on enrollment by the sort of relatively healthy people who would have been satisfied with more minimal, noncompliant plans. By allowing such individuals to retain noncompliant plans, the Department's action may undermine the statute's apparent overall objective of making compliant plans more prevalent and affordable.

346. *Id.* § 300gg-22(a)(2), (b).

347. Letter from Gary Cohen, *supra* note 4, at 3.

348. 42 U.S.C. § 300gg-22(b)(2)(C).

2. Suspension of the Employer Mandate

The Administration's second nonenforcement policy, the decision not to enforce the ACA's employer mandate for an additional year beyond the statutory effective date, also appears flawed. Beginning on January 1, 2014, employers with more than fifty employees generally must offer certain minimum health insurance coverage to their employees.³⁴⁹ If they fail to do so, and if one or more of their employees claim certain tax credits or other relief for purchasing health insurance on their own, then the statute imposes an "assessable payment" (i.e., a tax penalty) on the employer.³⁵⁰ In July 2013, however, the Treasury Department announced that it would not enforce these penalties until 2015.³⁵¹ (As this Article was going to press, the Department further extended nonenforcement of the penalties for certain employers, but the legality of this further policy is not specifically addressed here.)³⁵² The Department justified the one-year delay until 2015 by referring to its own failure to promulgate rules implementing a separate compliance-reporting requirement.³⁵³ Without these reports, Treasury reasoned, it would be "impractical to determine which employers owe" the penalties.³⁵⁴ Hence, "no [such] payments will be assessed for 2014."³⁵⁵

Treasury's reasoning betrays too lax a conception of the executive branch's duty to execute enacted statutes. In effect, Treasury's logic is that it cannot collect penalties because Treasury itself failed to require employers to report information necessary to detect violations—notwithstanding a statutory mandate to do so. It is true that agencies often miss statutory deadlines for promulgation of rules. In some cases, the complexity of regulatory problems may make such deadlines unrealistic given available agency resources and the required administrative procedures for rulemaking. It is also true that executive officials going back to the Framing have presumed authority to decline enforcement in circumstances where doing so is

349. I.R.C. § 4980H.

350. *Id.*

351. See I.R.S. Notice 2013-45, *supra* note 4 (providing transition relief to allow employers and insurers additional time to adapt their coverage and reporting systems).

352. See Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014) (providing additional transition relief in new regulations).

353. I.R.S. Notice 2013-45, *supra* note 4.

354. *Id.*

355. *Id.*

impracticable.³⁵⁶ Modern agencies may well need some flexibility in implementing complex new legislation like the ACA.

Nevertheless, given the important separation of powers values at stake, more explicit statutory authorization should be required for so sweeping and categorical a nonenforcement policy as the Administration adopted here. In general, missing deadlines for promulgation of rules is itself a breach of executive duty. In this case, the Treasury Department claimed a general “administrative authority,” supposedly derived from the agency’s organic rulemaking authority, “to grant transition relief when implementing new legislation like the ACA.”³⁵⁷ Yet even assuming the IRS holds some organic authority to tailor burdensome statutory requirements during a transitional period, such authority should not permit a decision, six months before a statutory deadline is even reached, to excuse compliance with specific statutory reporting requirements for a full year. If even the minimum reporting requirements under the ACA are burdensome for employers, as Treasury claimed, these burdens are a function of the statute, not Treasury policy. Treasury thus has no power to remove them.

Furthermore, even if delaying implementation of the reporting rules is justified, the blanket prospective exemption of all employers from penalties is not. As a practical matter, without reports from employers regarding their insurance coverage, identifying employers who have provided inadequate coverage and thus forced employees onto the individual insurance market may be difficult. Yet Treasury might still have forced noncompliant employers to take their chances. By going beyond passive nonenforcement and announcing prospectively that it will not assess penalties—even if a violation is called to its attention—the agency removed any deterrent effect that the statutory penalties might otherwise have had, thus accomplishing a de facto one-year suspension of the statute. Moreover, this policy, too, appears to cut against the overall objectives of the statute. As the conditioning of employer penalties on employee tax credits indicates, the penalties on employers are one means of funding other measures designed to ensure coverage for the uninsured.

356. *See supra* Part IV.A.2.

357. Letter from Mark J. Mazur, Assistant Sec’y for Tax Policy, U.S. Dep’t of the Treasury, to Fred Upton, Chairman, House Comm. on Energy & Commerce, at 2 (July 9, 2013), *available at* <http://perma.cc/6Z3L-Z4B9>. The statute cited by Treasury as support for this “transition relief” authority provides only that the Secretary must promulgate rules for enforcement of the Internal Revenue Code. *See* I.R.C. § 7805(a) (2012) (“[T]he Secretary shall prescribe all needful rules and regulations for the enforcement of this title . . .”).

In short, the announced one-year suspension of penalties cannot be squared with the text or policy of the statute, and neither can it be justified by reference to presumptive constitutional authorities of the President. It reflects a breach of executive duty and should not be a precedent for future suspensions of statutory enforcement without clear statutory authorization.

B. Exercising Discretion

In other areas like criminal justice, a substantial mismatch between the scope of statutory prohibitions and the resources available to enforce them makes significant enforcement discretion inevitable. Even in such areas, however, a proper understanding of executive duty should guide how executive officials approach their responsibilities.

In light of the constitutional principle of legislative supremacy in lawmaking, and the associated presumption against executive suspending and dispensing powers, executive officials should not understand Congress's de facto delegation of broad nonenforcement power as a license to engage in unrestrained policymaking through selective enforcement. Some degree of priority setting in enforcement is inevitable in these contexts. Yet executive officials should understand their task to be just that: a matter of setting priorities within the confines of statutory policy, not an unrestrained authority to adjust the law on the ground to match their preferences as to what the law on the books ideally should be.

Some have argued, in contrast, that prosecutors should be encouraged to adopt categorical public enforcement guidelines that clarify for the public what conduct the government will truly treat as criminal.³⁵⁸ The practical viability of these proposals seems doubtful. Recent examples of leniency notwithstanding, in general it seems unlikely that prosecutors will cede power by adopting guidelines that tie their hands in important cases by foreclosing otherwise available charges. In fact, meaningful enforcement guidelines might well end up being highly punitive, to the disadvantage of defendants who might otherwise have obtained lenient treatment.³⁵⁹ Even were they realistic, moreover, calls for more explicit, policy-based enforcement guidelines misunderstand the proper allocation of responsibility and

358. See, e.g., Luna, *supra* note 18, at 801 (advocating “overt prosecutorial decriminalization”).

359. For discussion of this point, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 911–12 (2009).

accountability within the federal constitutional scheme. In the short run, nonenforcement might help to conform federal criminal justice to public preferences. But in the long run, unrestrained executive enforcement discretion will only exacerbate the pathological politics of criminal law by removing political accountability for Congress's enactment—and perpetuation—of unduly harsh criminal laws.³⁶⁰

Drawing the distinction between priority setting and policymaking may well be difficult in practice. It is more a matter of mindset than any sort of bright-line rule. Nevertheless, it is critical to preserving the constitutional principle of congressional primacy over lawmaking. Here, too, some examples may help illuminate the issue.

1. General Guidelines

The Justice Department's general guidance on prosecutorial discretion reflects an appropriate executive mindset. Both the U.S. Attorneys' Manual and more specific recent guidance direct that prosecutors generally should pursue criminal charges when there is evidence of a provable violation.³⁶¹ Under these guidelines, federal prosecutors generally must pursue charges based on "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction."³⁶² At the same time, the guidelines do advise prosecutors that "equal justice depends on individualized justice," and that each prosecutorial decision must be based on "the specific facts and circumstances of each particular

360. Focusing on administrative rather than criminal contexts, Professor Kate Andrias has advocated broader "disclosure of enforcement policy decisions, accompanied by explanations rooted in law," as a means of "disciplin[ing] exercises of presidential enforcement discretion." Andrias, *supra* note 15, at 1117. This proposal largely sidesteps the question of whether categorical nonenforcement policies should be permissible in the first place. While aiming to promote public debate over "whether the President has a reasonable basis in statute for his choice to emphasize one enforcement policy over another or to prioritize one agency's mission over another's," Andrias recognizes that the President's "primary duty is to make real the promise of the relevant statutes." *Id.* at 1113, 1115. In any event, Andrias's disclosure proposal carries the drawback that nondisclosure of internal enforcement priorities may often be the best means of effectuating statutory policies. While executive officials must set sensible priorities when available resources do not permit complete enforcement, keeping their priorities secret may preserve the deterrent effect of the statute on a public ignorant of actual executive enforcement practices. For discussion of this issue in the context of marijuana enforcement, see *infra* Part V.B.2.a.

361. U.S. DEP'T OF JUSTICE, U.S. ATTORNEY'S MANUAL § 9-27.220 (1997); Memorandum from Att'y Gen. Eric H. Holder, U.S. Dep't of Justice, to All Federal Prosecutors 1 (May 19, 2010), available at <http://perma.cc/42V6-TXNC>.

362. U.S. DEP'T OF JUSTICE, *supra* note 361, § 9-27.300; see also Memorandum from Att'y Gen. Holder, *supra* note 361, at 2 (quoting this language and describing it as a "long-standing principle").

case.”³⁶³ According to the U.S. Attorney’s Manual, “Merely because the attorney for the government believes that a person’s conduct constitutes a [provable] Federal offense . . . does not mean that he/she necessarily should initiate or recommend prosecution.” The manual advises specifically that prosecutors may decline a case when prosecution would serve “no substantial Federal interest,” another jurisdiction may effectively prosecute the offense, or “there exists an adequate non-criminal alternative to prosecution.”³⁶⁴

Even these permissive standards no doubt understate how much discretion prosecutors in fact exercise. Given the vast mismatch between the scope of federal crimes and the available enforcement resources, executive officials undoubtedly leave many federal crimes effectively unpunished. Furthermore, in the vast majority of federal criminal cases that end in guilty pleas,³⁶⁵ prosecutors must offer defendants some reduction in the charges or possible sentence to induce the plea. In some cases, the discounted penalty may simply control for the prosecutor’s risks and uncertainties at trial. But many other plea bargains reflect a conscious decision to drop certain provable charges to conserve prosecutorial resources for other cases—effectively a decision to underenforce one law so as to better enforce others.

Nevertheless, the guidelines as a whole reflect a mindset in which enforcement—indeed, even maximum enforcement—is to be the rule, not the exception. The guidelines thus reflect at least an aspirational focus on individualizing justice without overriding congressional policies. This focus is consistent with the Constitution’s underlying framework of general policymaking by Congress and individualized enforcement by the executive branch.

2. Specific Cases

In contrast, recent policies in several specific areas depend on broader claims of nonenforcement authority. Here, three recent examples—marijuana and immigration enforcement policies from the Obama Administration, and certain environmental enforcement policies from the George W. Bush Administration—provide useful illustrations.

363. Memorandum from Att’y Gen. Holder, *supra* note 361, at 1.

364. U.S. DEP’T OF JUSTICE, *supra* note 361, § 27.220(B).

365. In 2010, ninety-one percent of felons charged in U.S. District Courts entered guilty pleas. U.S. Dep’t of Justice, *Federal Justice Statistics, 2010*, <http://perma.cc/3X7B-BCR4> (bjs.gov, archived Feb. 11, 2014).

Under this Article's framework, the Justice Department's 2013 guidance on marijuana enforcement can just barely be reconciled with an appropriate understanding of executive-branch responsibility.³⁶⁶ In contrast, the Homeland Security Department's immigration policy appears difficult to square with a proper conception of executive duty. The final example discussed below—the George W. Bush Administration's enforcement of "New Source Review" requirements of the Clean Air Act—highlights how categorical exercises of nonenforcement power may permit executive officials to benefit favored constituencies at the expense of broader public interests supported by statutory policies.

a. Marijuana

The Justice Department developed its current marijuana policy in response to referenda in several states that relaxed state-law prohibitions on marijuana possession. Although possession of any quantity of marijuana is a federal crime,³⁶⁷ the Justice Department has traditionally given low priority to enforcement of this prohibition. U.S. Attorneys thus have typically left to state authorities the job of prosecuting low-level marijuana violations.³⁶⁸ Nevertheless, marijuana advocates and some state officials have pressured the Obama Administration to adopt a formal policy of declining enforcement against individuals who possess the drug in compliance with state law. In 2009, after California and several other states legalized medical marijuana, the Justice Department directed U.S. Attorneys not to focus federal resources on prosecution of "individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana."³⁶⁹ In 2011, however, the Justice Department "clarifi[ed]" that the 2009 directive "was never intended to shield" large-scale growing operations from federal

366. As this Article was going to press, the Department extended this policy to federal crimes relating to financial transactions with marijuana businesses that are legal under state law. See 2013 Cole Financial Crimes Memorandum, *supra* note 3, at 1–2. This Article does not specifically analyze this extension of the policy beyond marijuana possession and distribution offenses to other related crimes.

367. 21 U.S.C. § 844(a) (2012).

368. In the most recent years for which data are available (2010 and 2006, respectively), the federal government prosecuted no more than ninety-three individuals for marijuana possession, as compared to some 750,000 state prosecutions for that offense. Transcript of Oral Argument at 4, *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) (No. 11-702).

369. Memorandum from David W. Ogden, *supra* note 3, at 2.

enforcement, and that U.S. Attorneys' Offices "should continue to review marijuana cases for prosecution on a case-by-case basis."³⁷⁰

Finally, in 2013, after Colorado and Washington legalized recreational marijuana use, the Justice Department announced a policy of concentrating federal resources on cases implicating one of eight enumerated federal enforcement priorities.³⁷¹ Noting that "the Department of Justice has not historically devoted resources to prosecuting individuals whose conduct is limited to possession of small amounts of marijuana for personal use on private property," the 2013 memorandum strongly suggested—without specifically promising—that federal officials would decline prosecution of even large-scale growers if those growers complied with state law and if the states maintained a "strong and effective state regulatory system."³⁷² (In 2014, as this Article was going to press, the Department extended its policy to federal crimes involving marijuana-related financial transactions.³⁷³ Because this extension of the policy was announced too late to be thoroughly addressed here, the analysis that follows considers only the policy with respect marijuana possession and distribution offenses.)

At least the first two of these marijuana enforcement memoranda reflect the appropriate executive mindset. While the 2013 memorandum creeps closer to an express promise of nonenforcement, it too is defensible insofar as it promises only to focus resources on particular types of cases, not to avoid prosecution altogether in other circumstances. Given scarce resources for enforcement, federal prosecutors must set priorities for enforcement, even if doing so means effectively abandoning punishment of certain violations. Here, individuals who possess marijuana in compliance with state law (particularly if they are gravely ill and using the drug for medical reasons) seem to be as good candidates as any for a low enforcement priority. Some degree of top-down direction regarding this priority seems appropriate, moreover, given that the President and senior Justice Department officials carry more direct political accountability for national law-enforcement priorities than do individual U.S. Attorneys or Assistant U.S. Attorneys.³⁷⁴

At the same time, a more definite nonenforcement policy, such as state officials and marijuana advocates sought, would exceed the

370. 2011 Cole Memorandum, *supra* note 3, at 2.

371. 2013 Cole Memorandum, *supra* note 3, at 1–2.

372. *Id.* at 3.

373. *See supra* note 371.

374. For a sustained argument in favor of presidential direction of agency enforcement practices, see Andrias, *supra* note 15.

Executive's proper role by effectively suspending a federal statute and thus usurping Congress's constitutional responsibility to set national policy. However popular such action might be, it would remove any political incentive for Congress to conform federal law to supposed public preferences, effectively letting Congress off the hook for the overbreadth of the criminal laws it has enacted. To be sure, aggressive federal enforcement might better test the popularity of federal marijuana laws by creating stronger political incentives for Congress to revise federal law. Yet such executive action would come at the cost of other, more urgent public priorities for federal enforcement, such as preventing terrorism, financial fraud, and organized crime. Furthermore, such aggressive enforcement could present substantial fairness concerns for individuals targeted for enforcement not because of the culpability of their conduct but rather as a means of testing the violated law's continued popularity.

Of course, all these problems result from the underlying pathological structure of modern federal criminal law—its excessive coverage, enabled by prosecutorial discretion, of conduct that the public likely does not consider worthy of punishments as severe as the letter of the law allows.³⁷⁵ But the toothpaste cannot be put back in the tube; aggressive enforcement of any one law will do little to correct the underlying structural problem. Under the circumstances, then, the best achievable balance between prudent policy and executive duty is likely the sort of unsatisfactory two-step reflected in the Obama Justice Department's statements: a directive to prosecutors that certain offenses should be low priority, accompanied by a reminder that federal laws remain in effect, that Congress is constitutionally responsible for any legal change, and that all prosecutorial decisions should be made case by case.

b. Immigration

If the Justice Department's marijuana policy is dubious but defensible, the Department of Homeland Security's current immigration enforcement policy appears to cross the line. In recent directives establishing a program of Deferred Action for Childhood Arrivals ("DACA"), the Secretary of Homeland Security has announced a policy of exercising "prosecutorial discretion" to decline to seek removal of undocumented immigrants under age thirty who entered the United States as young children and meet certain other

375. See *supra* Part IV.B.2.

criteria.³⁷⁶ Under the DACA program, such individuals may apply to receive, for a renewable two-year period, not only a promise to decline to initiate removal proceedings against them but also authorization to work in the United States.³⁷⁷

Within the framework developed here, this policy amounts to a categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization. The action thus is presumptively beyond the scope of executive authority: to be valid, it requires a delegation from Congress. Yet no statute specifically authorizes the status—“deferred action”—conferred on immigrants under the policy; the program, rather, depends on an exercise of prosecutorial discretion, in the form of a promise not to enforce immigration laws for a specified period.³⁷⁸

Immigration officials, to be sure, have exercised discretion to abstain from immigration enforcement through deferred action since at least the 1970s.³⁷⁹ Congress, moreover, has recognized “deferred action” as a possible legal status in some statutes, thus arguably providing implicit authority for this executive practice.³⁸⁰ In the past, however, immigration officials have used deferred action principally to avoid removing immigrants based on compelling individual circumstances³⁸¹—a form of case-by-case nonenforcement discretion. And while immigration authorities have granted deferred action to entire groups of individuals in the past,³⁸² some unforeseen humanitarian crisis or international incident typically has provided the basis for group-based relief. As compared to such situations where exceptional, unforeseen events justify relief from the full rigor of immigration law, the DACA program appears harder to justify as an implementation of policy objectives reflected in the statute. Even

376. Memorandum from Sec’y Napolitano, *supra* note 5, at 1.

377. See U.S. DEP’T OF HOMELAND SEC., *supra* note 5, at 3–4 (describing prosecutorial discretion with respect to individuals who came to the United States as children).

378. See generally Shoba S. Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 244 (2010) (discussing the importance of prosecutorial discretion in the immigration and naturalization process).

379. See *id.* at 246 (discussing the history of prosecutorial discretion).

380. See, e.g., 49 U.S.C. § 30301 note (2012); 8 U.S.C. § 1154(a)(1)(D)(i).

381. See Wadhia, *supra* note 378, at 250, 261–62 (discussing how factors such as physical infirmity, elderly age, family separation, and mental disability influence deferred-action decisions).

382. See, e.g., Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59, 67–68 (2013) (explaining specific discretionary decisions that the Attorney General and Department of Homeland Security have applied to categories of noncitizens).

taking account of past practice, then, the oblique references to deferred action in the immigration code seem inadequate to justify so sweeping a suspension of statutory law.

Other scholars have persuasively argued that immigration law is an area, much like federal criminal law, in which a gross mismatch between the scope of prohibitions and the resources available to enforce them makes substantial nonenforcement of those laws inevitable.³⁸³ Even so, just as in the criminal context, executive officials should properly understand their role in immigration enforcement to be a matter of priority setting rather than policymaking. Judged by this standard, the DACA program still seems hard to square with a proper conception of executive duty.

To be sure, even without the program, law-abiding undocumented immigrants, like those covered by the program, no doubt would be low priorities for removal as compared to individuals who have committed crimes or who otherwise pose some public safety threat. The current administration, moreover, has hardly been lax in pursuing removal of other categories of undocumented immigrants. Yet declining to prioritize certain cases, as the executive branch might properly have done, may have very different effects from an announced, categorical policy like DACA. While the former preserves the deterrent effect of federal statutes by leaving all individuals covered by the statute in some jeopardy, the latter removes the risk of enforcement altogether. It thus contradicts the statutory policy to a degree that mere prioritization of enforcement resources does not. Moreover, the contradiction here seems stark because the category of individuals benefited by the DACA program is quite predictably and foreseeably within the scope of the removal statutes.

However attractive it might be as a matter of policy, the DACA program appears to violate the proper respect for congressional primacy in lawmaking that should guide executive action, even when substantial exercises of prosecutorial discretion are inevitable. To the extent Congress has adopted overly broad and unduly harsh immigration laws, Congress should remain accountable for its choice. The executive branch should not presume the authority to let Congress off the hook.

383. Cox & Rodríguez, *supra* note 333, at 511. The Supreme Court itself has acknowledged the important role of prosecutorial discretion in immigration enforcement. See *Arizona v. United States*, 132 S. Ct. 2492, 2499 (2012).

c. New Source Review

A last illustrative example, this one from the George W. Bush Administration, highlights the degree to which an unbounded conception of executive enforcement discretion may permit executive officials to frustrate statutory objectives.

Under the so-called New Source Review (“NSR”) program mandated by 1977 amendments to the Clean Air Act, certain new or modified pollution sources must meet more stringent permitting requirements than preexisting sources.³⁸⁴ After vigorous enforcement efforts against coal-fired electric plants by the Clinton Administration prompted political opposition from industry, the Bush Administration took steps to weaken the law’s impact.³⁸⁵ To begin with, the Administration promulgated permissive regulations that would have exempted many plant modifications from NSR requirements.³⁸⁶ Yet the D.C. Circuit invalidated one such rule, disparaging it as permissible “[o]nly in a Humpty Dumpty world.”³⁸⁷ The Administration then exercised prosecutorial discretion to decline enforcement with respect to plant changes that the invalidated rule would have permitted. Indeed, for a year and a half after the court’s ruling, the Environmental Protection Agency evidently maintained an explicit internal policy that the law should be enforced only in accordance with the invalidated rule (even with respect to past violations that the regulation would not have covered).³⁸⁸

Given limited resources, agencies necessarily must prioritize certain enforcement actions over others. Internal agency directives may be an appropriate way of doing so. As noted, moreover, the difference between priority setting and policymaking is often a matter of judgment and degree.³⁸⁹ And even categorical suspension of

384. For a general description of statutory provisions and the program’s history, see Jonathan Remy Nash & Richard L. Revesz, *Grandfathering & Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1681–705 (2007); Thomas O. McGarity, *When Strong Enforcement Works Better than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative*, 72 MD. L. REV. 1204 (2013).

385. See McGarity, *supra* note 384, at 1243–70.

386. See Nash & Revasz, *supra* note 384, at 1702–04.

387. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006).

388. See *EPA Places Low Priority on Newly Detected Violations of Rules for New Source Review*, U.S.L.W. (BNA) (Oct. 10, 2006); Andrew Childers, *Annual Actual Emissions Standard Test for New Source Review Reinstated by EPA*, 39 Env’t Rep. (BNA) 1045 (May 30, 2008). Although the Bush Administration continued to litigate certain enforcement actions initiated by the Clinton Administration, the only enforcement suit the Bush Administration brought after the D.C. Circuit’s decision involved a plant that would have fallen outside the invalidated rule’s safe harbor. McGarity, *supra* note 384, at 1269–70.

389. See *supra* introduction to Part V.B.

enforcement may not provide the same legal security as a valid regulation: a future administration might always overturn the enforcement policy and pursue any cases for which the statutory limitations period has not expired.³⁹⁰

Yet this example illustrates how policy-based nonenforcement may be insidious. After the D.C. Circuit's decision, industry representatives expressed the hope that the Bush Administration would exercise its discretion in precisely the manner in which it did.³⁹¹ Nonenforcement thus enabled the Administration to provide a focused benefit to a favored constituency while shortchanging the broader, but more diffuse, public interest in clean air. A proper conception of the executive role should pay greater deference to Congress. However inevitable it may be to set priorities for enforcement within the coverage of a statute, executive officials are not free to unilaterally suspend enforcement for an entire category of cases based on disagreement with statutory policy.

C. Three Doctrinal Problems

The examples so far discussed illustrate core applications of this Article's framework. Yet a proper understanding of enforcement discretion and executive duty may also have broader implications for recurrent separation of powers questions. In particular, this framework may inform debates over the validity of statutory waiver provisions, the proper interpretation of criminal statutes, and the constitutionality of independent federal prosecutors.

1. Statutory Waiver

The framework developed here has important implications for a key modern practice—the growing use of administrative waivers. In an increasing number of statutes, Congress has authorized agencies to excuse particular parties from compliance with basic statutory requirements. Two recent defenders of the practice have called it “big waiver.”³⁹² These provisions may even reflect an emerging new paradigm of administrative law. During and after the New Deal, Congress tended to paint with a broad brush, leaving the details of national policy to administrators. In our own era of partisan distrust,

390. The Obama Administration in fact stepped up NSR enforcement. See McGarity, *supra* note 384, at 1271–74.

391. See Steven D. Cook, *Effect of New Source Review Decision Limited by EPA Policy, Proposed Rule*, 37 Env't Rep. (BNA) 662 (Mar. 31, 2006).

392. Barron & Rakoff, *supra* note 14, at 267.

however, Congress often may seek to retain greater control over the details of administrative policy by using waiver provisions rather than delegations to create administrative flexibility.³⁹³

Under a proper conception of enforcement discretion and executive duty, such waivers are not categorically impermissible. As explained earlier, there is no general constitutional prohibition on legislative delegation of executive authority to suspend or dispense with statutory requirements.³⁹⁴ Yet waivers are an even greater affront to legislative supremacy than categorical or prospective nonenforcement. Rather than simply turning a blind eye to violations, administrative waivers purport to cancel statutory provisions altogether. Indeed, in historic terms, they amount to an executive suspending power. Accordingly, to comply with the presumption against suspending and dispensing authority, such executive waivers must have clear statutory authorization.³⁹⁵ They cannot be presumed as part of the everyday administrative toolkit.

Two recent examples illustrate the necessary degree of legislative clarity. First, provisions in the No Child Left Behind Act of 2001 allow the Secretary of Education to excuse state education agencies from complying with key statutory benchmarks.³⁹⁶ Although the statute generally requires states to satisfy certain performance standards by 2014, it includes one provision allowing the Secretary to waive, with certain specified exceptions, “any statutory or regulatory requirement of [the statute] for a State educational agency, local educational agency, Indian tribe, or school through a local educational agency” that receives funds under the statute and requests a waiver.³⁹⁷ The Secretary has employed this authority to excuse states from compliance with much of the Act, on the condition that the states receiving waivers implement other specified reforms.³⁹⁸

This use of statutory waiver authority to impose an alternative regulatory regime raises difficult questions. At the least, it seems debatable whether Congress, in providing the safety valve of an executive dispensing power, anticipated that the executive branch would deploy this authority to impose alternative requirements of its

393. *See id.* at 292–95 (discussing reasons for increasing reliance on waiver provisions).

394. *See supra* Part III.D.1.

395. *Accord* Barron & Rakoff, *supra* note 14, at 322 (noting “there is much to be said” in favor of “a clear statement rule for recognizing the existence of a big waiver authority”).

396. 20 U.S.C. § 7861 (2012).

397. *Id.* § 7861(a).

398. *See* U.S. DEP’T OF EDUC., ESEA FLEXIBILITY POLICY DOCUMENT (2012), *available at* <http://perma.cc/9B7L-ZRP2> (describing the conditions for such a waiver).

own devising on parties otherwise subject to the law.³⁹⁹ In this case, however, the waiver authority itself does not depend on mere assertions of prosecutorial or administrative discretion, but rather on explicit statutory authorization. Given that the statute thus overrides the presumption against executive suspending or dispensing authority, as a general matter this program does not implicate the constitutional limitations on enforcement discretion addressed in this Article.

In contrast, the statutory basis for recent executive waivers of certain federal welfare laws appears less certain. Key federal legislation from the Clinton Administration sought both to transfer to the states administration of federal welfare programs and to require that welfare beneficiaries actively seek gainful employment as a condition of receiving benefits.⁴⁰⁰ In recent guidance, the Secretary of Health and Human Services asserted that the statute provides authority to waive state programs' compliance with certain work requirements of the statute.⁴⁰¹ This conclusion, however, depends on debatable inferences. While the statute allows waivers for certain state pilot projects, it does not clearly authorize the Secretary's new, broader reforms.⁴⁰² Given that an agency's general organic discretion over enforcement of laws it administers is insufficient by itself to justify an executive suspending or dispensing power, such thin textual inferences should not support an executive authority to waive statutory requirements.

2. Statutory Construction

The dual-presumption framework should also inform how courts interpret criminal statutes. As I have argued elsewhere, the criminal justice system's structural reliance on prosecutorial discretion, and the associated pathological politics of criminal law, support strong normative arguments for strictly construing criminal statutes, as required by the traditional rule of lenity.⁴⁰³ This Article's

399. For an analysis of this question, see Barron & Rakoff, *supra* note 14, at 325–27.

400. *E.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

401. U.S. DEP'T OF HEALTH & HUMAN SERVS., OFFICE OF FAMILY ASSISTANCE, TANF-ACF-IM-2012-03, GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115 (July 12, 2012).

402. *See id.* (reasoning, among other things, that work requirements of 42 U.S.C. § 607 may be waived under 42 U.S.C. § 1315 because that provision allows waiver of any requirement of 42 U.S.C. § 602, and § 602(a) requires compliance with § 607). *See generally* Barron & Rakoff, *supra* note 14, at 285 (Secretary's "interpretation, even if correct, is by no means self-evident").

403. *See* Price, *supra* note 30, at 886.

framework reinforces this conclusion by clarifying that the unbounded nonenforcement power exercised by modern prosecutors ordinarily requires affirmative statutory authorization. Construing criminal statutes broadly, as federal courts have often done, expands the charging options, and thus the discretion, of the executive branch.⁴⁰⁴ Construing federal criminal statutes as narrowly as possible, by contrast, would limit executive charging options, thus pushing the structure of federal criminal law incrementally closer to one in which all prohibitions may realistically be enforced.

The proper constitutional understanding of enforcement discretion bears particularly directly on disputes over proper interpretation of overlapping criminal statutes. In a number of contexts, criminal statutes prohibit specific forms of conduct with only limited penalties, even though other statutes cover broader forms of the same conduct with more severe penalties. For example, the statutory offense of credit card fraud generally must involve more than \$1,000,⁴⁰⁵ presumably because Congress did not wish to “mak[e] a ‘federal case’ out of small-scale frauds involving credit cards.”⁴⁰⁶ Yet current doctrine permits federal prosecutors to use mail and wire fraud statutes—which potentially carry much higher penalties—to prosecute credit card frauds, even if the fraud falls below the thresholds of the credit card statute.⁴⁰⁷

This interpretive approach is rooted in the mistaken assumption that the executive branch necessarily possesses plenary authority to select criminal charges.⁴⁰⁸ Recognition that the baseline executive duty is to prosecute all statutory violations, making exceptions only for unusual cases, should produce a different orientation. Specifically, it should prompt courts instead to view overlapping statutes as reflecting a gradation of mutually exclusive offenses—a real code of conduct, in other words, rather than a delegation of authority to the executive branch to reshape the law on the ground by selectively enforcing the law on the books.

404. *See id.*; Smith, *supra* note 18, at 554 (“All too frequently, courts have either created or exacerbated redundancies across criminal statutes by broadly construing generic federal statutes carrying higher penalties to encompass conduct that is subject to lower penalties under more specific federal statutes.”).

405. 15 U.S.C. § 1644(a) (2012).

406. Smith, *supra* note 18, at 555.

407. 18 U.S.C. §§ 1341, 1343; *United States v. Maze*, 414 U.S. 395, 399–401 (1974).

408. *See, e.g., United States v. Batchelder*, 442 U.S. 114, 124–26 (1979) (relying on principle that “[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion”). For arguments in favor of statutory exclusivity, see Smith, *supra* note 18, at 582–85.

3. Independent Prosecution

Finally, the proper constitutional framework for enforcement discretion has important implications for the longstanding debate over the constitutionality of independent prosecutors. In *Morrison v. Olson*, the Supreme Court upheld a statute giving the President only limited removal authority over certain prosecutors.⁴⁰⁹ Some scholars have followed Justice Scalia's celebrated lone dissent⁴¹⁰ in arguing that prosecution is an essential executive function that must be conducted by officers subject to plenary presidential oversight.⁴¹¹ Others have pointed to examples of nonfederal enforcement of federal laws in the eighteenth and nineteenth centuries to argue that federal law enforcement is not an essential executive function and thus can be taken outside the presidential chain of command.⁴¹² Although the independent-counsel statute at issue in *Morrison* has expired, the role of an independent prosecutor's investigation in bringing about President Clinton's impeachment highlights the significance of the issue, making it one of the enduring questions of constitutional law.

Nevertheless, the debate as it has been conducted misses a central point: that historical changes in the overall structure of criminal justice may affect the relevance of historic examples. As we have seen, Congress organized the early criminal justice system so as to create incentives for total enforcement; prosecutorial discretion was not a central feature of the criminal justice system to anywhere near the same degree as it is now.⁴¹³ In contrast, Congress today enacts prohibitions against a background expectation of prosecutorial discretion, with the consequence that substantive prohibitions standing alone do not necessarily reflect democratically sanctioned standards of conduct.

Accordingly, in the modern context, the practical need for presidential supervision of prosecutorial discretion is vastly increased.⁴¹⁴ Indeed, although critics of *Morrison* typically frame their position as a formalist argument that law enforcement is an inherent executive function,⁴¹⁵ the practical reasons they give for the

409. 487 U.S. 654, 655–57 (1988).

410. *Id.* at 697–734 (Scalia, J., dissenting).

411. *See, e.g.*, Prakash, *supra* 222, at 524–25 (discussing Scalia's dissent and other scholars casting doubt on the characterization of prosecution as an executive function).

412. *See* sources cited in *supra* note 207.

413. *See supra* Part IV.A.

414. *Cf.* Lessig & Sunstein, *supra* note 75, at 4.

415. *See, e.g.*, Prakash, *supra* note 222, at 526–27 (explaining the historical consensus that executives could control official prosecutors); *Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting) (describing investigation and prosecution as a “quintessentially executive function”).

unconstitutionality of independent prosecutors often turn on characteristically modern features of the criminal justice system. Critics highlight, for example, that because independent prosecutors often lack budget constraints and bear responsibility for investigating only a single offender or offense, their exercises of prosecutorial discretion may lack the discipline that resource constraints and docket pressures impose on other prosecutors.⁴¹⁶ In other words, independent prosecutors, unlike executive branch officials with other cases to pursue, may face overwhelming pressure to “bag[] their prey,”⁴¹⁷ even if other federal prosecutors typically would not have committed resources to prosecuting a similarly situated offender. The centrality of accountable exercises of discretion to modern criminal justice makes presidential supervision of prosecution constitutionally essential today, even if it was not so at the Founding.

VI. CONCLUDING REFLECTIONS: PRACTICE AND INTERPRETATION

Enforcement discretion is a hallmark of the modern American justice system and administrative state. We live under a vast accretion of civil and criminal prohibitions, softened in application by (hopefully) benevolent enforcers who may produce a law on the ground very different from the law on the books. But it was not always so. At least in the federal system, although important exercises of prosecutorial discretion stretch back to the Founding, such assertions of discretion appear to have been more limited in scope than is common today. The overall design of early federal enforcement, as well as certain specific enactments, suggests an understanding that Congress could oust executive discretion and bring about complete enforcement of its laws. Early history, moreover, suggests an outer limit on the Executive’s presumptive discretion. Although Congress on occasion authorized broader nonenforcement power, key early executive officials appear not to have presumed that they held authority to decline enforcement of federal statutes on a prospective or categorical basis. Only later did criminal justice and civil and administrative enforcement take on the forms we are familiar with today, in which wide-ranging discretion to decline enforcement is commonplace.

416. See, e.g., *Morrison*, 487 U.S. at 728–29 (Scalia, J., dissenting) (elaborating on the executive’s role in constraining prosecutions).

417. *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1176 (D.C. Cir. 2006) (Tatel, J., concurring).

Historical practice, no less than judicial interpretation, can be an important determinant of constitutional meaning. At least if it is rooted in satisfactory normative principles, the long-standing practice of the political branches can place a gloss on ambiguous constitutional text that should limit the range of interpretations available to all three branches in the future. But here, a normatively attractive interpretation of the constitutional text can account at most for early practice, not more recent developments. Accounting for modern practices in constitutional terms, as some judicial and executive-branch opinions have attempted to do, strains both the constitutional text and its proper normative underpinnings. Moreover, it distorts the understanding of urgent contemporary controversies, making the growing policymaking authority of the executive branch appear constitutionally inevitable when it is in fact a usurpation. Absent a congressional delegation of lawmaking power, Presidents must execute the law, not make it. A proper conception of executive duty requires them to respect that limit on their power.