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Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty

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

BY

PETER L. MARKOWITZ*

ABSTRACT

On November 20, 2015, President Obama, frustrated by congressional inaction on immigration, announced an ambitious and potentially transformative prosecutorial discretion policy to forego the deportations of millions of low priority undocumented immigrants. That announcement immediately sparked legal challenges, which have quickly wound their way to the Supreme Court, and nationwide debate about the limits of the President's prosecutorial discretion authority. President Obama's actions are part of a larger trend whereby modern presidents have increasingly used robust assertions of prosecutorial discretion powers to achieve policy goals that they could not realize through legislation.

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

This Article suggests a new way to think about the boundaries of the President's prosecutorial discretion authority. Specifically, I propose that the nature of prosecutorial discretion power is dependent on the context of

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enforcement and that the power is at its zenith when a president exercises her discretion to protect physical liberty. It is in the liberty deprivation context where historical precedent, the Constitution's structural bias against liberty deprivation and the textual sources of prosecutorial discretion powers all militate in favor of robust presidential powers as a necessary check against excessively punitive statutory schemes.

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INTRODUCTION

Prosecutorial discretion refers to the power of the Executive to determine how, when and whether to initiate and pursue enforcement proceedings.¹ Prosecutorial discretion is most commonly conceived of in the criminal context, wherein prosecutors routinely make determinations about which cases to bring, how vigorously to pursue them, and when and if to abandon a prosecution. However, in the modern era, prosecutorial discretion authority has been applied to a vast array of federal administrative enforcement proceedings beyond the criminal context. Modern presidents have asserted increasingly robust visions of the scope of their own prosecutorial discretion power—at times using prosecutorial discretion policies to achieve goals that they could not otherwise realize through the legislative process.

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

¹ See generally Principles of Federal Prosecution, U.S. Attorney's Manual § 9-27.001 (1997); U.S. Dep't of Justice, Immigration and Naturalization Service Fact Sheet on Prosecutorial Discretion Guidelines (2000); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 244 (2010). The precise boundaries of prosecutorial discretion are discussed *supra* at notes 17-19, 209-211 and accompanying text.

² Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodríguez, Dir., U.S. Citizenship & Immigration Servs., Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, and R. Gil Kerlikowske, Comm'r of U.S. Customs & Border Prot. 4 (Nov. 20, 2014) (hereinafter "DAPA Memo"), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf; Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs. & John Morton, Dir., U.S. Immigration & Customs Enforcement (June 15, 2012) (hereinafter "DACA Memorandum"), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

³ Elahe Izadi, *The Strategy to Hold Off on Deportation Changes Wins Out*, WASH. POST (May 28, 2014).

⁴ See *Texas v. United States*, 809 F.3d 134 (5th Cir. Nov. 9, 2015), *as revised* (Nov. 25, 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (Jan. 19, 2016); *Arpaio v. Obama*, 797 F.3d 11 (D.C. Cir. 2015); *Crane v. Johnson*, 783 F.3d 244 (5th Cir. 2015).

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

These aggressive assertions of presidential⁵ non-enforcement power raise a serious constitutional question: what limiting principle on prosecutorial discretion authority is necessary to preserve the separation of powers enshrined in our Constitution? Put another way, at what point does a non-enforcement policy cross the line between the executive discretion properly vested in the President and instead become violative of the President's constitutional duty to "take care that the laws be faithfully executed[?]"⁶ Taken to its extremes, the power not to enforce could act as a constitutionally suspect second veto for a broad swath of legislation. It would be odd indeed for the framers to have constructed a mechanism for overriding presidential vetoes only to have such mechanism rendered meaningless by a president's unchecked power to refuse to enforce laws based solely on divergent views about a law's political wisdom.

With the well-documented escalating reach of federal criminal law⁷ and the enormous breadth of civil regulatory schemes embodied in modern federal legislation,⁸ there is hardly a person or business in the United States that could not theoretically become subject to a federal enforcement action of one kind or another. The breadth of regulated conduct coupled with the reality of limited enforcement resources necessarily means that prosecutorial discretion is a central feature of modern federal law enforcement. In the immigration context, for example, there are estimated to be 11 million undocumented individuals potentially subject to deportation proceedings in

⁵ I use the terms "President" and "Executive" interchangeably throughout this article to refer to the entity that wields the power conferred by Article II of the Constitution. I take no position herein on the robust debate regarding the precise boundaries of the President's control over agency actions. Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 594-96 (1994) (arguing for a robust version of presidential control over agency actions), with Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 966 (2001) (arguing that the President lacks the authority to dictate substantive decisions entrusted to agencies by law),.

⁶ U.S. CONST. art. II, § 3, cl. 5.

⁷ See Sanford H. Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 909 (1962).

⁸ See generally RANDALL G. HOLCOMBE, FROM LIBERTY TO DEMOCRACY: THE TRANSFORMATION OF AMERICAN GOVERNMENT, 210-49 (2002).

the United States.⁹ However, notwithstanding an historically unprecedented national investment in immigration enforcement, the Department of Homeland Security has explained the annual enforcement budget can support a maximum of 300,000-400,000 deportations per year.¹⁰ The same story of vast regulatory schemes and limited enforcement resources can be told about nearly every federal enforcement system. Thus, resource constraints alone are a substantial justification for prosecutorial discretion. But the issue becomes more difficult when prosecutorial discretion policies are driven less by resource constraints and more by a president's normative judgment regarding the public interest, or lack thereof, in enforcement.

The Supreme Court has yet to provide significant guidance on the constitutional limits of executive discretion in this context, though it will have an opportunity to do so this term after granting certiorari in *Texas v. United States*—the litigation challenging the President's DAPA program.¹¹ In recent years, a growing body of scholarship has emerged focused on the phenomenon of prosecutorial discretion. Scholars have struggled to construct a constitutional limiting principle that takes realistic account of the ubiquitous and necessary role that prosecutorial discretion plays in the modern era.¹² Much of the relevant scholarship has focused not on the constitutional dimensions of the phenomenon, but rather on the functional discretion left to the Executive through statutory schemes and the normative merits of greater transparency and accountability.¹³

This Article proposes a new way to think about the constitutional limits of prosecutorial discretion.¹⁴ While others who have grappled with

⁹ Memorandum from the Office of Legal Counsel to the Sec'y of Homeland Sec. and the Counsel to the President, p1 (Nov. 19, 2014), <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> (hereinafter "OLC Memorandum Op.").

¹⁰ *Id.*; Doris Meissner, Donald M. Kerwin, Muzaffar Chishti, and Claire Bergeron, *Immigration Enforcement in the United States: The Rise of a Formidable Machinery*, MIGRATION POLICY INST. (Jan. 2013) (hereinafter "MPI Report").

¹¹ 809 F.3d 134, *cert. granted*, 2016 WL 207257 (Jan. 19, 2016).

¹² See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 717 (2014); 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, 857 (2013).

¹³ See, e.g., Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 105 (2015) (hereinafter "Cox & Rodríguez, *Redux*"); Michael Sant' Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 411 (2014); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034 (2013); Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458 (2009) (hereinafter "Cox & Rodríguez, *President and Immigration Law*"); Gerald L. Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611 (2006); Wadhia, *supra* note 1, at 264.

¹⁴ There is a robust body of scholarship focused on a number of related inquiries that this Article will not seek to address. Others have done exceptional work regarding the justiciability of executive non-enforcement decisions and this Article will not wade into those waters. See, e.g., Eric Biber, *Two Sides of the Same Coin: Judicial Review of*

the constitutional issue have treated prosecutorial discretion across administrative contexts as a monolith,¹⁵ I suggest that context matters. While it is clear that the Executive enjoys broad prosecutorial discretion in all enforcement contexts, the difficult issue is when, if ever, the President may categorically decline to initiate some set of enforcement proceedings based solely on the President's assessment that full (or any) enforcement is against the public interest. This is prosecutorial discretion in its most robust iteration. I refer to such policies as "categorical prosecutorial discretion policies" throughout this article. Categorical prosecutorial discretion policies most clearly raise the specter of the President potentially usurping Congress' primary policy-making function.

I propose that the dividing line between traditional administrative enforcement proceedings and those that can potentially result in a deprivation of physical liberty can offer a workable and well-founded constitutional limiting principle—with categorical prosecutorial discretion power being permissible only in the latter context.¹⁶ History is replete with examples of presidents issuing mass amnesties in both the criminal and immigration contexts—where physical liberty is at stake—but devoid, until very recent times, of similar categorical non-enforcement policies in traditional administrative contexts. The historical practice echoes structural features of our constitution, which place a premium on the protection of physical liberty as a necessary counter-majoritarian check protecting disfavored minorities against the most coercive power of the federal

Administrative Agency Action and Inaction, 26 VA. ENVTL. L.J. 461, 469-84 (2008); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1694-96 (2004); Mary M. Cheh, *When Congress Commands A Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 Geo. Wash. L. Rev. 253, 255 (2003). In the criminal context, many have examined the problematic intersection between expansive criminal codes and unchecked prosecutorial discretion. See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869 (2009); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 19 (1998); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981). Finally, this article will not weigh in on the well-developed debate regarding the scope of the President's power to refuse to enforce or defend laws the Executive deems unconstitutional, see, e.g., Neil Devins & Saikrishna Prakash, *The Indefensible Duty to Defend*, 112 COLUM. L. REV. 507, 533 (2012); Daniel J. Meltzer, *Executive Defense of Congressional Acts*, 61 DUKE L.J. 1183 (2012), or on the literature about the general aggrandizement of presidential power in the modern era, see, e.g., Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Bruce Ackerman, Essay, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004). The analysis in this article draws upon these important bodies of scholarship but focuses on distinct issues.

¹⁵ Price, *supra* note 12; Delahunty & Yoo, *supra* note 12.

¹⁶ A deprivation of "physical liberty," as used in this Article, is a restriction on an individual's physical freedom of movement on par with the physical incarceration. The question of whether deportation satisfies this definition is complex and is discussed at length *infra* at notes 246-250.

government. The structural bias in favor of liberty protection is further illuminated by the pardon clause's origins and jurisprudence, which also places a thumb on the scale of presidential power to exercise non-enforcement discretion in the liberty-deprivation context. Historical practice, the constitutional text and structure, and participatory democratic theory, all militate in favor of a conception of the Executive's prosecutorial discretion power that is at its zenith when individuals' physical liberty is at stake. Only as a one-way ratchet in favor of liberty protection should a president be permitted to categorically decline to initiate enforcement actions based on her unilateral assessment of the best interest of the nation.

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

PART I THE HISTORY OF PROSECUTORIAL DISCRETION

There are several types of executive non-enforcement. At times, the President has refused to spend money appropriated by Congress,¹⁷ or to promulgate regulations required by statute,¹⁸ or to carry into force specific provisions of a legislative scheme directing agency action. None of these suspect types of non-enforcement, however, can be conceived of as prosecutorial discretion. Prosecutorial discretion is a distinct subset of executive non-enforcement. The concept of prosecutorial discretion only comes into play when the Congress has enacted a statutory scheme that

¹⁷ See, e.g., *Train v. City of New York*, 420 U.S. 35 (1975); see also Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195, 1236 (2014).

¹⁸ See, e.g., *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007); Cheh, *supra* note 14, at 276.

regulates private conduct and proscribes penalties for misconduct that can only be triggered by executive prosecution. The discretion of the Executive to determine when and whether to bring or abandon such enforcement actions and how vigorously to pursue them is prosecutorial discretion.

There are many potential purposes served by prosecutorial discretion.¹⁹ Prosecutorial discretion can be aimed at achieving justice; when the strict application of the law or full enforcement of the proscribed penalties are disproportionate to the specific circumstances of the offense committed. Riding a bicycle on the sidewalks of New York City, for example, is an offense punishable by up to twenty days in jail.²⁰ Based on justice considerations, prosecutors universally decline to seek the full penalties warranted under law.²¹ At other times, an offense could be severe and warrant full punishment but mercy and humanitarian concerns may warrant an exercise of prosecutorial discretion, for example if the offender is particularly old, young, or infirm. Prosecutorial discretion decisions are sometimes less connected to the facts and circumstances related to the individual offense or offender and instead justified on utilitarian grounds related to larger societal interests.²² The decisions not to pursue prosecution against President Nixon, for example, was presumably not driven by a sense that the prescribed penalties for his offenses were too harsh or by any sense of mercy for him personally. Rather, it seems, the prosecution was not initiated because President Ford decided that the national interest would be better served by moving as quickly as possible past that episode in history. Separate and apart from justice, mercy, and societal utility, prosecutorial discretion is perhaps most commonly described as serving a purpose related to the efficient allocation of limited enforcement resources.²³ In the modern era, there are never sufficient resources to prosecute all offenses in any enforcement scheme and thus choices must be made about which prosecutions to pursue and which to forego. Prosecutors, whether they be administrative or criminal, the theory goes, are in a better position than Congress and the judiciary to assess how to most efficiently utilize the available enforcement resources. For examples, prosecutors are undeniably in the best position to assess the necessary resources a prosecution will require and, based upon the available evidence, the chances of success.

¹⁹ See generally Molly Clayton, *Forgiving the Unforgivable: Reinvigorating the Use of Executive Clemency in Capital Cases*, 54 B.C. L. REV. 751, 756 (2013); Cara H. Drinan, *Clemency in A Time of Crisis*, 28 GA. ST. U. L. REV. 1123, 1133 (2012).

²⁰ N.Y. Admin. Code § 19-176.

²¹ Sarina Trangle, *Councilman Aims to Trim Penalties for Some Crimes to Help Undocumented*, CITY & STATE (Oct. 20, 2015), available at <http://www.cityandstateny.com/articles/politics/new-york-city/councilman-aims-to-trim-penalties-for-some-crimes-to-help-undocumented.html#.ViZeAMsY1iZ>.

²² See, e.g., Principles of Federal Prosecution, U.S. Attorney's Manual § 9-27.001 (1997) ("A determination to prosecute represents a policy judgment that the fundamental interests of society require the application of the criminal laws to a particular set of circumstances").

²³ See, e.g., Wadhia, *supra* note 1, at 244-45.

Below I examine the early and modern history of prosecutorial discretion as an aid in the search for a workable constitutional theory of the boundaries of that power.

A. *The Early History of Prosecutorial Discretion Practices*

There is limited evidence of the Framers' conception of the reach of prosecutorial discretion power. Alexander Hamilton, in Federalist 74, explained the rationale for the pardon power. Much of that rationale can be applied equally to other forms of prosecutorial discretion, though the generalization was not made explicit:

Humanity and good policy conspire to dictate, that the benign prerogative of pardoning should be as little as possible fettered or embarrassed. The criminal code of every country partakes so much of necessary severity, that without an easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel.²⁴

While there was no direct conversation about the general power of prosecutorial discretion in the record of the framing of the Constitution, prosecutorial discretion was an uncontroversial power of the President from the start. President George Washington personally directed that numerous criminal and civil prosecutions be initiated and that others be halted.²⁵ It has been observed that President Washington's control over prosecutions was "wide-ranging, largely uncontested by Congress, and acknowledged--even expected--by the Supreme Court."²⁶ In the earliest days of the Union, future Chief Justice John Marshall had the opportunity to opine on the nature of the President's prosecutorial discretion authority in discussing the decision of the President to interrupt a prosecution of an individual accused of murder on board a British vessel and to instead deliver that person to British authorities. On the floor of Congress, Marshall described the President's prosecutorial discretion power as "an indubitable and a Constitutional power" which permitted him alone to determine the "will of the nation" in making decisions about when to pursue and when to forego prosecutions.²⁷ This issue of the President's power to cease a prosecution was first formally presented to the Attorney General in 1821. The resulting Attorney General Opinion determined that "[t]here can be no doubt of the power of the President to order a *nolle prosequi* in any stage of a criminal proceeding in the name of the United States. . . . The question appeals to [the President's] discretion; [the President's] power I think indubitable."²⁸

²⁴ THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²⁵ Andrias, *supra* note 13, at 1053.

²⁶ *Id.*

²⁷ 10 Annals of Cong. 596, 615 (1800).

²⁸ Power to Order a *Nolle Prosequi*, 5 Op. Att'y Gen. 729, 729 (1821).

Early assertions of prosecutorial discretion were not limited to the criminal context. Two of the early canonical cases establishing the President's prosecutorial discretion authority arose in the civil arena. In 1831, Attorney General, and later Supreme Court Justice, Roger B. Taney was called upon to determine whether the President had the authority to order an attorney for the United States to halt a forfeiture action seeking to condemn jewels which had been stolen from the Dutch Princess of Orange and illegally brought to the United States.²⁹ The Secretary of State sought to return the jewels to the Princess without requiring her to engage in a lengthy legal proceeding in the United States. The Attorney General determined that the President was empowered to exercise such prosecutorial discretion in the civil context by virtue of his authority to "take care that the laws be faithfully executed."³⁰

In 1868, in consolidated cases also pertaining to civil forfeiture actions initiated by the United States, the Supreme Court had the opportunity to consider the Executive's prosecutorial discretion authority in civil cases.³¹ In these post-Civil War cases—The Confiscation Cases—the United States had instituted forfeiture proceeding under a statute that allowed the seizure of property that had used to aid the rebellion. Before the Supreme Court, the United States moved to dismiss the actions, seeking to abandon its claim to the property.³² An "informer," who had originally brought the property and its illegal use to the attention of the authorities, and who was thus entitled to half of the seized property under the statute, opposed the government's motion.³³ Holding that the rights of the informer were conditional and that only the United States could initiate the forfeiture actions, the Court held that the motions must be granted because the Executive alone had the authority whether to pursue the enforcement actions.³⁴ These early cases clarify that the Executive's prosecutorial discretion powers were not historically limited to the criminal realm.

Neither was prosecutorial discretion power, in these early years, limited to individual cases by case determinations. Broad categorical prosecutorial discretion policies were implemented by a number of early presidents. Presidents Washington, Adams, Jefferson, Madison, Lincoln and Johnson all granted amnesty from prosecution to a broad classes of individuals.³⁵ Most of these amnesties were granted following some armed

²⁹ *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482 (1831).

³⁰ U.S. CONST., art. II, § 3; see *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. at 486.

³¹ *The Confiscation Cases*, 74 U.S. 454 (1868).

³² *Id.* at 456.

³³ *Id.*

³⁴ *Id.* at 457-62.

³⁵ See W.H. HUMBERT, THE PARDONING POWER OF THE PRESIDENT, 39-40 (American Council on Public Affairs, Wash. D.C. 1941); Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1664-65 (2008).

domestic conflict and protected the defeated combatants from subsequent prosecution as a means to restore civil order. President Jefferson, however, granted a categorical pardon to all persons convicted under the Sedition Act and ordered his district attorneys to enter *nolle prosequis* for all ongoing Sedition Act prosecutions not because of any armed conflict but because he viewed the Sedition Act as violative of the First Amendment.³⁶ In *Armstrong v. United States*, the Supreme Court was called upon to assess the validity of President Lincoln's categorical amnesty following the civil war.³⁷ The Court squarely held that it was within the President's constitutional powers to grant amnesty to all former supporters of the Confederate States and that no legislative authorization was required.³⁸

Thus, from the founding through the Civil War, presidents repeatedly invoked prosecutorial discretion authority in both civil and criminal contexts and repeatedly enacted categorical prosecutorial discretion policies. The Supreme Court recognized and affirmed these practices. The early examples of broad amnesties from prosecution were justified not on the ground of resource constraints, but rather on the President's unilateral utilitarian assessment of the best interest of the nation.³⁹

In contrast to these early accepted examples of the President's prosecutorial discretion powers, it is well established that the Framers intended to deprive the President of the arguably related "dispensing" and "suspending" powers enjoyed by the Kings of England before the Glorious revolution.⁴⁰ Through these powers, English Kings asserted the ability to license conduct that was otherwise proscribed by parliamentary law. The record of the Constitutional Convention demonstrates that the delegates unanimously rejected an effort to grant "suspending" powers to the President.⁴¹ Some have misread the Framers' emphatic rejection of the dispensing and suspending powers as a repudiation of the power of the

³⁶ Prakash, *supra* note 35, at 1664-65.

³⁷ *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1871).

³⁸ *Id.*; *cf* *Knote v. United States*, 95 U.S. 149, 153 (1877) ("[T]he distinction between [[pardon and amnesty] is one rather of philological interest than of legal importance."); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871) ("Pardon includes amnesty.")

³⁹ President Jefferson's action stand as an exception, insofar as he acted based upon his view that the Sedition Act was unconstitutional. Justice and mercy consideration also drove some early president's prosecutorial discretion decisions. *See, e.g.*, 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*, 236 (Harold C. Syrett ed., 1962) (directing nonenforcement based on justice and mercy consideration); Letter from President John Adams to the Attorney General and the District Attorney of Pennsylvania (May 16, 1800), in 9 *THE WORKS OF JOHN ADAMS* 56 (Charles Francis Adams ed., 1850-1856) (same); Letter from President Thomas Jefferson to George Hay, U.S. District Attorney for Virginia (June 19, 1807) (same).

⁴⁰ JACK N. RAKOVE, *ORIGINAL MEANINGS* 20 (1996).

⁴¹ *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 103-04 (Max Farrand ed., 1966); *see also* Price *supra* note 12, at 693.

President to exercise prosecutorial discretion based upon justice, mercy, or utilitarian societal considerations.⁴² Opponents of the President's DAPA program have specifically accused the President of attempting to "dispense" with the nation's deportation laws.⁴³

There is, however, a critical distinction between prosecutorial discretion and the repudiated suspending and dispensing powers. The distinction is primarily temporal. No one would today claim that the President could *ex ante* grant permission for an individual to violate an act of Congress. That is distinct, however, from the Executive's *ex post* determination not to prosecute. The DACA and DAPA programs, for example, are explicitly backward looking; they only apply to individuals who had unlawfully entered the country years before the programs were announced.⁴⁴ As Sir Matthew Hale explained, this key difference is what distinguished the common law pardon power, which was carried forward in our Constitution, and the dispensing power, which was not. As he explained, a pardon "dispenseth with the penalty, not the obligation" to comply with the law but a dispensation from the King "dispenseth both with the penalty and obligation of a law and is precedent."⁴⁵

B. *Modern Categorical Prosecutorial Discretion Policies*

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

In the criminal context, as discussed above, such categorical grants of prosecutorial discretion have been utilized since the founding of the

⁴² See, e.g., Delahunty & Yoo, *supra* note 12; Price *supra* note 12, at 675-76, 742.

⁴³ Texas v. United States, Mem. in Supp. of Mot. for Prelim. Inj., 2014 WL 7497774 (S.D. Tex. Dec. 4, 2014).

⁴⁴ See discussion *infra* at notes 252-254 and accompanying text.

⁴⁵ SIR MATTHEW HALE, THE PREROGATIVES OF THE KING 177 (D.E.C. Yale ed., 1976); see also William F. Duker, *The President's Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 495-96 (1977).

nation.⁴⁶ That practice has been carried forward by modern presidents. President Carter, for example, on his very first day in office issued a categorical unconditional pardon to approximately a half million men who had violated draft laws to avoid military service in Vietnam, most of whom had never been formally charged, because he sought to “heal the war’s psychic wounds.”⁴⁷ Carter’s action was modeled on special boards which Presidents Truman and Ford had used to grant clemency to tens of thousands of individuals who had avoided military service in World War II and Vietnam respectively.⁴⁸

More recently, under President Clinton, the Department of Justice (“DOJ”) enacted a “Corporate Leniency Policy”—which the DOJ describes as an “amnesty or corporate immunity program”—which grants effective immunity from criminal prosecution to corporations, as well as their directors, officers and employees, if the corporation is the first to come forward and report illegal antitrust activity and take certain other designated remedial steps.⁴⁹ Notably, the DOJ has made clear that “the grant of amnesty is certain and is not subject to the exercise of [individualized] prosecutorial discretion.”⁵⁰ Most recently, the Obama Administration has also announced broad non-enforcement guidelines related to marijuana offenses in states that have legalized various aspects of marijuana use and sale.⁵¹

By one count, at least one third of all United States presidents have issued categorical prosecutorial discretion policies of one kind or another in the criminal context.⁵² Moreover, the Supreme Court has been clear about the constitutional nature of the Executive’s “*absolute discretion* to decide whether to prosecute a [criminal] case,”⁵³ including the power to grant

⁴⁶ See discussion *supra* at notes 35-36 and accompanying text.

⁴⁷ Andrew Glass, *Carter Pardons Draft Dodgers Jan. 21, 1977*, POLITICO (January 21, 2008); Proclamation 4483--Granting pardon for violations of the Selective Service Act, August 4, 1964, to March 28, 1973 (Jan. 21, 1977), available at 42 FR 4391, 3 CFR, 1977 Comp., p. 4.

⁴⁸ Exec. Order No. 9814, 11 Fed. Reg. 14,645 (1946); U.S. Presidential Clemency Board, Report to the President (1975); Pardon Us: Systematic Presidential Pardons, 2001 WL 1750548 (Vera Inst. Just.).

⁴⁹ See Antitrust Div., U.S. Dep’t of Justice Corporate Leniency Policy, available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm>.

⁵⁰ Gary R. Spratling, Antitrust Div., U.S. Dep’t of Justice, *The Corporate Leniency Policy: Answers to Recurring Questions*, Remarks at the ABA Antitrust Section 1998 Spring Meeting (Apr. 1, 1998), available at <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

⁵¹ See Memorandum from David W. Ogden, Deputy Att’y Gen., U.S. Dep’t of Justice, to Selected U.S. Att’ys (Oct. 19, 2009), available at <http://blogs.justice.gov/main/archives/192>; Memorandum from James M. Cole, Deputy Attorney Gen., to All U.S. Attorneys (August 29, 2013), available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

⁵² *Pardon Us: Systematic Presidential Pardons*, 2001 WL 1750548 (Vera Inst. Just.).

⁵³ *Nixon v. United States*, 418 U.S. 683, 693 (1974) (citing *Confiscation Cases*, 7 Wall. 454; *Cox*, 342 F.2d at 171., *cert. denied sub nom* and *Cox v. Hauberg*, 381 U.S. 935, 85

broad categorical amnesties from criminal prosecution.⁵⁴ All of this, however, only begs the question of whether broad executive power in the criminal realm reflects a criminal exceptionalism or, rather, whether it illuminates something about the role prosecutorial discretion plays in the constitutional structure. I will return to this issue in Part II.

In the administrative arena, however, presidential policy making has, until recently, focused much more on the rule making process than on enforcement.⁵⁵ The significant use of non-enforcement policies in the administrative realm, at least outside the immigration realm discussed below, is a relatively recent phenomenon. President George W. Bush was the first to use categorical non-enforcement as a significant feature of his administrative policymaking efforts.⁵⁶

In the environmental context, President Bush sought to ramp down enforcement actions related to provisions of the Clean Air Act that imposed heightened pollution control requirements for coal-fired power plants that undergo modifications.⁵⁷ After promulgating a rule to that effect and having the rule struck down by the D.C. Circuit Court of Appeals,⁵⁸ the Bush Administration issued an internal EPA enforcement policy, which directed agency officials not to initiate enforcement actions against the category of power plants that would have been protected by the nullified rule.⁵⁹ In several other arenas, including FDA, DOL, SEC, civil rights, and voting rights, while no explicit policy was ever made public, dramatic reductions in enforcement consistent with the public political position of the administration, evince a widespread use of categorical prosecutorial discretion as a policy-making tool.⁶⁰

S.Ct. 1767, 14 L.Ed.2d 700 (1965)); *United States v. Smith*, 375 F.2d 243, 247 (5th Cir. 1967) (describing the power as “absolute” and “required in all cases”); *see also* *United States v. I.D.P.*, 102 F.3d 507, 511 (11th Cir. 1996).

⁵⁴ *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1871).

⁵⁵ Andrias, *supra* note 13, at 1055-60.

⁵⁶ Price, *supra* note 12, at 686; Andrias, *supra* note 13, at 1061; *see also* Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 807-15 (2010).

⁵⁷ Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1678-79 (2007).

⁵⁸ *New York v. EPA*, 443 F.3d 880, 890 (D.C. Cir. 2006).

⁵⁹ Andrias, *supra* note 13, at 1062-63; *see also* Joel A. Mintz, “Treading Water”: A Preliminary Assessment of EPA Enforcement During the Bush II Administration, 34 ENVTL. L. REP. 10,912, 10,918 (2004);

⁶⁰ *See* Minority Staff of H. Comm. on Gov’t Reform, Spec. Investigations Div., *Prescription for Harm: The Decline in FDA Enforcement Activity*, at i (June 2006), available at <http://oversight-archive.waxman.house.gov/documents/20060627101434-98349.pdf> (documenting 50% reduction in FDA warning letters); *U.S. Department of Justice: Information on Employment Litigation, Housing and Civil Enforcement, Voting, and Special Litigation Sections’ Enforcement Efforts from Fiscal Years 2001 through 2007*, Government Accountability Office (Oct. 2009), available at

President Obama carried forward the Bush Administration's use of categorical prosecutorial discretion policies as a policymaking tool; though, the new administration, unlike the Bush Administration, tended to announce their policies in public policy memoranda. While the recent immigration programs, discussed *infra* at Part I.C, are surely the most prominent example, President Obama's Treasury and Health and Human Services Departments (HHS) also publicly announced categorical prosecutorial discretion policies related to certain enforcement mechanisms for non-complaint insurance plans under the Affordable Care Act (ACA). ACA set a statutory deadline for insurance plans to meet certain minimum substantive coverage requirements.⁶¹ The statute empowered the HHS to initiate civil enforcement action for noncompliant plans.⁶² When individuals began having their health insurance preemptively canceled due to the looming deadline, and the President's pledge that those who like their health insurance would not have to change plans began being called into question, the Administration announced that it would, for a period, not bring any enforcement action related to certain provisions of the statutory scheme.⁶³ The President could not, of course, change the statutory deadline; however, because he viewed the implementation timeline as counter to the public interest, he used his purported enforcement discretion to categorically refuse to initiate any enforcement actions during, what he deemed, a "transitional period."⁶⁴

There is extremely limited case law evaluating the scope of prosecutorial discretion authority in the modern administrative era. The leading case, and one of the only cases, regarding the scope of prosecutorial discretion authority in the administrative context is *Heckler v. Chaney*.⁶⁵ In

<http://www.gao.gov/assets/300/297337.pdf> (documenting Bush Administration's reduction in enforcement of employment and voting rights laws); Goodwin Liu, *The Bush Administration and Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL'Y 77, 81 (2009) (same); Andrias, *supra* note 13, at 1063 (documenting Bush Administration's nonenforcement of securities and civil rights laws); *see also* Norman S. Poser, *Why the SEC Failed: Regulators Against Regulation*, 3 BROOK. J. CORP., FIN. & COM. L. 289, 309-17 (2009) (detailing the Bush Administration's SEC's enforcement failures); *see also* Andrias, *supra* note 13, at 1062 (observing that President Bush's non-enforcement policies were often not public or memorialized).

⁶¹ See 42 U.S.C. § 300gg to 300gg-21 (limiting instances in which issuers may impose preexisting condition exclusions); *id.* § 300gg note.

⁶² *Id.* § 300gg-22(a)(2), (b).

⁶³ 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>; I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013); *see also* Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (Feb. 12, 2014); Robert Pear, *Rules for Equal Coverage by Employers Remain Elusive Under Health Law*, N.Y. TIMES (Jan. 18, 2014), *available at* <http://www.nytimes.com/2014/01/19/us/rules-for-equal-coverage-by-employers-remain-elusive-under-health-law.html>.

⁶⁴ Letter from Gary Cohen *supra* note 63 at 1.

⁶⁵ *Heckler v. Chaney*, 470 U.S. 821, 823 (1985).

Heckler, the Court was called upon to review the Food and Drug Administration's ("FDA") decision not to initiate enforcement action against states for administering certain allegedly "unsafe" drugs to persons whom the state had sentenced to death by lethal injection. While the decision ultimately rested on statutory grounds, the case provides a rare glimpse into the Court's view of the historic scope and constitutional dimensions of administrative prosecutorial discretion authority. In declining to initiate such enforcement proceedings, the FDA specifically cited its "inherent discretion to decline to pursue certain enforcement matters."⁶⁶ In the course of its analysis, the Court was crystal clear regarding its view that an "agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an *agency's absolute discretion*," though the Court did recognize mechanisms by which Congress could exert some control over agency enforcement decisions.⁶⁷ The Court also noted the agency's power to set its own enforcement priorities and noted that "when an agency refuses to act it generally does not exercise its coercive power over an individual's liberty or property rights."⁶⁸ Finally, the Court specifically drew the connection between the "agency's refusal to institute proceedings" and the "decision of a prosecutor in the Executive Branch not to indict, a decision which has long been regarded as the special province of the Executive Branch."⁶⁹

In the end, however, the primary rationale for rejecting the challenge in *Heckler* was the Court's conclusion that non-enforcement decisions are generally unsuitable for judicial review.⁷⁰ In cases that have followed *Heckler* in the administrative law context, the only clear principle to be discerned from the Court's jurisprudence is the general unwillingness of courts to review agency non-enforcement decisions.⁷¹ While the case law is extremely limited, practice in the modern era evinces the pervasive role that prosecutorial discretion plays generally in all federal enforcement schemes, as well as examples of presidents carrying forward the historical use of categorical prosecutorial discretion policies in the criminal realm. Outside the immigration context, however, the use of similar policies in civil administrative arenas is a relatively recent innovation—with Presidents

⁶⁶ *Id.* at 824.

⁶⁷ *Heckler*, 470 U.S. at 831, 833 (emphasis added).

⁶⁸ *Id.* at 832 (emphasis added).

⁶⁹ *Id.* In addition, three of the four cases that the Court relies upon in *Heckler* to establish the principle that administrative non-enforcement decisions are presumptively non-reviewable involved prosecutorial discretion to decline to enforce criminal laws. *Id.* at 832 (citing *United States v. Batchelder*, 442 U.S. 114 (1979), *United States v. Nixon*, 418 U.S. 683 (1974) and *Confiscation Cases*, 7 Wall. 454, 19 L.Ed. 196 (1869)).

⁷⁰ *Id.*

⁷¹ See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007) (reaffirmed general non-reviewability of non-enforcement decisions); *Lincoln v. Vigil*, 508 U.S. 182 (1993) (same); see also *Vaca v. Sipes*, 386 U.S. 171 (1967).

Bush and Obama being the first to utilize such policies on any significant scale.

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

We consider the use of prosecutorial discretion in the immigration arena separately both because the practice in this arena stands in stark contrast to the practice in other civil administrative context and because the context is particularly important and timely given the active debate and litigation related to the DACA and DAPA programs. Similar to other administrative realms, the Court has had only limited opportunities in recent years to opine on the breadth of prosecutorial discretion authority in the context of immigration enforcement and has never articulated the constitutional limits of such authority.⁷² In regard to historical practice in the immigration arena, others have exhaustively cataloged the history of immigration prosecutorial discretion practices and a full recitation of that history is unnecessary.⁷³ A brief review is, however, important to the analysis that follows.

There are estimated to be approximately 11 million undocumented immigrants in the United States.⁷⁴ The population of lawfully present immigrants, who can also be subject to deportation proceedings,⁷⁵ is estimated to be over 13 million.⁷⁶ While appropriations for immigration enforcement operations now exceed \$18 billion annually⁷⁷—more than the combined budgets of the FBI, Drug Enforcement Administration, Secret Service, U.S. Marshals Service and Bureau of Alcohol, Tobacco, Firearms and Explosives⁷⁸—under current appropriations, DHS can deport, at most, a

⁷² *Arizona v. United States*, 132 S. Ct. 2492, 2505 (2012); *Reno v. American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999). In *American-Arab Anti-Discrimination Comm.*, the Court determined that federal courts lacked jurisdiction to hear a selective prosecution challenge from a group of immigrants facing deportation but, in the course of its analysis, did analogize prosecutorial discretion power in the criminal and immigration context and to emphasize that “exercising [] discretion for humanitarian reasons or simply for its [the Executive’s] own convenience” is the “special province of the Executive.” 525 U.S. at 484, 489. In *Arizona*, the Court struck down a state law permitting local authorities to make federal immigration arrests because it held that the state law infringed on the prosecutorial discretion that Congress had delegated to the federal agencies. 132 S. Ct. at 2505.

⁷³ See, e.g., Shoba Wadhia, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES*, (NYU Press 2015); Wadhia *supra* note 1; Cox & Rodríguez, *President and Immigration Law*, *supra* note 13; Neuman, *supra* note 13.

⁷⁴ OLC Memorandum Op. *supra* note 9, at 1.

⁷⁵ See generally, 8 U.S.C. 1227(a)(2).

⁷⁶ Office of Immigration Statistics, Department of Homeland Security, *Estimates of the Legal Permanent Resident Population in 2012*, https://www.dhs.gov/sites/default/files/publications/ois_lpr_pe_2012.pdf.

⁷⁷ MPI Report *supra* note 9.

⁷⁸ *Id.*

few hundred thousand individuals per year.⁷⁹ With almost 25 million individuals potentially subject to deportation and a capacity to target only a few hundred thousand people per year, prosecutorial discretion is, by necessity, a prominent feature of the immigration enforcement scheme.⁸⁰

Starting in 1975, the legacy Immigration and Naturalization Service (INS) and later its successor agency, the Immigration and Customs Enforcement (ICE) agency, have issued a series of prosecutorial discretion memoranda that set forth basic guidelines for agency lawyers and agents to follow in making prosecutorial discretion determinations.⁸¹ The memoranda direct agents to consider various equitable factors.⁸² The more recent memoranda, however, also set forth enforcement priorities—detailing not only the humanitarian factors to be considered in deciding when to forego enforcement but also the aggravating factors to be considered in deciding who to target for enforcement.⁸³ The current policy targets primarily individuals who have criminal convictions, including in some cases a single misdemeanor conviction, and individuals who have recently unlawfully entered the United States.⁸⁴

The current priorities memorandum was announced in November 2014 on the same day that the Department announced its DAPA program. However, the priorities memorandum's targeting criteria were only a modest

⁷⁹ OLC Memorandum *supra* note 9, at 1.

⁸⁰ See Cox & Rodríguez, *President and Immigration Law*, *supra* note 13, at 463.

⁸¹ Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't Homeland Sec., to Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf't, et al. 3-4 (Nov. 20, 2014) (hereinafter "Johnson Priorities Memorandum"), available at http://www.dhs.gov/sites/default/files/publications/14_1120_memo_prosecutorial_discretion.pdf; Memorandum from John Morton, Dir., U.S. Immigration & Customs Enforcement, to All Field Office Dirs., All Special Agents in Charge & All Chief Counsel 2 (June 17, 2011) (hereinafter "Morton Priorities Memorandum"), available at <http://www.ice.gov/doclib/securecommunities/pdf/prosecutorial-discretion-memo.pdf>; Julie L. Myers, Assistant Secretary of Homeland Security for Immigration and Customs Enforcement, on Prosecutorial and Custody Discretion (Nov. 7, 2007), available at <http://www.bibdaily.com/pdfs/AS%20MYERS%20MEMO%20RE%20PROSECUTORIAL%20AND%20CUSTODY%20DISCRETION.pdf> (pertaining to nursing mothers); Memorandum from Bo Cooper, General Counsel, U.S. Immigration and Naturalization Service, on INS Exercise of Prosecutorial Discretion, available at INS and DOJ Legal Opinions §99-5 MB 2006; Memorandum from William J. Howard, Principal Legal Advisor for U.S. ICE, on Prosecutorial Discretion 2 (October 24, 2005), available at www.shusterman.com/pdf/ice-pd-memo1005.pdf; Memorandum from Doris Meissner, Commissioner of Immigration and Naturalization Service, on Exercising Prosecutorial Discretion (Nov. 17, 2000), available at <http://drop.io/iceprosecutorialdiscretion>; Memorandum from Paul W. Virtue, Acting Executive Associate Commissioner, Immigration and Naturalization Service, on INS Cancellation of Operations Instructions (June 27, 1997), available at 2 Bender's Immigr. Bull. 867; (Legacy) Immigration and Naturalization Service, Operations Instructions, O.I. § 103.1(a)(1)(ii) (1975).

⁸² See *id.*

⁸³ See, e.g., *id.*; Morton Priorities Memorandum *supra* note 81.

⁸⁴ Johnson Priorities Memorandum *supra* note 81.

revision to publicly announced priorities that had been in place since 2011.⁸⁵ Under both the new and old priorities, the vast majority of the millions of potentially removable immigrants in the United States were designated as non-priorities for removal. Thus a sweeping public prosecutorial discretion policy had been in place for several years at the time of the DAPA announcement. The policy was plainly based upon the administration's normative judgments about the national interests served or not served in deporting various categories of immigration. However, notwithstanding the breadth of these policies and the Executive's policy making judgment in announcing these policies, neither prompted lawsuits or even calls that the President had exceeded the boundaries of his prosecutorial discretion authority.

It was the announcements of the President's DACA and DAPA programs that have prompted some to call into question the boundaries of the President's prosecutorial discretion policies. The DACA program, which was originally announced on June 15, 2012, dictated that any person who came to the United States before the age of sixteen, had been present in the United States for least five years on the date of the announcement, was engaged in or had completed certain educational programs or military service and who was under the age of thirty could be "considered for an exercise of prosecutorial discretion" if that person had not committed certain criminal offenses.⁸⁶ The memorandum announcing the program stated that decisions about prosecutorial discretion under the DACA program are to be made on a "case-by-case basis" and that the memorandum does not ensure that all persons meeting the *prima facie* eligibility criteria will be granted prosecutorial discretion.⁸⁷ When discretion was exercised under the program, however, the memorandum made clear that individuals would be granted "deferred action status" and that they could apply for work authorization.

Deferred action, along with a variety of other non-statutory formal prosecutorial discretion designations, has been utilized by federal immigration authorities for decades and had been recognized by both the Supreme Court and by Congress.⁸⁸ As the DACA memorandum makes explicit, deferred action is not an immigration status and does not create any substantive right or any pathway to status or to citizenship. Rather, it is a formal statement from the Department that it has, for a temporary period, decided to forego the initiation of any enforcement actions.⁸⁹ The recipients of DACA are young people deemed worthy of mercy since they lacked

⁸⁵ Compare *id.* with Morton Priorities Memorandum *supra* note 81.

⁸⁶ DACA Memorandum *supra* note 2.

⁸⁷ *Id.*

⁸⁸ *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (recognizing "deferred action" status); 8 U.S.C. § 1154(a)(1)(D)(i)(II), (IV) (same).

⁸⁹ DACA Memorandum *supra* note 2, at 3.

culpability in their own unauthorized entry into the United States. According to the Administration, DACA also increased enforcement efficiency by shrinking the haystack of unauthorized immigrants, thus allowing ICE to focus on its intended targets. Finally, in the Administration's view, DACA recipients contribute more to society and pose a lesser danger than the individuals identified as targets by the Department's priorities memorandum.⁹⁰

The DAPA program, announced on November 20, 2014, extended deferred action, on the same terms as the DACA program, to "adults who have been in this country since January 1, 2010, are the parents of U.S. citizens or lawful permanent residents, and who are otherwise not enforcement priorities."⁹¹ While the DACA program was significant, and benefited hundreds of thousands of young people, the DAPA program was vast by comparison.⁹² It was estimated that over five million of the nation's estimated eleven million undocumented individuals could qualify for DAPA.⁹³ Again, the Administration laid bare its justification from the program, explaining that the people who would benefit are "hard-working people" who do not pose a danger to public safety and bringing these people "out of the shadows" would, the Administration claimed, be in the country's "security and economic interests."⁹⁴

Notably, the reach of the highly controversial DAPA and DACA programs was dramatically smaller than the reach of the relatively uncontroversial enforcement priorities memoranda that had been in place for years.⁹⁵ Thus the size of the program alone cannot explain the outcry. Three factors have been identified at various times to distinguish the exercise of prosecutorial discretion under the priorities memoranda from the exercise of such discretion under the DACA and DAPA program. First, under the latter and not the former, individuals are given a formal designation noting they have been granted prosecutorial discretion. Thus, the theory goes, the programs may undermine any incentive that the ongoing risk of enforcement may create for individuals to "self-deport." Second, the

⁹⁰ *Id.* at 1-2; OLC Memorandum Op. *supra* note 9.

⁹¹ DAPA Memorandum, *supra* note 2 at 3. The memorandum also relaxed certain requirement of the original DACA program; expanding eligibility to that program as well.

⁹² Roberto G. Gonzalez and Angie M. Bautista-Chavez, *Two Years and Counting: Assessing the Growing Power of DACA*, AMERICAN IMMIGRATION COUNCIL (June 2014).

⁹³ White House Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), available at <https://www.whitehouse.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action>.

⁹⁴ DAPA Memorandum, *supra* note 2, at 3.

⁹⁵ Marc R. Rosenblum, *Understanding the Potential Impact of Executive Action on Immigration Enforcement*, MIGRATION POLICY INSTITUTE, 1-3 (July 2015) (estimating that 11.6 million immigrants are protected by the Johnson Priorities Memorandum *supra* note 81 and that 10 million immigrants were protected by the Morton Priorities Memorandum *supra* note 81 but that only half as many, approximately 5 million immigrants, are protected by the DAPA and DACA programs).

DACA and DAPA programs, unlike prosecutorial discretion under the priorities memorandum, carry with them a significant affirmative benefit: work authorization. Finally, unlike the priorities memoranda, the context of the DACA and DAPA programs create, at minimum, the impression that the President was using prosecutorial discretion to achieve an end run around Congress.

As to the first distinction, putting aside the well documented skepticism of the “self-deportation” theory, the presence of a formal grant of prosecutorial discretion in the DACA and DAPA programs does not set the programs apart from a wide array of other broad non-statutory prosecutorial discretion programs that have been a staple of immigration enforcement schemes for decades. Several mechanisms have been developed that allow the Executive to exercise an enormous amount of unilateral power to enact formal categorical prosecutorial discretion designations.⁹⁶ Under a program called Extended Voluntary Departure (EVD), similar in effect to deferred action, Presidents Kennedy, Johnson, Nixon, Ford, and Reagan all temporarily halted deportation efforts against certain nationalities at various times.⁹⁷ Similarly, in 1990, President Bush used his discretion to defer the deportations of Chinese immigrants through an executive order.⁹⁸ In perhaps the most analogous pre-cursor to DACA and DAPA, in 1990, the INS implemented the “Family Fairness Program”; granting EVD to approximately 1.5 million immigrants who were excluded from the 1986 statutory amnesty program but whose spouses or parents were beneficiaries.⁹⁹ There have also been broad deferred action programs implemented to benefit certain victims of domestic violence, certain crime victims and victims of human trafficking, foreign students affected by Hurricane Katrina, and certain widows and widowers of U.S. citizens.¹⁰⁰ There is simply nothing novel about a broad non-statutory formal prosecutorial discretion program in the immigration context.

The second distinction—that the programs do more than exercise prosecutorial discretion but also grant an affirmative benefit—certainly

⁹⁶ Some of the text below explaining examples of such programs is drawn from Petition for Rule Making Submitted to the Department of Homeland Security by the National Day Labor Organizing Network, et al. (Feb. 4, 2014), *available at* <http://www.notonemoredeportation.com/resources/rulemaking/>, which was co-authored by the author of this article.

⁹⁷ Jeffrey L. Romig, *Salvadoran Illegal Aliens: A Struggle to Obtain Refuge in the United States*, 47 U. PITT. L. REV. 295, 310 n.92. (1985); Lynda J. Oswald, *Extended Voluntary departure: Limiting the Attorney General’s Discretion in Immigration Matters*, 85 MICH. L. REV. 152, 157-160 (1968).

⁹⁸ Exec. Order No. 12711, 55 Fed. Reg. 13,897 (April 11, 1990).

⁹⁹ Memorandum for Regional Commissioners, INS, from Gene McNary, Commissioner, INS, Re: Family Fairness: Guidelines for Voluntary Departure under 8 CFR 242.5 for the Ineligible Spouses and Children of Legalized Aliens (Feb. 2, 1990) (“Family Fairness Memorandum”); *see also* Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (“IRCA”).

¹⁰⁰ OLC Memorandum Op. *supra* note 9, at.15-17 (collecting citations).

takes these programs out of the traditional exercise of prosecutorial discretion. However, notwithstanding the rhetoric around this issue, the Administration has never justified its granting of work authorization to DACA and DAPA recipients on its constitutional prosecutorial discretion powers. Rather, the Administration is able to grant these individuals work authorization only because Congress has explicitly empowered the Attorney General to determine which classes of immigrants are eligible for such authorization.¹⁰¹ Affirmative benefits, such as work authorization, cannot be and have not been justified by the President's constitutional prosecutorial discretion authority.

It is the third justification that truly distinguishes the DACA and DAPA programs from the exercise of prosecutorial discretion under the priorities memoranda. DACA was only announced after the President tried and failed to convince Congress to pass the Dream Act, which would have granted residency and a path to citizenship to the class of people now eligible for DACA. The DAPA program was only announced after the President tried and failed to convince Congress to pass comprehensive immigration reform, which would have granted residency and a path to citizenship for a similar swath of the undocumented population as those who benefited from the DAPA program. These dynamics create, at minimum, the appearance that the President is attempting to use his prosecutorial discretion power to make an end run around Congress. Notably, neither program bestows the benefits—residency and a path to citizenship—that the contemplated legislation would have provided. The optics of the situation are, however, undeniable. Interestingly, the Office of Legal Counsel in its evaluation of the President's power to enact the DAPA and DACA programs specifically relied upon the fact that the programs are “consonant with congressional policy.”¹⁰² But assuming *arguendo* that the DAPA and DACA programs do create some dissonance with the statutory scheme, the familiar *Youngstown* framework certainly requires a serious analysis of the nature of the President's prosecutorial discretion power in the face of active congressional resistance.¹⁰³ I will return to this issue in Part III.C.

Thus, the history demonstrates that prosecutorial discretion, in both the criminal and civil contexts, have been an established and virtually unquestioned constitutional power of the President from the earliest days of the nation. In the criminal context, broad categorical prosecutorial discretion policies have been enacted by presidents and affirmed by the Supreme Court throughout the nation's history based. Notably, in the

¹⁰¹ 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14).

¹⁰² OLC Memorandum Op. *supra* note 9, 25-28. *But see* Cox & Rodríguez, *Redux*, *supra* note 13.

¹⁰³ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952).

administrative context, immigration stands alone as the only administrative arena where such programs have been a regular feature of the enforcement landscape for decades—ever since the scale of the government’s deportation programs became a significant feature of federal law enforcement.¹⁰⁴ In other administrative contexts, the use of categorical non-enforcement as a policymaking tool is a relatively recent phenomenon.

PART II

THE CONSTITUTIONAL FRAMEWORK FOR PROSECUTORIAL DISCRETION POWER AND THE ROLE OF LIBERTY

A central tension in our constitutional framework is the purposefully designed struggle for power between the political branches of the federal government. As Madison explained it, it is “essential to the preservation of liberty” that “[a]mbition must be made to counteract ambition.”¹⁰⁵ Through this lens, the exercise of prosecutorial discretion can be understood, in part, as an important counter-majoritarian structural check on the power of the legislature. Prosecutorial discretion can play a critical role in mitigating the dangers of overly punitive legislative schemes that target minority communities in ways that are counter to justice or to the public interest.¹⁰⁶

Taken to its extreme, however, prosecutorial discretion could place too great a thumb on the scale of Presidential power, fundamentally undermining Congress’ primary policy-making role. In the modern administrative state, executive branch enforcement is a necessary and critical component of a vast array of federal policy implementation. Unchecked, a president could use purported prosecutorial discretion authority to unilaterally halt or substantially undermine agency enforcement actions across a broad swath of subject areas. This could include not only Department of Homeland Security’s enforcement of immigration laws, but also the Securities and Exchange Commission’s enforcement of securities laws, the Internal Revenue Service’s enforcement of tax laws, the Environmental Protection Agency’s enforcement of environmental laws, the Department of Justice’s enforcement of civil rights laws, the Department of Labor’s enforcement of labor laws, and the list goes on. Accordingly, a

¹⁰⁴ Over the last decade the annual number of deportations has hovered between 300,000-400,000 deportations annually. Department of Homeland Security, *Yearbook of Immigration Statistics: 2012 Enforcement Actions*, Table 39, available at <http://www.dhs.gov/publication/yearbook-immigration-statistics-2012-enforcement-actions>. Prior to 1992, however, the total annual number of deportations never exceeded 40,000 and often dipped below 10,000. *Id.*

¹⁰⁵ THE FEDERALIST NO. 51, at 321-322 (James Madison) (Clinton Rossiter ed., 1961).

¹⁰⁶ *Id.* (“It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. . . . If a majority be united by a common interest, the rights of the minority will be insecure.”).

limiting principle to the President's prosecutorial discretion power is necessary.

Some have leapt from this sound observation to the unwarranted conclusion that the President should not ever be permitted to exercise enforcement discretion based on an independent assessment of the wisdom and public interest in enforcement.¹⁰⁷ Indeed, among those who have grappled with the constitutional question, a few have taken the extreme position that the Take Care Clause requires full enforcement and does not permit of executive non-enforcement discretion.¹⁰⁸ The majority of commentators, however, agree that the executive power includes, at minimum, the ability to decline to prosecute violations of federal law on a case-by-case basis relying upon judgments about, *inter alia*, efficient allocation of limited resources and an assessment of the strength of available evidence.¹⁰⁹ Some recent commentators, however, question the authority of the Executive to rely upon his or her own normative judgment regarding the public interest in prosecution and to institute categorical prosecutorial discretion policies.¹¹⁰ The attraction of these limits is clear; categorical prosecutorial discretion policies most clearly raise the specter of the President effectively usurping Congress' primary policy-making function.¹¹¹ However, upon closer scrutiny, neither limit is workable in all circumstances.

It is not practically viable, desirable or legally defensible to excise independent normative judgments from prosecutorial discretion determinations.¹¹² To be sure, normative judgments regarding the wisdom, equity or public interest in enforcing a law can overlap significantly with the judgment made by the legislature in framing and enacting the law. However, the idea that the Executive's independent assessment of the public interest in prosecution can or should be eliminated is at sharp odds with both contemporary and early practice and cannot be supported by the legal foundations of prosecutorial discretion authority.¹¹³ In deciding whether to initiate deportation proceedings, for example, few would take issue with a prosecutor's consideration of the impact of deportation on U.S. citizen

¹⁰⁷ See, e.g., Delahunty & Yoo, *supra* note 12, at 784-85; Love & Garg, *supra* note 17, at 1206.

¹⁰⁸ See, e.g., Delahunty & Yoo, *supra* note 12.

¹⁰⁹ See, e.g., Andrias, *supra* note 13; Delahunty & Yoo, *supra* note 12; Love & Garg, *supra* note 17; Price *supra* note 12.

¹¹⁰ See, e.g., Delahunty & Yoo, *supra* note 12; Love & Garg, *supra* note 17, at 1212; Price *supra* note 12.

¹¹¹ Madison, *supra* note 105 ("In republican government, the legislative authority necessarily predominates.").

¹¹² See Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not to Prosecute*, 110 COLUM. L. REV. 1655, 1662 (2010) (arguing the equitable prosecutorial discretion decisions are inevitable and desirable).

¹¹³ See discussion *supra* at Part I.

children of a single parent. Likewise, when prosecutors decide to forego enforcement of certain marijuana prosecutions to preserve resources for more prosecutions of methamphetamines cases—presumably because they see latter as more dangerous to the public than the former—they exercise exactly the type of public interest assessment that the public expects from prosecutors.

Similarly, the idea that prosecutorial discretion determinations must be made solely on a case-by-case basis is in significant tension with the practice of prosecutorial discretion throughout history.¹¹⁴ Moreover, a prohibition on categorical prosecutorial discretion policies would significantly undermine the institutional design goals of transparency, political accountability, and uniformity. As a society, we expect top prosecutors to establish priorities and guidelines that control the discretion of line level prosecutors.¹¹⁵ Only through clear, transparent public policies can we achieve consistent enforcement and political accountability.

Thus, the Executive's normative judgment and her power to enact categorical policies cannot and should not be excised from prosecutorial discretion decisions. Below I explore an alternative limiting principle based upon the nature of the enforcement proceedings. Specifically, I propose that those proceedings that can result in a person being taken into the physical custody of the government and deprived of their freedom of movement, are the areas where the President enjoys the greatest power to decline to initiate enforcement proceedings. In Part III.C, I consider whether deportation proceedings fit within this category.¹¹⁶

With the Supreme Court's jurisprudence in this realm significantly underdeveloped, it does little to help us evaluate the constitutional boundaries of prosecutorial discretion power beyond the criminal realm.¹¹⁷ In the absence of useful guidance from the courts, I return to the source to evaluate the limiting principle I propose. I begin with an examination of the constitutional textual sources of prosecutorial discretion authority and then attempt to contextualize the various provisions through a structural analysis of the role of liberty protection and prosecutorial discretion authority in the constitutional scheme.

¹¹⁴ See discussion *supra* at 35-36, 46-52, 96-100 and accompanying text.

¹¹⁵ Even those that generally argue against policy based prosecutorial discretion concede that "[s]ome degree of top-down direction . . . seems appropriate." Price, *supra* note 12, at 758.

¹¹⁶ See discussion *infra* at 246-250 and accompanying text.

¹¹⁷ See discussion *supra* at note 53-54, 65-83 and accompanying text.

A. *Textual Sources of Prosecutorial Discretion Authority*

The words “prosecutorial discretion” do not appear in the Constitution and no single provision in the constitution can be identified as the sole source of such power. Instead, the power emanates from a variety of provisions, including, Article II’s Take Care Clause,¹¹⁸ Executive Vesting Clause,¹¹⁹ and Pardon Clause.¹²⁰ An analysis of each of these provisions is therefore a useful starting point for the constitutional inquiry into the breadth of prosecutorial discretion power.

1. The Take Care Clause

The Constitution states that the President “shall take Care that the Laws be faithfully executed.”¹²¹ This clause is generally understood to stand for the most basic premise taught in grade school civics classes that, while it is Congress’ function to make the law and the Supreme Court’s function to interpret that law, it is the President’s function to enforce the law. That is the constitutional system of separation of powers at its most basic level.

It has been observed by scholars and courts alike that the language of the Take Care Clause reads more naturally as a command than a grant of power and thus it is counterintuitive to read the provision as a broad source of prosecutorial discretion authority.¹²² However, the Take Care Clause is nevertheless the provision most commonly cited by courts and scholars as a source of the President’s power to exercise prosecutorial discretion.¹²³ As the Supreme Court explained in *Heckler*, “an agency’s determination of when not to bring an enforcement action also falls within 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.”¹²⁴

In *Buckley v. Valeo*, the Court had the opportunity to opine on the connection between the Take Care Clause and prosecutorial discretion authority in evaluating a wide-ranging challenge to the Federal Election

¹¹⁸ U.S. CONST., art. II, § 3.

¹¹⁹ U.S. CONST., art. II, § 1.

¹²⁰ U.S. CONST., art. II, § 2; *see generally*, *In re Aiken Cnty.*, 725 F.3d 255, 262 (D.C. Cir. 2013) (citing all three clauses as sources of prosecutorial discretion authority).

¹²¹ U.S. CONST., art. II, § 3.

¹²² *See, e.g.*, *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 613 (1838); Cheh, *supra* note 14, at 282; WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, 147-50 (2d ed. 1829); Delahunty & Yoo, *supra* note 12, at 799.

¹²³ *See, e.g.*, *Heckler*, 470 U.S. at 832; *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976); Price *supra* note 12, at 697-98; Andrias, *supra* note 13, at 1052-53; *see also The Jewels of the Princess of Orange*, 2 Op. Att’y Gen. 482 (1831).

¹²⁴ *Heckler*, 470 U.S. at 832 (internal quotation marks omitted).

Campaign Act.¹²⁵ While the case is most well known as part of the Court's jurisprudence on campaign finance law, one challenged provision of the Act related to the enforcement authority of the Federal Election Commission.¹²⁶ A majority of the Commission's members were appointed by Congress; however, the statute purported to authorize the Commission to initiate civil enforcement proceedings and to require the Attorney General to initiate criminal enforcement proceedings—both traditional executive functions.¹²⁷ Likewise “the decision *not* to seek judicial relief [] rest[ed] solely with the Commission.”¹²⁸ The Court held that the delegation of this executive enforcement discretion—including the power to *decline* to initiate proceedings—to a congressionally controlled commission was impermissible; the Court explained that “it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed.’”¹²⁹

The history surrounding the drafting of the Take Care Clause adds some limited additional guidance to identifying the constitutional limiting principle I seek.¹³⁰ The earliest iteration of the Take Care Clause can be found in The Virginia Plan authored by James Madison at the inception of the Constitutional Convention. Therein, Madison described an “Executive” with the “*power* to carry into effect the national laws.”¹³¹ A later draft of the clause introduced at the Convention stated that “It shall be [the Executive’s] *duty* to provide for the due & faithful exec--of the laws.”¹³² The wording was thereafter refined by the Committees and Detail and Style, which arrived at the final text.¹³³ While there is no clear explanation for the transition from the “power” construction originally proposed by Madison to the “duty” construction in the final text, one of the authors of the revised duty language, future Supreme Court justice James Wilson, was clear in his vision that the clause was intended to impose a limit on presidential power. He explained that under the clause, the President has “authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established.”¹³⁴

¹²⁵ *Buckley*, 424 U.S. 1.

¹²⁶ *Id.* at 109-42.

¹²⁷ *Id.* at 111-12.

¹²⁸ *Id.* (emphasis added).

¹²⁹ *Id.* at 138 (quoting U.S. CONST., art. II, § 3).

¹³⁰ For an excellent recitation of the history of the Take Care Clause and its relation to the English suspension and dispensing powers see Price *supra* note 12, at 692-94.

¹³¹ Virginia Plan, § 9 (1787) (emphasis added).

¹³² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 171 (Max Farrand ed., 1911) (emphasis added).

¹³³ See Delahunty & Yoo, *supra* note 12, at 802 (quoting 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 185, 597, 600 (Max Farrand ed., 1911)).

¹³⁴ 2 JAMES WILSON, LECTURES ON LAW PART 2, in *Collected Works of James Wilson* 829, 878 (Kermit L. Hall & Mark David Hall eds., 2007); see also Delahunty & Yoo, *supra* note

Thus, while the Take Care Clause is generally understood as a source of prosecutorial discretion power, the text, jurisprudence and the framing history do little to define the boundaries of that power. It is clear that the clause both empowers the President to exercise enforcement discretion but also imposes an obligation to see that laws, as a general matter, are executed consistent with Congress' dictates. What the text, jurisprudence and framing history of the clause tell us is that the appropriate constitutional limiting principle must take full account of both the power the clause bestows on the President regarding enforcement discretion and the limit that the clause imposes on the President to prevent usurpation of the congressional function.

2. The Executive Vesting Clause

The very first sentence of Article II of the U.S. Constitution declares that "[t]he executive Power shall be vested in a President of the United States of America."¹³⁵ However, the Constitution provides no precise definition of the executive power. Nevertheless, like the Take Care Clause, the Executive Vesting Clause has also been cited as a source of the President's authority to exercise enforcement discretion.¹³⁶

Courts have had the opportunity to expound on the nature of the executive power to enforce the laws in situations where Congress has attempted to insert itself into enforcement functions or vest enforcement functions in an entity outside of the control of the President.¹³⁷ In *Morrison v. Olson*, the Court considered a challenge to the enforcement authority of an independent counsel appointed pursuant to the provisions of the Ethics and Government Act.¹³⁸ Under the Act, the Attorney General, and through her, the President, had control over the decision to seek the appointment of an independent counsel, the scope of his appointment, and his removal for good cause. However, once appointed, the independent counsel, exercised a significant autonomy in the exercise of prosecutorial discretion.¹³⁹ The question thus arose whether, in depriving the President of full control over prosecutorial discretion decisions, the Act "violate[d] the principle of separation of powers by unduly interfering with the role of the Executive Branch."¹⁴⁰ Ultimately, the Court held that because Congress was not assuming for itself control over prosecutorial discretion and because the

12, at 802 (reciting the history of the drafting of the clause); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 66-65 (1994) (same).

¹³⁵ U.S. CONST., art. II, § 1.

¹³⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 120-43 (1976); *Morrison v. Olson*, 487 U.S. 654 (1988); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 695 (1952).

¹³⁷ See, e.g., *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); *Morrison*, 487 U.S. 654 (1988); *Buckley*, 424 U.S. at 138-39 (1976).

¹³⁸ *Morrison*, 487 U.S. 654.

¹³⁹ *Id.* at 662-63.

¹⁴⁰ *Id.* at 693.

President, through the Attorney General, exercised a significant “degree of control over the power to initiate an investigation by the independent counsel,” the Act did not impermissibly divest the President of his executive power.¹⁴¹ *Morrison* is important for our inquiry, however, because the Court was clear in its vision that prosecutorial discretion authority falls squarely within the executive power.¹⁴² Justice Scalia, made this point explicitly in his dissent, though he pointed out that he was in agreement with the majority on this point. In evaluating the scope of the “executive power” specifically in reference to the Executive Vesting Clause, he explained that a core component of that power is “prosecutorial discretion,” which he described as “the balancing of various legal, practical, and political considerations.”¹⁴³

Similarly in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, the Court considered a provision of the Sarbanes–Oxley Act of 2002,¹⁴⁴ which vested certain prosecutorial discretion functions in a board responsible for creating and enforcing rules for the accounting industry.¹⁴⁵ The board was a “nonprofit corporation,” with members who were not considered Government officers or employees.¹⁴⁶ Because the board members could not be removed by the President, or even by anyone directly accountable to the President, the Court held the Act impermissibly infringed on the President’s constitutional enforcement discretion and was thus “contrary to Article II’s vesting of the executive power in the President.”¹⁴⁷

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

3. The Pardon Clause

The Pardon Clause states that the President “shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”¹⁴⁸ A “pardon” is generally understood to excuse an offender’s crime, while a “reprieve” delays or mitigates the

¹⁴¹ *Id.* at 695-96.

¹⁴² *Morrison*, 487 U.S. at 691.

¹⁴³ *Id.* at 708 (Scalia, J. dissenting).

¹⁴⁴ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745. (codified as amended in scattered sections of 15 U.S.C. and 18 U.S.C.).

¹⁴⁵ *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010).

¹⁴⁶ *Id.* at 484.

¹⁴⁷ *Id.* at 492, 496.

¹⁴⁸ U.S. CONST., art II, § 2.

punishment for a criminal offense.¹⁴⁹ A pardon is a greater benefit than a grant of prosecutorial discretion; the former is permanent and relieves an offender of punishment and the future threat thereof, while the latter is wholly revocable. Nevertheless, the greater pardon power has been construed to include the lesser prosecutorial discretion power.¹⁵⁰

Courts and scholars have generally taken an expansive view of the President's pardon power.¹⁵¹ Under the Pardon Clause courts have held that the President has the power to act "at any time after [a crime's] commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment."¹⁵² The pardon power has been interpreted to include the power to commute sentences and to impose conditions on a pardon or commutation, even when such conditions are not contemplated by statute.¹⁵³ The Court has also been clear that the pardon power "cannot be modified, abridged, or diminished by the Congress."¹⁵⁴ The broad pardon power is both reflective of and a source of the absolute prosecutorial discretion afforded to the President in criminal cases.¹⁵⁵

Notably for our purposes, the pardon power has been consistently interpreted since the early days of the union to include the power to grant broad categorical amnesties from prosecution upon the President's unilateral determination that such amnesties were in the public interest.¹⁵⁶ The Supreme Court has been consistent and apparently untroubled by the extension of the pardon power to categorical amnesties.¹⁵⁷ Scholars have likewise recognized that the pardon power encompasses the power to grant broad amnesties.¹⁵⁸ The power is far from theoretical. As discussed *supra* at Part I, it has been exercised repeatedly since the early days of the Union

¹⁴⁹ Price *supra* note 12, at 698.

¹⁵⁰ See *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1866); *In re Aiken Cnty.*, 725 F.3d at 265; *The Jewels of the Princess of Orange*, 2 Op. Att'y Gen. 482, 485-86 (1831); Cheh, *supra* note 14, at 282.

¹⁵¹ See, e.g., Price *supra* note 12, at 698; Kathleen Dean Moore, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST, 217 (1989); Duker, *supra* note 45 at 535.

¹⁵² See *Ex Parte Garland*, 71 U.S. at 380.

¹⁵³ *Schick v. Reed*, 419 U.S. 256, 264 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1855).

¹⁵⁴ *Schick*, 419 U.S. at 266.

¹⁵⁵ *Nixon*, 418 U.S. at 693; see also *Cox*, 342 F.2d at 171, *cert. denied sub nom* and *Cox v. Hauberg*, 381 U.S. 935, 85 S.Ct. 1767, 14 L.Ed.2d 700 (1965); *United States v. Smith*, 375 F.2d 243, 247 (5th Cir. 1967).

¹⁵⁶ John M. Mathews, THE AMERICAN CONSTITUTIONAL SYSTEM 168 (1st ed. 1932); Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 641 (Feb. 2001).

¹⁵⁷ See, e.g., *Knote v. United States*, 95 U.S. 149, 153 (1877); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 156 (1871); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871).

¹⁵⁸ See, e.g., Duker, *supra* note 45 at 519; Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 577 (1991); Moore, *supra* note 151, at 5.

and into modern times by some of our nation's most iconic presidents.¹⁵⁹ But for the criminal designation, it is hard to find a distinction between the power asserted by these presidents and the power asserted by President Obama through his creation of the DACA and DAPA programs. They all involve a categorical policy decision not to enforce properly enacted statutes against broad classes of offenders because of the presidents' normative judgments regarding the public interest, or lack thereof, in such prosecutions.

The criminal distinction is potentially critical insofar as the amnesties in the criminal context have been justified by the pardon power, which has generally been viewed as extending only to criminal matters. However, nothing in the plain language of the clause limits pardons to the criminal context. Rather, the pardon power extends to "Offences against the United States."¹⁶⁰ Despite the popular conception that the pardon power applies only to criminal matters, the limited authority available interpreting the phrase "offenses against the United States" suggests some applications beyond the criminal context.

While the Supreme Court has frequently remarked in *dicta* that the pardon power pertains to criminal proceedings,¹⁶¹ only twice has it specifically considered the application of the power beyond the criminal context, each time reading the clause to reach beyond its traditional criminal boundaries.¹⁶² In *Ex parte Grossman*, the Supreme Court was confronted with the question of whether a presidential pardon could operate to relieve an individual of incarceration ordered by a court pursuant to a contempt finding.¹⁶³ The district court had issued an injunction against the petitioner prohibiting him from selling alcohol in violation of federal law. Upon violation of that order, the court held the petitioner in contempt and ordered him imprisoned for a period of one year and ordered him to pay a fine of \$1000. Thereafter, the President issued a pardon commuting the sentence to the fine alone, which was paid. Nevertheless, the district court ordered the petitioner remanded to serve the period of incarceration on the theory that the pardon power did not extend to contempt findings because "offenses," as used in the pardon clause, only extends to "crimes and misdemeanors."¹⁶⁴

The Supreme Court held that the President was acting within his powers under the pardon clause. The Court specifically held that "the term 'offense'" as used in the pardon clause is "more comprehensive . . . than are

¹⁵⁹ See discussion *supra* at notes 35-36, 46-52, 96-100 and accompanying text..

¹⁶⁰ U.S. CONST., art II, § 2.

¹⁶¹ See, e.g., *Schick v. Reed*, 419 U.S. 256, 260 (1974); *United States v. Wilson*, 32 U.S. 150 (1833).

¹⁶² *Ex parte Grossman*, 267 U.S. 87 (1925); *The Laura*, 114 U.S. 411, 413-14 (1885).

¹⁶³ 267 U.S. 87 (1925).

¹⁶⁴ *Id.* at 108

the terms ‘crimes’ and ‘criminal prosecutions.’”¹⁶⁵ The contempt order in *Grossman* was technically classified as “criminal” rather than “civil” contempt but the Court was clear that it was not criminal in the sense of the Fifth and Six Amendments because no right to jury attached, nor other constitutional criminal procedure protection.¹⁶⁶ The civil versus criminal distinction in the contempt context rested on the question of whether the penalty imposed was intended to vindicate the rights of the state, the dignity of the court so to speak, or the rights of a private party. The former were designated as criminal contempt and the latter as civil contempt.

Critical to the Court’s analysis was its holding that the scope of the pardon power was co-extensive with the scope of the “king’s prerogative” at the time of the framing.¹⁶⁷ The Court observed that the pardon power in England, referred to as the “king’s prerogative,” had extended to contempt orders that sought to vindicate wrongs against the state, but not to contempt orders aimed at delivering justice and restitution to private individuals.¹⁶⁸ Thus, the reach of the pardon power, the Court held, turned not on the criminal designation but on whether the offense was properly considered an offense against the state rather than a dispute between private parties.¹⁶⁹ This holding comports with authoritative accounts of the way the colonial legislatures, like the English Parliament, at the time of the framing, did not make a sharp distinction between civil and criminal proceedings.¹⁷⁰ The fact that the criminal-civil divide was not well established at the timing of the framing helps explain why the pardon power was not defined by reference to that distinction. The pardon power was limited not by the criminal designation but by the principle that the Executive had full discretion to relieve an individual of penalties for offenses against the state but had no power to pardon individuals as a mechanism to interfere with disputes between private parties.¹⁷¹ In its analysis, the Court explicitly recognized that such pardons, even for offenses against the state, can infringe on the

¹⁶⁵ *Id.* at 117-18 (citing *Schick v. United States*, 195 U.S. 65 (1904)).

¹⁶⁶ *Id.*

¹⁶⁷ *Grossman*, 267 U.S. at 109 (1925) (quoting *United States v. Wilson*, 7 Pet. 150, 160 [8 L. Ed. 640] (Marshall, C.J.)); *see also In Ex parte Wells*, 59 U.S. 307 (1855).

¹⁶⁸ *Grossman*, 267 U.S. at 110 (1925); *see also Heckler*, 470 U.S. at 847-48 (1985) (Marshall, J. concurring); Duker, *supra* note 45 at 486.

¹⁶⁹ *Id.*; *Ex parte Wells*, 59 U.S. at 312.

¹⁷⁰ Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 511-12 (2000); *see also* Peter Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 320-28 (2008).

¹⁷¹ *See also In re Abrams*, 689 A.2d 6, 32 (D.C. 1997); Duker, *supra* note 45 at 486; *cf. Milwaukee Cty. v. M.E. White Co.*, 296 U.S. 268, 270-71 (1935) (holding outside the pardon context that a civil suit was an “offense[] against the United States”). State Courts in interpreting their constitution’s pardon powers have come to similar conclusions about the power’s extra-criminal reach. *See, e.g., In re Opinion of the Justices*, 17 N.E.2d 906, 907 (Mass. 1938); *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, 121 (1872).

power of the coordinate branches of government. Nevertheless, the Court explained that that was the balance the Constitution struck as a fail-safe protection against unjust deprivations of liberty.¹⁷²

Several decades earlier, the Supreme Court considered the case of *The Laura*, wherein a private citizen had filed suit against a steam boat operator seeking statutory damages imposed on such operators for exceeding their permissible passenger load.¹⁷³ The statute, however, made the private right of action secondary to an action in the name of the United States and also permitted the Secretary of the Treasury to, in his discretion, absolve any violating carrier of the liability imposed by statute. After the Secretary granted such absolution, the case was dismissed and the plaintiff appealed, arguing that Congress violated the Constitution by delegating to the Secretary the exclusive right of the President to issue reprieves and pardons for offenses against the United States. In its analysis, the Court accepted that pardon power would permit the President to absolve the carrier of civil liability for the cause of action held by the United States but rejected that the power was exclusive to the President, instead holding that Congress too could grant such relief.¹⁷⁴

Thus, the Supreme Court has squarely held in *Grossman* that the pardon power could be used to protect the liberty of individuals in the context of non-criminal offenses against the federal government. In *dicta*, in *Laura*, the Court again affirmed the use of pardons in non-criminal contexts. The Court, likewise, has recognized that the pardon power includes the power to grant broad amnesties based on the President's unilateral normative judgment. This jurisprudence suggests that the pardon power may extend to modern administrative proceedings that involve offenses against the state, at least insofar as the offense implicates significant liberty interests.

However, the limitation of this authority must be recognized in two respects. First, insofar as both cases arose before the New Deal and before the birth of the modern administrative state, the Court in these decisions could not have foreseen the full modern separation of powers implications of extending the power beyond the criminal realm. Though it is worth noting that *Grossman* has been cited with approval by the Supreme Court in the modern era.¹⁷⁵ Second, the dearth of case law exploring the extra-criminal boundaries of the pardon power is a byproduct of the fact that presidents have not general granted pardons in non-criminal contexts. But regardless of whether a pardon can formally operate in such proceedings,

¹⁷² *Id.* at 120-21; see also *Power of the Pres. to Remit Fines Against Defaulting Jurors.*, 4 U.S. Op. Atty. Gen. 458 (1845).

¹⁷³ *The Laura*, 114 U.S. 411 (1885).

¹⁷⁴ *Id.* at 413-14.

¹⁷⁵ *Schick v. Reed*, 419 U.S. 256, 266 (1974).

insofar as the clause is an established source of presidential authority to grant broad categorical amnesties and insofar as its operation is not strictly limited to criminal proceedings, the Pardon Clause jurisprudence can, at minimum, help inform our understanding of the nature prosecutorial discretion power in the administrative arena. Specifically, the Pardon Clause jurisprudence suggests that the President may enjoy heightened prosecutorial discretion powers beyond the criminal realm in administrative proceedings which are closely tied to the historic roots of the Pardon Clause.

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

B. *Structural Constitutional Analysis*

The conventional wisdom is sound that the President may not generally, as a result of policy disagreements with Congress, direct administrative agencies to stop enforcing statutes against broad categories of potential offenders.¹⁷⁶ But the history and jurisprudence discussed *supra* demonstrate that, in at least some limited contexts, broad categorical prosecutorial discretion policies have played an important and firmly entrenched role in federal policymaking. Below, I further explore the potential limiting principle for heightened prosecutorial discretion suggested by the Pardon Clauses. Namely, I consider the implications of cabining heightened prosecutorial discretion powers to the limited category of federal enforcement proceedings that relate to offenses against the state and that

¹⁷⁶ See Andrias, *supra* note 13, at 1113.

implicate significant liberty interests. Specifically, I evaluate this limiting principle with reference to the values that underlie the separation of powers doctrine and the structural bias against liberty deprivation built into the constitution. In addition, I consider how this limiting principle interacts with the tenet that prosecutorial discretion may not generally be used to undermine vested private rights. I also consider the implications of the limiting principle through the lens of participatory democratic theory. Finally, I investigate the practical constraints the limiting principle can impose on presidential policy making.

1. The Constitutional Bias Against Liberty Deprivation

The question of how much prosecutorial discretion a president should have is first and foremost a question of the proper separation of powers between Congress and the President. In evaluating this issue, one must start then by examining the purpose behind that separation of powers. There are few points where the intent of the framers is as clear. As Justice Jackson explained in his famous concurring opinion in *Youngstown*, “the Constitution diffuses power the better to secure liberty.”¹⁷⁷ Madison made the same point emphatically in Federalist 47, wherein he sought to articulate the justification for the separation of powers between the three branches:

The reasons on which Montesquieu grounds his maxim [of separation of powers] are a further demonstration of his meaning. ‘When the legislative and executive powers are united in the same person or body,’ says he, ‘there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.’¹⁷⁸

While political theorists generally agree that the system of separation of powers was envisioned primarily as a “prerequisite for civil liberty,”¹⁷⁹ political liberty as well as physical liberty was surely encompassed in this

¹⁷⁷ *Youngstown*, 343 U.S. at 635 (Jackson, J. concurring opinion); see also *Boumediene v. Bush*, 553 U.S. 723, 742 (2008) (“The Framers’ inherent distrust of governmental power was the driving force behind the constitutional plan that allocated powers among three independent branches. This design serves not only to make Government accountable but also to secure individual liberty.”); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (“The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.”); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536-38 & n.102 (1991); Harold J. Krent, *Separating the Strands in Separation of Powers Controversies*, 74 VA. L. REV. 1253 (1988); Lessig & Sunstein, *supra* note 134; Strauss, *supra* note 5, at 578.

¹⁷⁸ THE FEDERALIST NO. 47, at 299 (James Madison) (Clinton Rossiter ed. 1961); see also MONTESQUIEU, THE SPIRIT OF THE LAWS 163 (J.V. Prichard ed., Thomas Nugent trans., 1914) (1748).

¹⁷⁹ Brown, *supra* note 177 at 1533.

vision.¹⁸⁰ Moreover, property protection is also clearly a central value in the constitutional order.¹⁸¹ How then does the constitutional structure support the notion of enhanced discretion solely for the protection of physical liberty? First, notwithstanding the value placed on property in the Constitution generally, in the context of separation of powers theory and jurisprudence, liberty protection, more than property preservation, is the primary consideration.¹⁸² Thus, insofar as the robust prosecutorial discretion is viewed as primarily a separation of powers issue, a focus on liberty protection is warranted.

Second, while the Constitution secures many varieties of liberty, a review of the Due Process jurisprudence demonstrates that not all liberty interests receive the same level of protection. The Constitution reserves the greatest process protections for those at risk of losing their physical liberty.¹⁸³ The Supreme Court has not only extended a panoply of special procedural protections when physical liberty is at issue but has also characterized the deprivation of physical liberty as “the core of the liberty protected by the Due Process Clause,”¹⁸⁴ “the most elemental of liberty interests,”¹⁸⁵ “a massive curtailment of liberty,”¹⁸⁶ and an “interest of immense importance” and “transcending value.”¹⁸⁷ Modern jurisprudence demonstrates that creating special protections against unwarranted liberty deprivations is entirely consistent with the constitutional scheme.

As Judge Cavanaugh of the D.C. Circuit explained it,

¹⁸⁰ *Id.*

¹⁸¹ *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 (1972).

¹⁸² *Brown*, *supra* note 177 at 1533.

¹⁸³ *See e.g.* *Jones v. United States*, 463 U.S. 354, 361-62 (1983), (noting that “commitment for any purpose constitutes a significant deprivation of liberty” and requiring clear and convincing evidence of dangerousness to confine a mentally ill individual); *Lassiter v. Dep’t of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 25 (U.S. 1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”); *Vitek v. Jones*, 445 U.S. 480, 497 (1980) (requiring the qualified and independent assistance must be provided to an inmate who is threatened with involuntary transfer to a state mental hospital); *Mullaney v. Wilbur*, 421 U.S. 684, 703 (1975) (holding that state must bear the burden of proof beyond a reasonable doubt on facts that can trigger a more lengthy deprivation of physical liberty); *In re Winship*, 397 U.S. 358, 364, 368 (1970) (clarifying that requirement of proof beyond a reasonable doubt for individuals faced with criminal incarceration and extending the rule to juveniles facing physical liberty deprivations in juvenile delinquency proceedings); *In re Gault*, 387 U.S. 1, 35-42 (1967) (holding that due process requires the State to pay for representation by counsel in a civil “juvenile delinquency” proceeding that could lead to incarceration).

¹⁸⁴ *Turner v. Rogers*, 131 S. Ct. 2507, 2518 (2011) (evaluating detention pursuant to contempt proceedings).

¹⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (evaluating detention military detainees).

¹⁸⁶ *Humphrey v. Cady*, 405 U.S. 504, 509 (1972) (evaluating detention of sex offenders).

¹⁸⁷ *In re Winship*, 397 U.S. 358, 363 (1970) (evaluating detention of juvenile delinquents).

The Executive's broad prosecutorial discretion and pardon powers illustrate a key point of the Constitution's separation of powers. One of the greatest unilateral powers a President possesses under the Constitution, at least in the domestic sphere, is the power to protect individual liberty by essentially under-enforcing federal statutes regulating private behavior . . . [T]he President's prosecutorial discretion and pardon powers operate as an independent protection for individual citizens against the enforcement of oppressive laws that Congress may have passed.¹⁸⁸

Nevertheless, a robust vision of prosecutorial discretion, even confined to the liberty deprivation context, undeniably can come at a significant cost to congressional power. An organizing principle of separation of powers jurisprudence has always been to guard against the aggrandizement of one branch of government at the expense of the power of another.¹⁸⁹ However, it somewhat misses the mark to characterize the president's power to unilaterally prevent liberty deprivation through inaction as presidential aggrandizement vis-à-vis Congress. In fact, the constitutional scheme reserves precisely the same unilateral power to Congress to prevent liberty deprivations. The Due Process Clause ensures that the President may not deprive a person of liberty except pursuant to the law as set forth by Congress. Through inaction, the decision *not* to pass such a law, Congress could therefore also prevent liberty deprivation. Thus, the presidential power to prevent liberty deprivation must be viewed alongside the congressional power to prevent liberty deprivation through law making and the judicial power to prevent liberty deprivation through habeas review. Rather than aggrandizing one branch above the others, the unilateral power of each branch to prevent liberty deprivation reflects a constitutional structural bias against liberty deprivation in general.¹⁹⁰

Another concern regarding robust prosecutorial discretion power relates to the fact that our system of law-making has a bias built in toward inaction—a reality that is hard to escape in the context of today's congressional gridlock.¹⁹¹ Some have argued that, in light of the bias toward inaction, a robust vision of prosecutorial discretion power is

¹⁸⁸ *In re Aiken Cnty.*, 725 F.3d at 264.

¹⁸⁹ *See e.g. Buckley*, 424 U.S. at 122; *Chadha*, 462 U.S. at 951; Madison, *supra* note 105 at 322.

¹⁹⁰ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1017 (2006) (explaining the effective veto power of each branch to prevent liberty deprivation in the criminal context); *cf. In re United States*, 345 F.3d 450, 454 (7th Cir. 2003) (Posner, J.) (“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 . . .”).

¹⁹¹ *See, e.g., Price supra* note 12.

especially problematic.¹⁹² Insofar as it is extremely difficult to make laws in the first place, they argue that allowing a president to refuse to enforce, or fully enforce, a properly enacted law creates too great a bias toward inaction and thus too great a tendency toward effective deregulation.

In the narrow confines of the liberty deprivation context, however, the Constitution does precisely what these scholars identify as generally inconsistent with the constitutional scheme. The Constitution imposes several additional hurdles and safeguards against government action that can result in liberty deprivation. Several provisions of the Constitution impose special obstacles toward action, when that action involves the deprivation of physical liberty. The Suspension Clause dictates that, unlike most other contexts, the judiciary cannot be deprived of the opportunity to review the legality of deprivations of physical liberty.¹⁹³ The Bill of Attainder clause limits the ability of the legislature to directly dictate the deprivation of an individual's liberty.¹⁹⁴ Likewise, the Pardon Clause, discussed *supra*, gives the President the unique power to prevent the deprivation of liberty.¹⁹⁵ And, of course, there are a host of additional protections against unwarranted liberty deprivations in criminal proceedings.¹⁹⁶ Not all of these provisions are strictly limited to the liberty deprivation context but the unifying theme and the central danger against which these provisions guard is the danger of unwarranted physical liberty deprivation. Collectively, these provisions demonstrate that, notwithstanding the general hurdles to law making, the constitutional order includes many additional fail-safe mechanisms when it comes to federal action that can result in the deprivation of physical liberty.

Thus, where prosecutorial discretion operates as a one-way ratchet against liberty deprivation, the foundational concern that underlies the system of separation of powers is not offended. Heightened prosecutorial discretion in this realm is also consistent with the Constitution scheme that includes several additional checks against government action in the liberty deprivation context. In contrast, a robust vision of prosecutorial discretion across all administrative contexts, which allows broad-based inaction based on policy disagreements with Congress would also act as a one-way ratchet, but this time not specifically in favor of liberty but rather in favor of a generalized deregulation bias. That bias finds no support in the structure of the Constitution. In addition to the structure and foundational features, modern due process jurisprudence also demonstrates the unique protections

¹⁹² Love & Garg, *supra* note 17, at 1200-1.

¹⁹³ U.S. CONST., art. I, sec. 9, cl. 2; *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (holding that the Suspension Clause requires judicial review of deportation cases).

¹⁹⁴ U.S. CONST., art. I, sec. 9.

¹⁹⁵ See discussion *supra* at Part II.A.3.

¹⁹⁶ See, e.g., U.S. CONST., amend. V (right to grand jury, protection against double jeopardy, right against self-incrimination); amend. VI (right to speedy trial, right to trial by jury, right to confront witnesses, right to counsel).

the Constitution affords when physical liberty is at stake. Collectively, the foundational purpose of the separation of powers, the unique structural checks against liberty deprivation in the Constitution, and the modern case law reserving the greatest process protection when physical liberty is at stake, all evince a constitutional scheme that militate in favor of the most robust protections against the deprivation of physical liberty.

2. Public Offenses Versus Interference with Private Rights

Insofar as the President derives some aspects of any heightened prosecutorial discretion authority from the Pardon Clause, it is important to consider the distinction in the Pardon Clause jurisprudence between offenses against the state and the disruption of private rights.¹⁹⁷ In some sense, all administrative and criminal proceedings can be understood as offenses against the state. There are always important societal interests at play; that is why we invest as a society in establishing these enforcement systems. Society as a whole has a strong interest in the enforcement of labor, immigration, civil rights, securities, and criminal laws, for example. Conversely, government enforcement proceedings always have some collateral impact on private rights (beyond the obvious private rights of the subject of the enforcement proceedings). In labor law, prosecutorial discretion decisions can impact the private rights of employers and employees. In civil rights law, prosecutorial discretion decisions can impact the private rights of potential victims of civil rights and potential rights violators. In criminal law, prosecutorial discretion decisions can similarly be conceived of as impacting the rights of victims and perpetrators.

In the context of the modern administrative state, how then do we give meaning to the principle that the pardon power, and the derivative aspects of the prosecutorial discretion power, extend only to “offenses against the United States” and may not be used to interfere in private disputes? In its clearest form, a criminal prosecution for treason is an offense against the United States. Notwithstanding the potential presence of individualized victims, it is a well-established principle of criminal law that, as a formal matter, the rights being vindicated in criminal proceedings are societal not individual rights.¹⁹⁸ While a victim of a crime may have an individual civil cause of action against a criminal defendant, the public decision whether or not to prosecute that individual does not disrupt that right. On the other hand, the use of prosecutorial discretion to interfere in a private tort dispute, for example, would be a clear example of an impermissible use of the power to directly interfere with a private right. It is

¹⁹⁷ See discussion *supra* at note 167-171 and accompanying text.

¹⁹⁸ See *Heckler*, 470 U.S. at 847-48 (Marshall, J. concurring).

clear that the President could not generally use his enforcement discretion to direct the termination of a private civil law suit.

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

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

Notably, for our purposes, enforcement proceedings that implicate the deprivation of physical liberty universally fall into the former group, where the public interest is paramount. The decision of the President to initiate or not initiate proceedings that could result in criminal incarceration, deportation, or military internment, for example, are formally designed to vindicate a general societal interest and cannot directly impact the private legal rights of non-parties. In contrast, there are certain administrative proceedings that are initiated primarily to vindicate particularized private interests and where the outcome of the proceedings can directly impact the legal rights of non-parties. The Securities Exchange Commission may enforce securities laws on behalf of shareholders against a company and the outcome of those proceedings can *directly* impact the legal rights of such shareholders. The Labor Department may enforce labor laws on behalf of employees against an employer and the outcome of those proceedings can *directly* impact the legal rights of such employees. The Department of Justice may enforce civil rights laws on behalf of aggrieved individuals against a state or private entity and the outcome of those proceedings can

directly impact the legal rights of such aggrieved individuals. In these instances, inaction, as much as action, means the federal government is choosing sides in a private dispute. Choosing not to act—and not to initiate enforcement proceedings—puts the federal government on the side of the regulated entity. Choosing to act—and initiate enforcement proceedings—puts the federal government on the side of the intended beneficiary of the regulation.

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

Criminal prosecutorial decisions vindicate only intangible interests, common to society as a whole, in the enforcement of the criminal law. The conduct at issue has already occurred; all that remains is society's general interest in assuring that the guilty are punished. In contrast, requests for administrative enforcement typically seek [to remedy] . . . injuries [that] often run to specific classes of individuals whom Congress has singled out as statutory beneficiaries. . . .¹⁹⁹

Though Justice Marshall draws a line between criminal and administrative enforcement, what he identifies as unique and important about criminal enforcement that justifies the heightened discretion can be applied with equal force to administrative enforcement that threatens physical liberty; they are both post hoc enforcement proceedings that seek to vindicate society's general interest (as opposed to settling disputes between various private interests) and can result in a significant deprivation of liberty. He concluded by noting that “[t]o the extent arguments about traditional notions of prosecutorial discretion have any force at all in [the administrative] context, they ought to apply only to an agency's decision to decline to seek penalties against an individual for past conduct”²⁰⁰

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

¹⁹⁹ 470 U.S. at 847-48 (Marshall, J. concurring) (internal citations omitted).

²⁰⁰ *Id.* at 849-50.

3. Democratic Participatory Theory Considerations

A separate factor to be considered is how the scope of prosecutorial discretion authority should be informed by participatory democratic dynamics.²⁰¹ Outside of the liberty deprivation context, it is important to consider how the regulated entities, generally most able to advocate for themselves through Congress, would also benefit from the bias toward inaction that robust prosecutorial discretion provides. In most traditional administrative contexts—i.e. food safety, environmental regulation, labor protections, banking regulations, etc.—the interests of the regulated entities are significantly more concentrated than the interests of the beneficiaries of the regulation. In addition, in these contexts, the regulated entities, which are often powerful business interests, are well situated, usually better situated than the beneficiaries of the regulations, to influence the congressional law-making process and thus to guard against excessively punitive statutory schemes. In these contexts, the dynamics of agency capture and, even short of capture, the ability of these types of regulated entities to influence the prosecuting agencies can operate as an additional effective check against excessive enforcement.²⁰² These dynamics support a more limited vision of prosecutorial discretion authority in traditional administrative realms since we have little reason to fear overly punitive statutory schemes.

However, precisely the opposite democratic participatory dynamic is at play in the liberty deprivation context. In the criminal context, troves have been written about how the political dynamics of criminal law create ever-expanding criminal codes and increasingly harsh penalties.²⁰³ The same dynamics are almost universally true in other realms where Congress establishes enforcement schemes that threaten physical liberty.²⁰⁴ Guantanamo detainees, Japanese internment victims, sex offenders, undocumented immigrants, and severely mentally ill individuals are dramatically unlike the entities regulated in the traditional administrative realms discussed above. These disenfranchised groups are least able to guard against excessively punitive statutory schemes through the democratic process. As a result, many have observed how these realms of federal law, like criminal law, have trended almost consistently toward harsher

²⁰¹ See generally Michael C. Dorf, *The Coherentism of Democracy and Distrust*, 114 YALE L.J. 1237 (2005) (discussing the utility of democratic participation as a guide constitutional interpretation); see also Cheh, *supra* note 14, at 265-66 (2003) (discussing the participatory democratic theory considerations in evaluating prosecutorial discretion power).

²⁰² See generally Michael A. Livermore, Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337 (2013); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010).

²⁰³ See, e.g., Bowers, *supra* note 112, at 1662; William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 508-09 (2001); Richman, *supra* 14, at 759-60.

²⁰⁴ See Cox & Rodriguez, *President and Immigration Law*, *supra* note 13, at 516; Price *supra* note 12, at 746 (2014).

enforcement schemes.²⁰⁵ Thus, insofar as the concern about excessive prosecutorial discretion relates to the counter-majoritarian potential for the President to undermine the will of Congress, in the liberty deprivation realm, a counter-majoritarian safety valve is an important safeguard against excessively punitive statutory schemes targeting politically disfavored minority groups. Moreover, the same political dynamics that operate against Congress and lead to the one-way ratchet of ever-harsher criminal and immigration laws, for example, also operate against the President directly—significantly reducing the potential for presidential overreach in these arenas.

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

In traditional administrative realms, the recent trend toward categorical prosecutorial discretion policies is ahistorical. Allowing the President to categorically under-enforce in all administrative realms would grant her a vast power to undermine the will of Congress across an enormously broad swath of subject-areas that collectively make up a significant portion of the work of the federal government. This would upset the constitutional balance by creating a deregulatory bias unsupported by the structure of the Constitution. Moreover, it would allow powerful regulated entities, fully able to advocate for themselves through the legislative process, an unnecessary second bite at the apple to escape regulation.

In contrast, recognizing the President's power to enact categorical prosecutorial discretion policies only in those realms where physical liberty is at stake is entirely consistent with historical practice. Throughout the nation's history, in both the immigration and criminal realms, Presidents have repeatedly enacted just such policies, generally without significant controversy. Such power is consistent both with the Constitution's structural bias against liberty deprivation and with the way in which prosecutorial discretion power is amplified by the Pardon Clause when enforcement proceedings seek to vindicate offenses against the public that

²⁰⁵ *See id.*

do not directly interfere with vested private rights. It is also in the liberty deprivation realm where the regulated individuals are universally disfavored groups, least able to advocate for themselves through the legislative process, and thus where our system most needs a counter-majoritarian check on congressional power. Moreover, limiting robust prosecutorial discretion authority to the liberty deprivation context cabins this tool of presidential power to the context of its historic use and thus significantly limits the potential for unwarranted presidential encroachment into congressional policy making.²⁰⁶ The number of arenas where the federal government locks people up, or imposes some equivalent physical deprivation of liberty, is quite limited. Beyond the criminal sphere, immigration detention and deportation are unquestionable the largest areas implicated.²⁰⁷ While caution should be exercised anytime the President is empowered to undermine the will of Congress, limiting this power to the liberty deprivation realm is both consistent with historical practice and sharply circumscribes its reach, as the large majority of federal government's administrative enforcement apparatus would not be implicated.

²⁰⁶ See discussion *supra* at notes 35-36, 46-64, 96-100 and accompanying text.

²⁰⁷ Other types of non-criminal federal confinement include prisoners of war subject to military commissions, military internment, and sex offenders and mentally ill individuals subject to civil commitment.

PART III
EXPLORING THE LIMITS OF THE EXECUTIVE POWER TO PROTECT
LIBERTY

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

First, the definitional limits of prosecutorial discretion, which distinguish it from the repudiated dispensing and suspending powers, are foundational boundaries of the President's enforcement discretion.²⁰⁸ Prosecutorial discretion may only be exercised after an offense has been committed.²⁰⁹ The President thus has no power to *ex ante* sanction any violation of law.²¹⁰ Moreover, the President's enforcement discretion does not include the power to refuse to enforce congressional mandates that an agency take an action unrelated to individualized enforcement, for example, to promulgate regulations, spend appropriated dollars, or implement federal programs.²¹¹ If, for example, Congress were to pass a law requiring the construction of a wall along the southern border of the country, the President would be obligated, notwithstanding his stated policy disagreements with such a project, to build the wall. Full enforcement is the default rule but the very nature of prosecutorial discretion is an exception to that default.

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

As a general matter, there is widespread confusion about the differences between (i) the President's authority to disregard statutory mandates or prohibitions on the Executive, based on the President's constitutional objections, and (ii) the

²⁰⁸ See generally discussion *supra* at 17-19.

²⁰⁹ See discussion *supra* at notes 40-45.

²¹⁰ See *id.*; Brown, 161 U.S. at 601; see also Charles D. Berger, *The Effect of Presidential Pardons on Disclosure of Information: Is Our Cynicism Justified?*, 52 OKLA. L. REV. 163, 172 (1999); Duker, *supra* note 45 at 526; Hoffstadt, *supra* note 156 at 641.

²¹¹ *Massachusetts v. E.P.A.*, 549 U.S. 497, 533-34 (2007); *Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 610-13 (1838).

President's prosecutorial discretion not to initiate charges against (or to pardon) violators of a federal law. There are two key practical differences. [T]he President may disregard a statutory mandate or prohibition on the Executive only on constitutional grounds, not on policy grounds. By contrast, the President may exercise the prosecutorial discretion and pardon powers on any ground . . .²¹²

This does not mean that Congress' general power to direct agency action can be used as a Trojan horse to limit the constitutionally protected prosecutorial powers of the President. To the extent that Congress cannot not directly limit the President's discretion over agency enforcement actions,²¹³ neither could it do so indirectly through appropriations or otherwise.²¹⁴

Second, the President remains accountable to, and limited by, the will of the electorate. Some may discount the potency of this check on presidential power, especially during a second term in office. However, public support or hostility toward presidential action always remains a primary consideration insofar as the President's power vis-à-vis Congress is often a function of her public support. Moreover, the President at all times remains conscious of her role as the leader of her political party and acutely attuned to how her policies will impact the electoral fate of her party. In addition, the undivided concentration of the prosecutorial discretion power in the President serves to increase accountability to the electorate.²¹⁵ This is particularly true in the arenas where liberty deprivation is at stake—criminal, immigration, military internment, etc—since prosecutorial discretion in these contexts benefits widely disfavored classes. Thus, in the liberty deprivation context in particular, as Hamilton explained, the “dread of being accused of weakness or connivance” is a powerful limit on the President's broad assertion of her power.²¹⁶ Accordingly, democratic accountability is a significant check on the President's prosecutorial discretion power, particularly in high profile ambitious assertions of such power.

Finally, while the Constitution bestows on the President her prosecutorial discretion power, it also unquestionably limits that power.²¹⁷ Equal protection values require that prosecutorial discretion policies cannot

²¹² *In re Aiken Cnty.*, 725 F.3d 255, 266 (D.C. Cir. 2013).

²¹³ See discussion *infra* at Part III.B.

²¹⁴ See *McMellon v. United States*, 387 F.3d 329, 369 (4th Cir. 2004); see also discussion *infra* at Part III.B.

²¹⁵ Hamilton, *supra* note 24, at 447.

²¹⁶ *Id.*

²¹⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978); cf. *Webster v. Doe*, 486 U.S. 592, 603 (1988) (holding that even actions generally precluded from judicial review can be reviewable if they raise a constitutional question).

be motivated by an improper discriminatory purpose.²¹⁸ Nor does the Constitution permit the President to exercise prosecutorial discretion with a retaliatory purpose or with the intent to punish individuals for exercising their First Amendment or other constitutional rights.²¹⁹ Similarly, an exercise of prosecutorial discretion triggered by bribery or other corrupt motives would offend due process norms.²²⁰ Thus, while the Constitution bestows extremely broad prosecutorial discretion authority on the President, it also imposes some clear outer limits to the exercise of that discretion.

These principles limit the operation of prosecutorial discretion power in all contexts. However, in determining how that power may be limited by Congress, context matters. Pursuant to the familiar *Youngstown* framework, presidential power is generally a function of the extent to which Congress has authorized, remained silent, or disapproved of presidential action.²²¹ However, there are certain realms where Congress may not, or has only a limited ability to, intrude on the power of the President.²²² Insofar as the President's prosecutorial discretion authority is at its height in the liberty deprivation context, it follows that Congress' power is at its lowest ebb when it attempts to limit the President's authority to protect liberty. It is beyond the scope of this article to identify the exact boundaries of presidential and congressional authority here. Below, I attempt to consider the areas where Congress may assert some control over prosecutorial discretion in the liberty deprivation context and to draw into focus those areas where congressional power may be uniquely limited.

A. *Indirect Mechanisms of Congressional Control*

There are certain indirect mechanisms that Congress can unquestionably utilize to assert some control over prosecutorial discretion policies in any realm. Congress has oversight authority of all federal agencies and can engage in fact finding and public hearings and call agency heads to account for controversial policies. Moreover, even when Congress lacks the authority to directly alter prosecutorial discretion policies, it has a myriad of tools to assert collateral political pressure on the Executive to

²¹⁸ See *Wayte v. United States*, 470 U.S. 598 (1985); *Hotel & Rest. Employees Union, Local 25 v. Smith*, 846 F.2d 1499, 1510-11 (D.C. Cir. 1988); see also Wadhia, *supra* note 1, at 287. But cf. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 489 (1999) (holding "alien unlawfully in this country has no constitutional right to assert selective enforcement as a defense against his deportation").

²¹⁹ *Heckler v. Chaney*, 470 U.S. 821, 846 (1985) (Marshall, J. dissenting); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); cf. *Bridges v. Wixon*, 326 U.S. 135, 162 (1945).

²²⁰ *United States v. Welch*, 572 F.2d 1359, 1360 (9th Cir. 1978).

²²¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J. concurring).

²²² See, e.g., *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (holding that the President has exclusive power to recognize foreign nations and Congress may not intrude on that power); Schick, 419 U.S. at 266 (holding that the pardon power "cannot be modified, abridged, or diminished by the Congress.").

express its disapproval.²²³ For example, it can withhold appropriations, refuse to confirm executive nominees, conduct investigations, withhold action on collateral legislation of import to the President, or refuse to act on legislation essential to the operation of the government. Depending on the depth of the Congress' disapproval and the depth of the President's commitment to her prosecutorial discretion policies, these collateral levers could be significant mechanisms of control.

B. Direct Mechanisms of Congressional Control

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

Courts have, in a handful of cases, suggested that Congress can directly limit an administrative agency's enforcement discretion. In *Heckler*, the Supreme Court opined that "Congress may limit an agency's exercise of enforcement 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."²²⁴ In *Dunlop v. Bachowski*, an unsuccessful candidate for labor union office sued challenging the Secretary of Labor's decision not to bring civil action to set aside a union election.²²⁵ The Court held that review of the Secretary's decision not to file suit was justiciable and that Congress had permissibly limited the agency's prosecutorial discretion authority by mandating that an action be initiated if the Secretary finds probable cause of a violations that likely impact the outcome of the union election.²²⁶ Similarly, in *Cook v. FDA*, the D.C. Circuit Court of appeals interpreted a statute to entirely deprive the Food and Drug Administration of discretion to decline initiate enforcement actions regarding the importation

²²³ *United States v. Windsor*, 133 S. Ct. 2675, 2701, 2704-05 (2013) (Scalia, J., dissenting) (discussing the "innumerable ways" Congress can exert indirect political pressure on the President); Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715 (2012) (same); Richman, *supra* 14, at 759 (same); Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies*, 80 GEO. L.J. 671, 671-72 (1992) (same).

²²⁴ *Heckler*, 470 U.S. at 833.

²²⁵ 421 U.S. 560 (1975), *overruled in part on other ground by*, *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526 (1984).

²²⁶ *Id.* at 566-68.

of certain restricted drugs.²²⁷ Notably all of these cases arose in traditional administrative realms where the enforcement proceedings would not result in the deprivation of physical liberty.

Two things are clear from the case law and scholarship. First, there is widespread agreement that Congress may sometimes directly limit the scope of the Executive's prosecutorial discretion authority.²²⁸ Second, there is widespread agreement that some congressional limits would impermissibly intrude on the President's prosecutorial discretion authority.²²⁹ Nothing in the case law or scholarship, however, provides adequate guidance regarding the line between these two generally accepted principles. The division between traditional administrative enforcement proceedings and enforcement proceedings that implicate physical liberty can fill this void and appropriately balance the critical separation of powers considerations.

In the traditional administrative realms Congress should enjoy greater power to dictate the terms of executive enforcement via statute. Indeed, there are examples of statutory schemes that mandate enforcement in all cases where a violation is found.²³⁰ It is hard to imagine, for example, that Congress could not mandate enforcement action necessary to remedy unsafe conditions discovered at a nuclear power plant. Identifying the precise boundaries of congressional power to limit enforcement discretion in traditional administrative realms is beyond the scope of this project. However, whatever those boundaries may be, it seems clear that Congress cannot aggrandize its own power by granting executive discretion to actors under congressional controlled.²³¹ Categorical prosecutorial discretion policy in these traditional administrative realms, particularly when

²²⁷ 733 F.3d 1, 7-10 (D.C. Cir. 2013).

²²⁸ See, e.g., *Heckler*, at 833; *Morrison v. Olson*, 487 U.S. 654, 696 (1988); *Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975); Love & Garg, *supra* note 17, at 1236; Price *supra* note 12, at 707; Robert J. Reinstein, *The Limits of Executive Power*, 59 Am. U. L. Rev. 259, 316 (2009); Jack Goldsmith, John F. Manning, *The President's Completion Power*, 115 Yale L.J. 2280, 2295 (2006).

²²⁹ See, e.g., *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010); *Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976); *Schick v. Reed*, 419 U.S. 256, 266-67 (1974); *McMellon v. United States*, 387 F.3d 329, 369 (4th Cir. 2004); Price *supra* note 12, at 707. Perhaps unsurprisingly, the Office of Legal Council has been particularly protective of the President's non-defeasible enforcement discretion. See, e.g., Swift Justice Authorization Act, 2002 WL 34482989 (O.L.C.), at *10 (Apr. 8, 2002); Congress Requests for Info. from Inspectors Gen. Concerning Open Criminal Investigations, 13 Op. O.L.C. 77, 79 (1989); Subpoenas of Dep't of Justice Investigative Files, 8 Op. O.L.C. 252, 264 (1984).

²³⁰ *Dunlop*, 421 U.S. 560; *Cook*, 733 F.3d 1.

²³¹ *Buckley*, 424 U.S. at 138-39; *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138 (2010).

motivated by policy disagreements with Congress, would be the most difficult to justify.²³²

In the context of criminal enforcement and the limited administrative arenas that can result in the deprivation of an individual's physical liberty, Congress' power should be significantly more limited. Here Congress should not be permitted to encroach on the Executive's constitutional enforcement discretion by imposing an enforcement quota mandating a particular level of enforcement.²³³ Neither should Congress be permitted to proscribe the President's authority by dictating the factors that much be considered when the President exercises her enforcement discretion.²³⁴ This is relatively uncontroversial in the criminal realm where courts have recognized that Congress may not limit prosecutorial discretion authority.²³⁵

²³² In contrast, executive agencies must always be free to make prosecutorial discretion determinations based on resource allocation considerations. However, it can at time be difficult to distinguish pure resource allocation justifications from justifications based on normative considerations tied to mercy or societal utility. A decision, in the face of limited resources, to prioritize one type of labor violation over another because the Executive deems one more serious can be framed as a resource allocation decision. But the Executive has no special expertise in determining the seriousness of one offense versus the other. True resource allocation policies are based on considerations where the Executive holds some superior institutional expertise such as assessing the cost of certain types of prosecution or the likelihood of success.

²³³ Interestingly, unlike in traditional administrative realms, Congress has almost universally refrained from enacting statutes that purport to limit executive enforcement discretion in the liberty deprivation realm. One prominent counter example is a provision that Congress has included in appropriations bills in recent years, which was originally understood to require that immigration authorities maintain custody of a certain number (most recently 34,000) immigrants on any given day. *See Consolidated Appropriations Act, 2014*, Pub. L. No. 113-76, 128 Stat. 5, 251 (2013) (requiring that the immigration agency maintain not "fewer than 34,000 detention beds."). This appears to be the sort of enforcement quota I maintain is impermissible in the liberty deprivation realm. However, DHS Secretary Jeh Johnson, who oversees the immigration agency, has rejected this interpretation. *See Jessica Vaughan, DHS Sec. Johnson Disputes Detention Bed Mandate* (March 14, 2014), *available at* <http://cis.org/vaughan/dhs-sec-johnson-disputes-detention-bed-mandate>. He maintains that Congress cannot dictate a certain level of enforcement and that the appropriation language only means that he must have 34,000 beds available on any given day. *Id.* Since the agency has adopted this view of the purported "bed quota," its daily detained population of immigrant detainees has fallen significantly below the 34,000 beds described in the appropriations language. Joanne Faryon, *U.S. Government Holding Fewer Immigrants In Detention*, *NEWSOURCE.ORG* (Apr. 6, 2015) (reporting on data showing that the average daily immigrant detainee population for the first five months of fiscal 2015 was 26,374).

²³⁴ The Office of Legal Counsel ("OLC"), in a memorandum issued on the same day President Obama announced his DAPA program, at least partially endorsed the idea that congressional priorities can act as a limiting principle on the President's prosecutorial discretion power. OLC Memorandum Op. *supra* note 9. *But see Cox & Rodriguez, Redux supra* note 13 (convincingly demonstrating the unworkability of this proposed limiting principle); *see also Wadhia, supra* note 1, at 246 ("Neither the immigration statute nor the regulations contain eligibility criteria for seeking a favorable grant of prosecutorial discretion.").

²³⁵ *See discussion infra* at 53-54 and accompanying text.

The same considerations that drive non-defeasible prosecutorial discretion authority in criminal proceedings—consistent historical practice, the Constitution’s structural bias against liberty deprivation, the enhanced power emanating from the Pardon Clause for offenses against the state, and the participatory democratic theory dynamics—apply with equal force to other liberty deprivation realms.²³⁶ Permitting the Congress to dictate the terms of the President’s prosecutorial discretion in this realm would be inconsistent with the constitutional scheme, requiring consensus of the three branches of government to deprive an individual of physical liberty. It would likewise undermine the role the President can play in checking against overly punitive statutory schemes targeting disfavored groups. In these realms, therefore, where physical liberty is at stake, that the President should be permitted to enact categorical prosecutorial discretion policies.

C. *Evaluating Modern Prosecutorial Discretion Practices*

Using this proposed framework, I return to the practices of modern presidents and their increasing use of broad policy driven prosecutorial discretion policies. When the Bush Administration issued its policy directing that the Environmental Protection Agency should categorically refrain from initiating enforcement proceedings against certain coal fired power plants, it did so presumably based on its judgment that the economic impact of regulatory violations at issue did more harm to the public interest than the environmental benefits that could be reaped through enforcement.²³⁷ This was, however, in direct conflict with the judgment of Congress in enacting the statutory scheme. Thus, insofar as physical liberty deprivation was not at stake, it is difficult to justify the President using his enforcement discretion to supplant the judgment of Congress. A similar analysis applies to President Bush’s apparent categorical non-enforcement policies in the labor, food safety, securities regulation, and civil rights realms, though because these policies were not memorialized in public memorandum it is more difficult to conclusively evaluate them.²³⁸

President Obama’s determination to categorically refrain from enforcing certain requirements regarding non-complaint insurance plans under the Affordable Care Act (ACA) for a period during which Congress had mandated enforcement, presents a slightly more difficult case. One could argue that the President’s categorical non-enforcement policy here was driven by his judgment that the congressional timeline was unworkable

²³⁶ Cf. *I.N.S. v. Chadha*, 462 U.S. 919, 935 n.8 & 953 n.17 (1983) (reserving the question of whether Congress “retain[ed] the power ... to enact a law, in accordance with the requirements of Article I of the Constitution, mandating a particular alien’s deportation,” explaining that “other constitutional principles [may] place substantive limitations on such action,” and noting then-Attorney General Jackson’s characterization of such a law as “an historical departure from an unbroken American practice and tradition”).

²³⁷ See discussion *supra* at 57-59 and accompany text.

²³⁸ See discussion *supra* at 60 and accompany text.

and would thus undermine effective implementation of the law that Congress designed. Insofar as the President's policy was aligned with congressional objectives, this would militate in favor of a permissible exercise of prosecutorial discretion. However, two factors cut significantly in the other direction. First, there was no ambiguity in the statutory scheme regarding the timeline for implementation. The relevant implementation date was thought out, staged, and plain on the face of the statute. Thus, Congress had made clear its considered judgment regarding the workable timeline for implementation. Second, there is ample evidence to suggest that the President was motivated less by a desire to protect against undermining the statutory scheme and more by his political desire to adhere to prior characterizations that he had made about people's ability to maintain health insurance policies they liked. This would not have been true if he adhered to the congressional timeline. Thus, here to, I propose that the President exceeded his discretion in enacting the categorical non-enforcement policy.²³⁹

President Obama's non-enforcement guidelines related to marijuana offenses in states that have legalized various aspects of marijuana use and sale present the clearest case of appropriate categorical discretion. Insofar as the guidelines fall within the criminal realms and he unquestionably has the power to pardon all such offenses, so too could he grant amnesty from prosecution. President Clinton's "Corporate Leniency Policy," which protected corporations, as well as their directors, officers and employees, from anti-trust prosecutions under certain circumstances was also within the President's power. Insofar as the policy relates to non-enforcement of criminal laws, it again falls easily with the President's power.²⁴⁰

Finally, I turn to an analysis of the DACA and DAPA programs. There is significant debate regarding whether or not the DACA and DAPA programs are consistent with the statutory scheme and whether the programs can be justified as part of an enforcement prioritization program that, regardless of any heightened powers, is within the authority of the agency to efficiently allocate limited enforcement resources. In regard to the prioritization issue, recall that current appropriations support the deportation of a maximum of a few hundred thousand individuals each year; but there are approximately 25 million individuals who could potentially face

²³⁹ See Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. Penn. L.R. __ (forthcoming 2016).

²⁴⁰ The issue of corporate criminal prosecution raises an interesting issue insofar as corporations, even in the criminal context, can never face a deprivation of physical liberty. Query whether criminal proceedings that do not result in a deprivation of liberty should suggest a narrower vision of prosecutorial discretion authority. Certainly some of the democratic participatory theory dynamics would play out differently in the corporate context. However, ultimately this is a narrow issue and one controlled by Supreme Court precedent declaring the Executive's absolute discretion in the criminal context. See discussion *supra* at 53-54 and accompanying text.

deportation proceedings.²⁴¹ Insofar as DACA and DAPA are available to non-priority immigrants only, the Administration has justified the programs, in part, based on the need to remove some of the haystack to find the needles that are its enforcement priorities.²⁴² This, however, begs the question, in the first instance, of whether its enforcement priorities are consistent with the statutory scheme.

The Office of Legal Counsel (“OLC”) explicitly justified the programs as consistent with the statutory scheme, explaining that the beneficiaries are individuals who could eventually gain status through the statute, though sometimes not for decades.²⁴³ Opponents have asserted that the programs are in direct conflict with the statute and, in fact, it was the President’s inability to win passage of the DREAM Act and comprehensive immigration reform through Congress that led him to attempt to undermine the statutory scheme.²⁴⁴ It is first important to note that the failure of this Congress to pass the DREAM Act and comprehensive immigration reform are not relevant to the analysis of the values and priorities underlying the previously enacted Immigration and Nationality Act. Perhaps more importantly, however, Professors Cox and Rodriguez have recently and convincingly critiqued the analysis of the OLC, not because they see a conflict between the programs and the INA but because they demonstrated that there is no way to reasonably discern the congressional priorities that underlie the Act, which is the product of decades of revisions and rewrites by multiple Congresses with many different motivations.²⁴⁵

Ultimately, under the framework I propose, however, adherence to statutory priorities is only potentially dispositive if physical liberty is not at stake. Thus, the threshold question is whether the deportation proceedings implicate a potential physical liberty deprivation. I answer that question in the affirmative for three reasons. First, while not all individuals facing deportation are detained, the physical act of deportation, of being banished from the United States, is a physical liberty deprivation, restricting one’s physical freedom of movement in a manner on par with physical incarceration. The Supreme Court has characterized the liberty deprivation related to deportation in the gravest of terms, suggesting that it is akin to the “loss of all that makes life worth living” and that it is often more significant than the consequences of incarceration.²⁴⁶ Indeed, the historic precursors to deportation, first banishment and later the English practice of

²⁴¹ See discussion *supra* at 74-80 and accompany text.

²⁴² See OLC Memorandum Op. *supra* note 9.

²⁴³ *Id.*

²⁴⁴ Randy Borntrager, *GOP: President Obama's Out to Destroy Our Nation Through His Executive Actions on Immigration*, HUFFINGTON POST (May 19, 2015).

²⁴⁵ Cox & Rodríguez, *Redux*, *supra* note 13.

²⁴⁶ *Padilla v. Kentucky*, 559 U.S. 356, 361 (2010); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

“transportation” to the colonies, were among the most severe consequences imposed on individuals convicted of crimes.²⁴⁷ Deportation is, in many circumstances, increasingly recognized as a form of quasi-criminal punishment.²⁴⁸ Second, while not every (or even most) criminal proceedings result in a sentence of incarceration, it is the *potential* for incarceration that triggers the Executive’s heightened prosecutorial discretion. The same is true in deportation proceedings. While hundreds of thousands of immigrants facing deportation are detained each year, many are not.²⁴⁹ However, like criminal defendants, all immigrants facing deportation face the potential of detention.²⁵⁰ Third, in considering the availability of *habeas corpus* review for deportation proceedings, the Supreme Court has held that deportation proceedings categorically satisfy the custody requirement of the great writ. Thus, I place deportation proceedings in the category of proceedings that implicate physical liberty deprivations.

I, therefore, conclude that the President is within his powers to enact broad categorical prosecutorial discretion policies regarding deportation proceedings. Two issues remain to consider whether the DACA and DAPA programs fall within the definitional limits of prosecutorial discretion rather than the repudiated dispensing and suspending powers. First, DACA and DAPA carry with them not only a decision to forego deportation proceedings but also an affirmative grant of work authorization. No vision of prosecutorial discretion authority can justify the affirmative grant of a statutorily prohibited benefit. This issue is ultimately a red herring, because far from being prohibited, work authorization is affirmatively authorized for these individuals under the statute enacted by Congress.²⁵¹ Thus, the benefit of work authorization flows from the statute, and thus from Congress, and not from the President’s enforcement discretion.

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

²⁴⁷ *Fong Yue Ting v. United States*, 149 U.S. 698, 709, 736-41 (1893) (Brewer, J., dissenting); Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 HARV. C.R.-C.L. L. REV. 289, 323-24 (2008).

²⁴⁸ Peter L. Markowitz, *Deportation is Different*, 13 U. PA. J. CONST. L. 1299 (2011).

²⁴⁹ DHS Office of Immigration Statistic, *Immigration Enforcement Actions: 2013*, Available at http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

²⁵⁰ 8 U.S.C. § 1226(a).

²⁵¹ See 8 U.S.C. §§ 1103(a)(3), 1324a(h)(3); 8 C.F.R. § 274a.12(c)(14); see also discussion *supra* at note 101 and accompanying text.

announcement of the program are eligible.²⁵² Thus the program can in no way be viewed as prior authorization for individuals to illegally enter the United States. However, the program allows for the issuance of deferred action for three years. Insofar as that states an intention not to initiate deportation proceeding based upon some past act—the illegal entry into the United States for example—this would be squarely within the President’s prosecutorial discretion authority. The memorandum makes clear, however, as it must, that a grant of deferred action confers no legal immigration status. Certain provisions of the INA make mere presence without legal immigration status a violation.²⁵³ If the three-year grant of deferred action is understood to authorize a future and continuing violation of the INA,²⁵⁴ the grant would fall beyond the prosecutorial discretion authority of the President.

However, the DAPA memorandum also makes clear that it confers no rights to protection from future prosecution.²⁵⁵ Nothing prevents the President from revoking a grant of deferred action at any time and initiating deportation proceedings. Indeed, fear that the next President would not honor the grant of deferred action has created significant anxiety in the immigrant community and deterred some from applying for the program. The practice of granting deferred action for fixed periods of time is a longstanding practice acknowledged without challenge by the Supreme Court. The three-year grant of deferred action contemplated under the DAPA and DACA programs is best understood, not as a license for future unlawful conduct but as a matter of administrative convenience and diligence, ensuring that the decision will be periodically revisited. Thus insofar as the President’s DAPA and DACA programs implicate potential deprivations of physical liberty and do not authorize future illegality, and insofar as the affirmative benefit work authorization is grounded in the statute, the programs appear within the President’s constitutional authority.²⁵⁶

²⁵² DAPA Memorandum *supra* note 2.

²⁵³ 8 USC § 1227(a)(1)(B)

²⁵⁴ *Reno*, 525 U.S. at 491 (characterizing immigration violations as “an ongoing violation of United States law.”).

²⁵⁵ DAPA Memorandum *supra* note 2.

²⁵⁶ It is important to note that this Article only directly bears upon the constitutionality of the DACA and DAPA program. The legal challenges to the programs also raise procedural and substantive challenges under the Administrative Procedure Act (APA). *See Texas v. United States*, 809 F.3d 134 (5th Cir. Nov. 9, 2015), *as revised* (Nov. 25, 2015), *cert. granted*, No. 15-674, 2016 WL 207257 (Jan. 19, 2016). It is on the bases of the courts’ assessment of the likelihood of success on the APA claims that the programs have been preliminarily enjoined. *Id.* While this article has no direct bearing on those claims, query whether, if the President is within his non-defeasible constitutional authority, Congress has the power, through the APA or otherwise, to prevent his actions.

CONCLUSION

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

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