

THE ENFORCEMENT MESS: FEDERAL NONENFORCEMENT AFTER *UC REGENTS*

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INTRODUCTION

Nonenforcement has gained prominence in recent years as a potent means of updating on-the-ground public policies without new legislation or regulatory rulemaking. For reasons good and bad, enforcement discretion has long been a defining feature of criminal justice and public administration in the United States. But in some recent examples it has threatened to supplant the law itself as the basis around which law-abiding citizens are expected to organize their behavior.

The trend began, or at least received a significant boost, in the Obama Administration, which effectively remade the law in certain areas of intense political contestation by announcing explicit policies of enforcement forbearance regarding marijuana and immigration. Under President Trump, the federal government sought to repeal those policies and in some important examples declined to follow suit. At the same time, though, the Trump Administration sought to undo multiple disfavored regulations without any new rule-making process, a form of executive action that presents parallel problems. Meanwhile, at the state and local levels in recent years, a crop of “progressive” prosecutors pursuing social-justice goals in major cities have openly abandoned enforcement of some crimes, prompting criticism from political opponents that they are inviting lawlessness and exceeding the proper bounds of their authority. For their part, courts, at least at the federal level, have imposed some limits on policies that seek to change the on-the-ground law through enforcement discretion. But then this past June, the Supreme Court threw the field in disarray by holding, in a confused and incoherent opinion in *Department of Homeland Security v. Regents of the University of California*,¹ that the Trump Administration could not undo an immigration nonenforcement program adopted by its predecessor.

This brief conference essay aims to clarify this confused field by identifying the correct conceptual framework for analyzing enforcement

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¹ 591 U.S. __ (2020).

questions, at least at the federal level. Building on prior work, the essay argues that enforcement discretion itself is ultimately an authority only to make case-specific enforcement exceptions and set priorities for enforcing broad laws with limited resources; it is not a power to change the law itself, nor to make prospective or categorical exemptions from statutes' application.² It further argues that programmatic exercises of enforcement discretion must generally be revocable: they cannot be subject to legally protected reliance because if they were, then enforcement officials could deliberately undermine disfavored laws by inviting reliance on promised forbearance.³ These principles apply equally to criminal and civil enforcement, although administrative agencies sometimes issue "enforcement policies" that are really exercises of delegated interpretive or law-making discretion and thus raise distinct issues.⁴

Beyond laying out these basic principles, the essay makes two further modest contributions: First, it offers critical analysis of the *UC Regents* decision. In that case, as noted, the Court barred the Department of Homeland Security under President Trump from rescinding an immigration forbearance program adopted during the Obama Administration. The Court reasoned that the new administration could not repeal the old one's policy without giving greater consideration to reliance interests of immigrants participating in the program. If taken seriously as a generalizable precedent, this decision could have dramatic consequences. In particular, by imposing obstacles to repealing nonenforcement policies, it could encourage executive officials to adopt such policies in the first place as a means of undermining disfavored laws. For a number of reasons, however, *UC Regents* is probably an ad hoc decision good for one day and case only—it aimed to avoid an unappealing and politically damaging result in a charged electoral season, not to establish enduring principles for enforcement-related questions.

Second, the essay offers a few tentative thoughts about the future of federal enforcement discretion—both what should happen and what likely will. Whatever the correct view of the law, pressure on administrations to employ enforcement discretion as a policy tool will likely remain intense, and may well be ineluctable in the short run post-*UC Regents*, notwithstanding the decision's narrow reasoning. As for what agencies ideally should do, although background legal understandings preclude executive officials from limiting their own discretion too sharply with internal administrative measures, the legal structures built around prosecutorial discretion in criminal

² Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 674-75 (2014).

³ Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937, 945 (2017).

⁴ *Id.* at 982-83.

law and some other areas are nonetheless quite unattractive in key respects. Ultimately, reform measures should be oriented towards paring away unnecessary statutes and regulations—a goal that, ironically, categorical executive nonenforcement policies may undermine. Congress or executive officials might consider a number of measures to help stimulate such legal revisions, including delegating authority to suspend criminal statutes, narrowly construing criminal prohibitions, and encouraging retrospective review by administrative agencies. Executive officials might also make greater use of internal enforcement priorities to promote equitable treatment of individual defendants without unduly eroding public compliance with governing substantive laws.

The essay proceeds as follows. Part I provides an overview of the legal basis for federal enforcement discretion and its legal limits. Part II examines policies from the Obama and Trump Administrations in light of these legal principles, and Part III critically analyzes the *UC Regents* decision. Part IV speculates about how executive officials will respond to *UC Regents* and considers several constructive steps they might take. The essay ends with a brief conclusion addressing nonenforcement’s significance in the current political moment.

I. A LEGAL FRAMEWORK FOR FEDERAL ENFORCEMENT DISCRETION

A. *The Basic Framework*

In federal criminal law and some other areas of federal administration today, the number of potential defendants so far exceeds the number who can realistically be prosecuted that enforcement discretion is effectively plenary. This reality, however, promotes a distorted constitutional understanding. Although courts and commentators often presume that such absolute discretion is an Article II prerogative,⁵ the most relevant Article II provision, the so-called Take Care Clause, obligates the President to “take Care that the Laws be faithfully executed.” Far from conferring nonenforcement authority on the Executive, therefore, the Constitution’s plain text obligates presidents to effectuate any constitutionally valid federal laws—even if the President disagrees with them, or indeed even if Congress overrides a presidential veto to enact them.⁶

As I argued in a 2014 article, the constitutional structure does support presuming some baseline discretion, namely, the authority to decline

⁵ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575-76 (1992); *United States v. Nixon*, 418 U.S. 683, 693 (1974).

⁶ Price, *Enforcement Discretion*, *supra* note __, at 689-90.

enforcement in particular cases for case-specific reasons.⁷ The federal executive is not supposed to be a robot. Tailoring general laws to particular facts is a natural aspect of the executive function, and the basic structure of separated executive and legislative power implies a potential gap between the strict letter of the law and its application in specific circumstances. By the same token, however, the baseline constitutional structure does not support presuming authority either to prospectively license violations or to categorically suspend enforcement for broad sets of cases. Such executive actions are tantamount to what the Framers would have called “dispensing” or “suspending” powers—law-changing executive prerogatives that British monarchs historically exercised but that Parliament repudiated in the English Bill of Rights of 1689 and that the U.S. Constitution aimed equally to foreclose.⁸

My article supported this framework in part with a study of early federal practice, and further research by other scholars has only reinforced these conclusions. As Andrew Kent, Ethan Leib, and Jed Shugerman document in a 2019 article on *Article II and Faithful Execution*, “faithful execution” at the time of the framing was understood as a term of art binding executive officials to implement statutes without regard to their personal views about them.⁹ In particular, “[f]aithful execution was understood as requiring good faith adherence to and execution of national laws, according to the intent of the lawmaker. Waivers or refusals to enforce for policy reasons without clear congressional authorizations, then, appear to be invalid under the clauses.”¹⁰ This principle, moreover, “offer[s] some support for the argument against systematic executive discretion to effectively ‘suspend’ laws through an assertion of categorical prosecutorial discretion.”¹¹ Again, faithful execution in this sense does not necessarily mean imposing every available penalty and pursuing every violation; some degree of discretion is a welcome and necessary incident of separating legislative and executive power. It does, however, indicate that federal executive officials should consider themselves duty-bound to seek to bring about compliance with statutory law.¹²

B. Enforcement Discretion’s Historical Development

But if the Constitution and early practice suggest limited executive

⁷ *Id.* at 704.

⁸ Price, *Enforcement Discretion*, *supra* note ___, at 705.

⁹ Andrew Kent et. al., *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019).

¹⁰ *Id.* at 2185.

¹¹ *Id.* at 2187.

¹² Price, *Enforcement Discretion*, *supra* note ___, at 704-06.

enforcement discretion, how did we end up with the virtually plenary discretion exercised by federal prosecutors today? My article suggests that prosecutorial discretion came to appear natural and inevitable, particularly in criminal law, because a steady accumulation of federal criminal laws, combined with a historic shift from case-based to salaried compensation that encouraged greater discretion, created an environment in which full enforcement became a practical impossibility.¹³ Federal prosecutors' mandate became a matter of enforcing broad laws with limited resources, a task that inevitably requires exercising discretion over which cases to pursue and which to let slide. This legal structure, once in place, became self-reinforcing, particularly during the era of "tough on crime" politics that began in the 1960s and may or may not now be ending. Congress could enact harsh and extensive laws while expecting that prosecutors would decline enforcement in marginal cases and employ punitive laws mainly to extract plea bargains against genuinely culpable offenders.¹⁴

As commentators have long complained, the resulting legal structure is quite unattractive. Seen in its best light, as David Sklansky has argued, extensive enforcement discretion might enable prosecutors to serve as "mediating figures" who blur boundaries between vengeance and mercy, courts and police, and so on; their role tempering the law in application can lend nuance to statutory prohibitions.¹⁵ When applied with moderation, moreover, criminal laws may signal community disapproval and foster deterrence even without necessarily leading to harsh applications against offenders.¹⁶

The reality, however, appears far uglier than such appealing features of discretion alone could support. The federal criminal code is massive, sprawling, and punitive to a degree that the democratic process in all likelihood could not have supported without an expectation that prosecutors would exercise considerable discretion regarding its application.¹⁷ Indeed, much of the code, particularly its use of multiple, overlapping offenses to cover particular crimes, seems designed to strengthen prosecutors' negotiating position in seeking plea bargains with offenders they deem genuinely culpable.¹⁸ Yet at the same time the law gives defendants no

¹³ *Id.* at 743-45.

¹⁴ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

¹⁵ David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 477 (2016).

¹⁶ Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 631 (1984).

¹⁷ See, e.g., Stuntz, *supra* note ___, at 517-19; Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008).

¹⁸ See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV.

recourse if a particular prosecutor chooses to enforce an outdated, unpopular, or widely disregarded law against them.

Given this reality, prosecutors should—and generally do—appreciate the degree of discretion they exercise and should consider with care whether to pursue any particular case. But the constitutional separation of powers still matters as well to how executive officials understand their responsibility and exercise their discretion. Prosecutors are ultimately servants of the law, charged with faithful execution rather than independent policy-making authority. Indeed, their obligation to enforce the law as it is and not as they wish it to be is an important constraint on executive unilateralism. To strike a balance between these competing obligations, as I argued in 2014, executive officials in criminal law and other areas with similarly extensive discretion should understand their authority to consist in priority-setting rather than policy-making.¹⁹ Choosing to pursue one crime or type of crime rather than another when one lacks the time and resources to pursue both is a natural and inevitable aspect of the executive function in areas like criminal law. By contrast, supplanting the goals of a criminal statute with different on-the-ground conduct rules is a matter for the legislature.

Distinguishing between these two forms of executive action may often be a matter of mindset and degree rather than any sort of bright-line rule.²⁰ For that reason, executive enforcement responsibility cannot be fully enforced by courts: because courts generally lack manageable standards for assessing the executive branch's priorities, nonenforcement presents a judicially remediable problem only when the executive branch articulates some definite form of permission, such that setting aside the policy may meaningfully restore the underlying substantive law's deterrent effect.²¹ Yet even short of such judicially redressible violations, executive officials breach appropriate limits on enforcement discretion when they take steps to effectively alter the law on their own. Doing so, moreover, may only compound the problem executive officials aim to solve by relieving political pressure on Congress to make necessary statutory changes.

As for civil administration, the same basic constitutional principles apply, but the degree of presumed background discretion may vary from one area to the next. Immigration law appears to reflect the same negative feedback loop as federal criminal law: immigration prohibitions are likely stricter and more

L. REV. 2463, 2468 (2004); Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 646 (2011).

¹⁹ Price, *Enforcement Discretion*, *supra* note __, at 754-55.

²⁰ Price, *Enforcement Discretion*, *supra* note __, at 755.

²¹ For my elaboration of this point, see Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1572, 1627-29 (2016).

severe than the public desires, in part because Congress has legislated against a backdrop of limited enforcement resources and presumed executive discretion.²² Given, however, that enforcement discretion is generally a product of legislative choice rather than Article II, enforcement discretion in other areas of civil administration may not carry comparable scope. Though such examples are rare, some statutes even go so far as to specifically require full enforcement.²³ Such mandates generally are not judicially enforceable because court-mandated prosecution would violate the separation of judicial and executive power, but they are nevertheless constitutional so long as they preserve executive discretion to decline enforcement against individuals the executive branch judges to be factually innocent.²⁴

C. The Problem of Reliance

Another important implication of this legal framework is that when executive officials do announce nonenforcement policies, those policies generally do not estop the government from future enforcement if it changes its mind. In a handful of cases, the Supreme Court has recognized a due process defense against criminal prosecution when the government specifically invited unlawful conduct, but these cases apply only if the government indicated the conduct was actually lawful; they do not apply if the government merely promised nonenforcement.²⁵ What is more, lower courts have limited their application to situations in which the legal assurances were objectively reasonable.²⁶

This doctrine is harsh because lax enforcement can easily mislead the public about what conduct is lawful. I have argued it should be relaxed at the margins in circumstances in which the unfairness to individuals is acute and the cost to separation of powers in protecting reliance is slight.²⁷ But in general it reflects a necessary limit on executive enforcement discretion: if inviting reliance on promised forbearance could establish a legal defense, then executive officials could effectively change the law itself through

²² Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law*, 119 *YALE L.J.* 458, 511 (2009).

²³ *See, e.g.*, 29 U.S.C. § 482(b) (requiring investigation of certain labor complaints); 42 U.S.C. § 1987 (“authoriz[ing] and requir[ing]” certain civil rights prosecutions).

²⁴ For discussion of this point, see Price, *Political Question*, *supra* note ___, at 1598.

²⁵ *See, e.g.*, *United States v. Pa. Indust. Chem. Corp.*, 411 U.S. 655, 674 (1973); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965); *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959); *United States v. Rampton*, 762 F.3d 1152, 1157 (10th Cir. 2014); *United States v. Smith*, 940 F.2d 710, 715 (9th Cir. 1970).

²⁶ Price, *Reliance*, *supra* note ___, at 944-45.

²⁷ *Id.*

nonenforcement assurances.²⁸ Again, however, enforcement discretion by itself provides no such power. As the Supreme Court put it in a recent decision, “[a]n agency confronting resource constraints may change its own conduct, but it cannot change the law.”²⁹

Some confusion surrounds this reliance question because administrative agencies sometimes issue “enforcement policies” that are really exercises of delegated interpretive authority. Unlike criminal prosecutors, administrative agencies sometimes hold interpretive discretion or law-making authority with respect to the laws they administer. In other words, they are understood to exercise a power, delegated from Congress, to determine what the law is, and not merely how it is enforced. Agencies, furthermore, may often choose whether to develop their interpretation of governing laws through notice-and-comment regulations or instead through orders resolving case-specific adjudications. When agencies pursue the latter course, they sometimes issue guidance to regulated parties indicating what conduct they are likely to treat as unlawful. Though sometimes styled “enforcement policies,” such guidance documents are distinct from the sort of priority-setting enforcement policy discussed so far. They do not indicate which violations of a clearly applicable law the agency will focus resources on pursuing; instead, they indicate what the agency understands the law to prohibit in the first place.³⁰

Some examples may help. In a classic case regarding administrative guidance, the Food and Drug Administration established “‘action levels’ informing food producers of the allowable levels of unavoidable contaminants such as aflatoxins.”³¹ On some level, these action levels merely indicated how the agency planned to enforce a statutory restriction on “poisonous or deleterious substances” in food, and the court at one point characterized the action levels as “cabining . . . [the] agency’s prosecutorial discretion.”³² In reality, however, the agency’s guidance did not merely indicate what forms of adulterated food it was prioritizing for enforcement; instead, it interpreted what food the agency considered adulterated as a matter of law in the first place. For that reason, the agency concluded that the guidance announced a legislative rule that could be promulgated only through notice and comment procedures.³³ Likewise, in a more recent case, *FCC v. Fox Television Stations*, the Supreme Court held that the Federal

²⁸ *Id.* at 945.

²⁹ *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2445 (2014).

³⁰ An immense literature addresses agencies’ use of guidance documents. For a helpful recent survey of agency practice and some proposals for reform, see Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 *YALE J. ON REG.* 165 (2019)

³¹ *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 945 (D.C. Cir. 1987).

³² *Id.* at 945, 948.

³³ *Id.*

Communications Commission could not change its “enforcement policy” with respect to a statutory prohibition on “obscene, indecent, or profane” broadcasts without offering a reasoned explanation of any “serious reliance interests” based on the prior policy.³⁴ Again, however, the enforcement policy in question was not a mere prioritization of some offenses over others, but an indication of what statements the agency would treat as indecent under the statutory standard.

As *Fox Television* illustrates, courts have sometimes protected regulated parties’ reliance on legal understandings reflected in documents like these, even though legal interpretations in such guidance documents would not normally receive judicial deference on direct review. Indeed, in a later round of the *Fox Television* litigation, the Court held that a due process principle of fair notice precluded the agency from retroactively penalizing a broadcaster at all for material that the then-effective agency policy indicated was lawful.³⁵ Similarly, in *Christopher v. SmithKline Beecham Corp.*, the Supreme Court reviewed an agency’s interpretation of its own regulations without deference because the agency’s “very lengthy period of conspicuous inaction” with respect to conduct defying the agency’s current interpretation signaled to regulated parties that the agency “did not think the agency’s practice was unlawful.”³⁶

These cases protect regulated parties’ reliance on regulators’ stated or apparent view of the law. They do not suggest that regulated parties may rely on what we might call “true” agency enforcement policies, i.e., those that indicate what violations the agency will pursue, as opposed to those that plausibly interpret what conduct violates the law in the first place.³⁷ Agencies of all sorts may issue enforcement policies of the priority-setting variety too, and courts have been extraordinarily reluctant to protect reliance on those sorts of enforcement policies. As noted earlier, courts have repeatedly rejected arguments that such reliance should establish a defense under either the Due Process Clause or the Administrative Procedure Act—or so at least things stood until *UC Regents*.³⁸

³⁴ 556 U.S. 502, 515-16 (2009) (“*Fox P*”).

³⁵ *FCC v. Fox Television Stations*, 132 S. Ct. 2307, 2318 (2012) (“*Fox IP*”).

³⁶ 132 S. Ct. 2156, 2168-69 (2012); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126-27 (2016) (denying deference to a legislative rule because it departed from the agency’s past interpretation without accounting for regulated parties’ reliance interests).

³⁷ For further discussion of this distinction and the relevant case law, *see Price, Reliance*, *supra* note __, at 982-86.

³⁸ *See supra* note __; *see also, e.g., Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) (indicating that recognizing estoppel based on executive assurances would “invade the legislative province reserved to Congress”); *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (rejecting estoppel against the government so as to protect the interest of the “citizenry as a whole” in legal compliance); *United States v.*

To sum up, then, enforcement discretion is not an absolute executive prerogative. Instead, absent any more specific statutory direction, Article II properly supports only a default authority to decline enforcement in particular cases and to set general, non-binding priorities when limitations of time and money preclude full enforcement. As a necessary consequence, outside of certain administrative contexts in which an agency exercises interpretive authority through its enforcement choices, the law generally cannot protect reliance on nonenforcement assurances. Instead, the underlying substantive law must remain at least theoretically enforceable, so as to prevent executive officials from acquiring a de facto dispensing power by inviting reliance on promised forbearance.

II. RECENT CONTROVERSIES

These legal principles provide guideposts for assessing a number of recent controversies regarding nonenforcement. I will begin with some examples from the Obama Administration, then turn to President Trump, and then take stock of the broader picture, so as to set the stage for an analysis of *UC Regents*.

A. Obama-Era Controversies

At least three major controversies over nonenforcement arose in the Obama years. First, as more and more states amended their own laws to remove prohibitions on medical or even recreational marijuana, the U.S. Justice Department announced a policy in 2013 of assigning low priority to federal marijuana crimes involving consumers or distributors who acted in compliance with state law and did not implicate other federal interests.³⁹ Second, around the same time, the Obama Administration also announced “transition relief” that delayed the statutory effective dates of certain prohibitions in the Affordable Care Act. One such delay suspended certain minimum coverage requirements for insurance plans; another postponed employers’ obligation to provide employees with qualifying coverage or else

Washington, 887 F. Supp. 2d 1077, 1084 (D. Mont. 2012) (rejecting reliance defense based on federal marijuana nonenforcement policy despite acknowledging that, “when taken in the aggregate, particularly through the filter of the news media, the words of federal officials were enough to convince those who were considering entry into the medical marijuana business that they could engage in that enterprise without fear of federal criminal consequences”), *adhered to on reconsideration*, No. CR 11-61-M-DLC, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

³⁹ Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, Guidance Regarding Marijuana Enforcement (Aug. 29, 2013).

incur certain penalties.⁴⁰ Both delays reflected political controversies surrounding the provisions in question.

Finally, and most controversially of all, in 2012 and 2014 the Obama Administration adopted policies encouraging broad categories of unauthorized immigrants to apply for two- or three-year renewable promises of nonenforcement known as “deferred action.” Though technically nothing more than non-binding assurances of enforcement forbearance, as a practical matter deferred action recipients received a prospective guarantee of non-deportation for the prescribed time period, as well as the opportunity to apply for work authorization and obtain other benefits that would otherwise have been barred by statute.⁴¹

In my 2014 article and later work, I argued that the administration’s marijuana policy was dubious but defensible insofar as it made clear it was non-binding and merely established priorities for federal enforcement, as opposed to any sort of legal permission for law-breakers.⁴² By contrast, I argued that the ACA delays and the first deferred action program crossed the line because they effectively suspending statutory requirements prospectively for broad categories of regulated parties.⁴³ When the administration later promulgated the second of the two immigration programs—“Deferred Action for Parents of Americans” or “DAPA,” as opposed to “Deferred Action for Childhood Arrivals” or “DACA”—it released an opinion by the Justice Department’s Office of Legal Counsel that largely accepted the legal principles outlined above and advocated in my article, but approved DAPA (though not a further proposed program) based on a dubious argument that Congress had implicitly conferred authority to grant deferred action to the program’s beneficiaries.⁴⁴ Disagreeing, a federal district court enjoined the program nationwide before it took effect; a split Fifth Circuit panel affirmed

⁴⁰ For further description and analysis of these examples, see Price, *Enforcement Discretion*, *supra* note __, at 750-54, and Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1721-25 (2016).

⁴¹ For the administration’s description and legal defense of these programs, see *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. __ (Nov. 19 2014); *see also*, e.g., Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 383-92 (2017); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 131-33 (2015).

⁴² Price, *Enforcement Discretion*, *supra* note __, at 757-59.

⁴³ *Id.* at 749-54, 759-62. For a similar argument regarding the second immigration program, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 216 (2015).

⁴⁴ *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. __ (Nov. 19 2014).

the injunction; and the Supreme Court, then one member short following Justice Scalia's death, affirmed as well by an equally divided vote.⁴⁵

B. President Trump's Mixed Record

When President Trump took office, his administration rescinded both the Obama Administration marijuana guidance and the DACA program (DAPA was still enjoined). The ACA delays had already lapsed, and in one noteworthy example the administration declined to build upon them. When the state of Idaho announced that it would allow sale of non-compliant health insurance plans in the state, the Trump Administration declined to bless the state's attempted suspension of federal law. Instead, making clear that the ACA "remains the law and we have a duty to enforce and uphold the law," it announced that it would enforce the ACA's restrictions itself if the state failed to do so.⁴⁶ Thus, in some important ways, the administration took noteworthy steps towards limiting use of enforcement policies to alter on-the-ground law.

In other areas, however, the Trump Administration engaged in abuses that closely parallel the Obama Administration's. In a number of administrative policies, the administration purported to suspend various binding regulations that it considered bad policy. As already explained, when enforcing conduct prohibitions in a relatively clear statute, administrative officials hold the same obligation of faithful execution that applies to criminal enforcement. For that reason, the ACA delays and immigration deferrals mentioned earlier were unlawful: both went beyond any conceivable interpretive discretion held by the agency and sought instead to alter legal obligations based on nothing more than the agency's organic enforcement discretion. Because they bind the agency as well as regulated parties, so-called legislative rules or regulations—that is, agency-promulgated rules, typically adopted through notice-and-comment procedures, that have the force and effect of law⁴⁷—may impose similar enforcement obligations on the agency. At the least, agencies lack authority to wipe away regulatory obligations through mere exercises of enforcement discretion; instead, undoing a notice-and-comment rule typically requires a new notice-and-comment rule.⁴⁸

⁴⁵ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

⁴⁶ See Nicholas Bagley, *Knock It Off, Idaho. (But Carry On, Idaho.)*, TAKE CARE BLOG (Mar. 9, 2018), <https://takecareblog.com/blog/knock-it-off-idaho-but-carry-on-idaho>; Nicholas Bagley, *Idaho Is Ignoring Obamacare Rules. That Could Set Off a Catastrophic Chain Reaction.*, VOX (Feb. 24, 2018), <https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt>.

⁴⁷ See, e.g., *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014).

⁴⁸ *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that agencies are bound by their own regulations until validly repealed).

Much as they enjoined DAPA in the Obama Administration, courts had little trouble setting aside the Trump Administration’s lawless defiance of these principles. In *Clean Air Council v. Pruitt*, for example, the D.C. Circuit held that the Environmental Protection Agency lacked authority to “stay” a recent regulation limiting so-called “fugitive” emissions from oil and gas production.⁴⁹ Calling it “‘axiomatic’ that ‘administrative agencies may act only pursuant to authority delegated to them by Congress,’” the court held that the agency could not repeal or suspend its rule without a new notice-and-comment process because the only statutory provision invoked by the agency provided no authority for doing so.⁵⁰ Likewise, in *Natural Resources Defense Council v. National Highway Traffic Safety Administration*, the Second Circuit invalidated an agency’s suspension of civil penalties adopted in a prior regulation because the APA’s requirement to follow notice-and-comment procedures applies “with the same force when an agency seeks to delay or repeal a previously promulgated final rule.”⁵¹ These decisions effectively enforced the same legal limit discussed above with respect to DACA and the ACA delays: although agencies may prioritize some violations over others because they lack the time and resources to pursue both, enforcement discretion alone provides no authority to alter the law itself.⁵²

In a sense, then, to this point a pattern of bipartisan abuse met with bipartisan judicial repudiation. But then events took a curious turn. In several decisions in multiple jurisdictions, lower federal courts barred the Trump Administration’s attempted rescission of DACA. These courts reasoned, in effect, that the administration violated the Administrative Procedure Act by insufficiently considering immigrants’ reliance interests in its rescission decision.⁵³ These decisions are nearly impossible to reconcile with those invalidating the administration’s regulatory suspensions. If suspending a law is itself so lawless that courts must enjoin it, as cases like *NRDC v. Pruitt*

⁴⁹ 862 F.3d 1 (D.C. Cir. 2017).

⁵⁰ *Id.* at 9 (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (internal alteration and citations omitted)).

⁵¹ 894 F.3d 95, 113 (2d Cir. 2018).

⁵² Some courts have held that agencies, at least as a default, retain authority to waive regulatory (as opposed to statutory) requirements in particular cases. Any such authority is an exercise of the agency’s ongoing interpretive authority with respect to the laws it administers, not an exercise of mere enforcement discretion, and case-specific waivers of this sort do not present the same issues as an across the board suspension of a previously promulgated regulation or regulatory requirement. For questions presented by this type of waiver, see generally Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHICAGO-KENT L. REV. 1359 (1997).

⁵³ See, e.g., *Regents of the Univ. of Cal. v. U.S. Dep’t of Homeland Sec.*, 908 F.3d 476 (9th Cir. 2018), *cert. granted sub nom. Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 139 S. Ct. 2779 (2019).

hold, then the executive branch must itself have authority to suspend such suspensions, as the Trump Administration effectively did by cancelling DACA. Nevertheless, this past June, the Supreme Court affirmed these lower-court rulings in its 5-4 decision in *UC Regents*—a decision whose manifold defects I address in Part III.

C. Broader Developments

Meanwhile, some other developments have added to the confusion. First, despite repealing the Obama administration’s permissive policy, the Trump Administration appears not to have resumed meaningful enforcement of federal marijuana laws.⁵⁴ This policy is in part dictated by Congress, which has enacted a recurrent appropriations provision barring use of Justice Department funds to punish state-compliant medical marijuana dispensaries.⁵⁵ As to recreational marijuana, however, the administration appears to have simply conceded, perhaps sensibly, that the cat is now out of the bag. As a practical matter, despite its non-committal character, the Obama Administration’s nonenforcement policy enabled development of a multi-billion dollar industry in multiple states. Although this industry is operating in flagrant violation of federal drug-trafficking laws, which make distributing any quantity of marijuana a criminal offense, the Trump Administration seems to have judged it politically impossible to reassert these statutes’ continuing force.⁵⁶

In addition, outside the federal government, nonenforcement has continued to gain strength as a policy tool in the post-Obama years. In particular, a wave of “progressive” prosecutors in major cities, including San Francisco where I teach, have purposefully scaled back criminal enforcement.⁵⁷ As a basis for their policies, these officials have invoked concerns about the criminal justice system’s undue harshness and its disparate racial and socio-economic effects. The electoral success of such appeals suggests a remarkable softening of the tough-on-crime attitudes that

⁵⁴ For discussion of the Trump Administration’s actions on marijuana, see Zachary S. Price, *Federal Nonenforcement: A Dubious Precedent*, in *MARIJUANA FEDERALISM: UNCLE SAM AND MARY JANE* 123, 125-26 (JONATHAN ADLER, ED., 2020).

⁵⁵ For the current iteration of this provision, see Consolidated Appropriations Act, 2020, Pub. L. No. 116-93, div. B, tit. V, § 531, 133 Stat. 2317, 2431 (Dec. 20, 2019).

⁵⁶ Price, *Federal Nonenforcement*, *supra* note __, at 126. Despite the nonenforcement policies, federal marijuana prohibitions have continued to impair access to banking and other heavily regulated services. See Julie Andersen Hill, *Banks and the Marijuana Industry*, in *UNCLE SAM AND MARY JANE*, *supra* note __, at 139.

⁵⁷ See Rebecca Goldstein, *The Politics of Decarceration*, 129 *YALE L.J.* 446, 467-70 (2019) (reviewing RACHEL ELISE BARKOW, *PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION* 111 (2019)).

dominated crime politics from at least the 1960s until very recently.⁵⁸ Nonenforcement by locally elected prosecutors, furthermore, does not necessarily raise the same concerns presented in the federal separation-of-powers context. W. Kerrel Murray has made a compelling case that such policies, if announced ahead of time during an election campaign, should generally be considered lawful, at least in the absence of specific state laws limiting local prosecutors' discretion.⁵⁹

Nevertheless, continued reliance on such policies, rather than legislative changes to underlying criminal laws, suggests an ongoing fracturing of our societal commitment to enacted legislation as the focus of social organization and public order. In a society with deep political divisions over what the law should be, the notion of legal compliance as an impersonal norm binding citizens and officials alike, without regard to their personal view of the law's content, seems likely to remain under pressure and continue generating controversies over enforcement. What is more, given the political pressure for criminal justice reform within the Democratic coalition, as evidenced by recent nationwide protests over police violence, the next Democratic administration may well resume efforts to soften federal criminal law in application through bold executive action. I will return shortly to these incentives and their likely effects, but first the *UC Regents* decision, and how it exacerbates pressures for executive unilateralism, warrants a closer look.

III. WHAT DOES *UC REGENTS* MEAN?

The framework elaborated so far provides relatively clear guideposts for assessing enforcement policies and executive obligations, but the Court's *UC Regents* decision departs from the framework in important ways. If taken seriously as a generalizable precedent, *UC Regents* could have significant consequences: far from discouraging categorical nonenforcement policies that undermine laws a particular administration disfavors, the decision could promote such policies by erecting obstacles to their future repeal.⁶⁰

Though recognizing that "DHS may rescind DACA,"⁶¹ Chief Justice Roberts's majority opinion in *UC Regents* held that DHS's rescission in this case was "arbitrary and capricious" in violation of the APA because the

⁵⁸ *Id.*

⁵⁹ Walter Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. ___ (forthcoming 2020).

⁶⁰ I offered a similar preliminary analysis of *UC Regents* in a blog post just after the Court issued the decision. Zachary Price, *Symposium: DACA and the Need for Symmetrical Legal Principles*, SCOTUSBLOG (Jun. 19, 2020), <https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles/>.

⁶¹ 591 U.S. ___ (2020) (slip op. at 9).

agency insufficiently explained its action.⁶² According to Chief Justice Roberts’s opinion for the Court, the Secretary of Homeland Security was bound by an earlier determination from the Attorney General that DACA was unlawful,⁶³ but she nonetheless failed “to appreciate the full scope of her discretion” because, in the Court’s view, she could have cancelled benefits associated with deferred action without terminating the policy’s “forbearance component.”⁶⁴

In addition, as a second and apparently independent defect in the agency’s decision-making, the Chief’s majority opinion faulted the Secretary for inadequately considering the reliance interests of DACA beneficiaries. Instead of the terse statement it issued upon initially rescinding DACA, the secretary should have “asses[ed] whether there were reliance interests, determine[d] whether they were significant, and weigh[ed] any such interests against competing policy concerns.”⁶⁵ Absent a self-flagellating litany of immigrants’ reliance interests and the agency’s reasons for disregarding them, the Court reasoned, the Secretary fell afoul of the Court’s holding in an earlier case that agencies must demonstrate “cognizan[ce] that longstanding policies may have ‘engendered serious reliance interests that must be taken into account.’”⁶⁶ As it happens, the Secretary had in fact made clear in a later elaboration of her reasons for rescinding DACA that she considered it “critically important for [the government] to project a message that leaves no doubt regarding the clear, consistent, transparent enforcement of the immigration laws against all classes and categories of aliens.” The Court, however, disregarded this statement as a “post hoc rationalization,” even though the Secretary prepared it in response to a district court’s demand for a more complete explanation for the rescission.⁶⁷

The Court’s reasoning on all these points was confused to the point of incoherence. To begin with, the Court seemed to miss the point of the controversy surrounding DACA. No one doubts that DHS could have issued a policy, akin to the Obama Administration’s marijuana guidance, that assigns low priority to enforcing immigration laws against sympathetic and otherwise law-abiding immigrants of the sort benefitted by DACA; indeed,

⁶² *Id.* (slip op. at 2).

⁶³ *Id.* (slip op. at 19).

⁶⁴ *Id.* (slip op. at 19-20).

⁶⁵ *Id.* (slip op. at 26).

⁶⁶ *Id.* (slip op. at 23-24) (citing *Encino Motorcars*).

⁶⁷ *Id.* (slip op. at 14-15). This aspect of the decision also casts doubt on the previously accepted practice of remanding flawed agency decisions without vacating them. See Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for Chenery I’s Ordinary Remand Rule?*, NOTICE & COMMENT BLOG (June 19, 2020), <https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-chenery-is-ordinary-remand-rule/>.

the department had done just that before announcing the DACA program. But handing out prospective individualized assurances of nonenforcement for specified periods to a large category of regulated parties is another matter. This point would likely be obvious to many DACA proponents if the technique were employed instead to authorize unlawful pollution, firearms sales, or labor practices, among other things. Contrary to the Supreme Court's strained reading, moreover, the Fifth Circuit's decision seized on precisely this aspect of DACA when it characterized the program as granting immigrants "lawful presence" without any statutory authority for doing so. Besides, even holding aside this problem, the Court's insistence that the Secretary should have parsed the Fifth Circuit's decision to recognize that her "forbearance authority was unimpaired"⁶⁸ is at odds with its earlier recognition that the Secretary was bound by the Attorney General's determination that DACA was unlawful. If the Attorney General's legal determination was conclusive, what difference could the details of the Fifth Circuit's reasoning make?

The fact is the Court could not properly reach questions regarding the rescission's reasonableness without addressing DACA's legality, yet the majority purported to hold aside such questions while only considering the decision's procedural adequacy. In so-called "hard look" review of the sort employed in *UC Regents*, courts assess whether an agency was "arbitrary and capricious" in violation of the APA by probing the reasonableness of the agency's stated reasons for action. In practice, such review is often a sliding scale that calibrates judicial review's rigor to the nature and context of the administrative decision.⁶⁹ If legislative rules fall at one end of the spectrum and thus require the most probing review, enforcement choices should fall at the other: policies prioritizing one set of offenses over others generally implicate essentially indeterminate questions of resource-allocation, questions that agencies have superior competence and accountability in addressing.⁷⁰ Indeed, for these and other reasons, the Supreme Court has held that case-specific nonenforcement decisions are altogether unreviewable.⁷¹

In that context, judicial review of an agency's reasons for resuming

⁶⁸ *Id.* (slip op. at 20).

⁶⁹ See, e.g., Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 880 (2020) (observing that governing case law "leaves a reviewing court flexibility to approach a case with a light or heavy touch, depending on the stakes and the general sense of whether the agency is implementing its mandate in good faith").

⁷⁰ For my elaboration of this point, see Price, *Political Question*, *supra* note __, at 1610-18.

⁷¹ *Heckler v. Chaney*, 470 U.S. 821, 831 (1985); see generally Christopher J. Walker, *Administrative Law Without Courts*, 65 UCLA L. REV. 1620, 1628 (2018) (explaining that an "agency's decision whether to exercise its enforcement powers" is "generally not reviewable").

enforcement following a pause, including reasons relating to litigation risk and legality, should be highly deferential. That is particularly true if the past policy or program was in fact unlawful, as I have suggested was true and as Justice Thomas argued in dissent.⁷² Rigorously reviewing an agency's reasons for cancelling an unlawful program risks freezing such programs in place instead of facilitating restoration of law-bound governance. The exacting form of scrutiny the Court applied in *UC Regents* thus highlights in particularly acute form the longstanding concern that hard look review may be manipulable and prone to enabling judges to impose their own policy preferences on agencies.⁷³

As for the Supreme Court's alternative reliance rationale, the majority opinion appeared oblivious not only to the cases discussed earlier that declined to protect reliance on enforcement forbearance, but also to the risks of executive self-aggrandizement to which that caselaw responds. To the extent it was lawful, DACA was justified as an exercise of agency enforcement discretion; DHS characterized the policy as an exercise of "prosecutorial discretion" and argued that past programmatic grants of deferred action, though much more limited in scope and addressed to more particularized circumstances, afforded precedents for the larger DACA program. If DACA was simply a valid exercise of enforcement discretion, however, then a necessary consequence of this theory of authority is that the DACA grants were also revocable, as indeed the agency repeatedly stated they were. Again, then, understanding hard look review to protect reliance in this context risks weakening a central constraint on adopting permissive forbearance policies in the first place.

The best argument for the *UC Regents* majority may be that requiring clear articulation of interests negatively affected by a policy change may promote democratic accountability by requiring the agency to acknowledge and accept its new policy's costs. Here, of course, at least in its second policy statement (which the Court majority conveniently disregarded), the agency did in fact take responsibility for the rescission's harsh effects by deeming it "critically important for [the government] to project a message that leaves no doubt regarding the clear, consistent, transparent enforcement of the immigration laws against all classes and categories of aliens." In context, such generalized acknowledgement of policy tradeoffs should be enough;

⁷² *UC Regents*, 591 U.S. __ (2020) (Thomas, J., concurring in part and dissenting in part).

⁷³ See, e.g., Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 767 (2008) (reporting evidence that "[p]olitical commitments significantly influence the operation of hard look review"). For a proposal to solve this problem by focusing judicial review on legal interpretation rather than policy, see Pojanowski, *supra* note __.

requiring greater specificity only invites an indeterminate and inevitably subjective assessment of how much detail suffices. Yet even this statement should not have been necessary to permit repeal of an expressly non-binding nonenforcement policy. In the enforcement context, any benefit to democratic accountability in requiring such a statement is more than offset by the loss to statutory primacy and law-bound governance in impairing agencies' authority to reverse permissive policies.⁷⁴

For all these reasons, *UC Regents* could have quite negative consequences if generalized as a significant precedent. Consider the marijuana example. Notwithstanding the expressly non-committal and revocable character of the Obama Administration's announced policies—which have since in fact been revoked—*UC Regents* could suggest that the government could only resume actual enforcement of federal marijuana prohibitions outside the confines of these policies if it first published a self-flagellating litany of ways doing so would disrupt expectations of marijuana businesses who jumped at the chance to engage in unlawful behavior. Likewise, to take examples with opposite political valence, consider the Trump Administration's regulatory cancellations. *UC Regents* could suggest that courts invalidating such cancellations had their analysis backwards: rather than invalidate the government's lawless disregard for its own regulations, these courts should have demanded that agencies take account of any reliance regulated parties had placed on the permissive policy statements.

Furthermore, by raising obstacles to revoking permissive policies, *UC Regents* elevates the political incentive to adopt them in the first place. Again, those incentives may already be powerful. In a polarized political environment, with deep contestation over the merits of existing laws and multiple impediments to legislative compromise, nonenforcement can be an important means of delivering tangible results to important constituencies. The Obama Administration's marijuana and immigration examples, at the least, appear to fit this pattern. Now that the Supreme Court has appeared to bless this tactic and even give such policies a degree of insulation from future change, the Trump Administration could be expected to throw up a number of nonenforcement policies—regarding firearms regulation, perhaps, or environmental or labor regulation, or even campaign finance and public corruption—and see what sticks, particularly if the President's reelection

⁷⁴ William Buzbee has instead analyzed the DACA rescission as an example of what he calls “agency statutory abnegation,” meaning an attempt to undo past regulatory action by claiming the past action was undertaken without proper legal authority. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019). DACA differs from other examples of this phenomenon, however, in that the government's past action was based solely on a theory of enforcement discretion, not any exercise of delegated interpretive authority that courts would have reviewed deferentially.

prospects continue to darken.

Whether such efforts succeed, will depend importantly on how lower courts interpret *UC Regents*. In all likelihood, given the majority opinion’s oddities and self-contradictions, most judges will recognize it to be an outlier precedent. As already noted, the Court expressly declined to consider DACA’s legality—yet faulted the secretary for failing to consider options she believed were unlawful. It held that the secretary was bound by the attorney general’s legal conclusions—yet faulted her for failing to independently parse the reasoning in a court decision. It emphasized the importance of considering reliance interests—yet never addressed the troubling incentives that protecting reliance could create for the executive. Overall, the court repeatedly emphasized the particular features of the government’s shambolic rescission process and parsed the particular words of DHS’ explanation. In conclusion, moreover, it stressed that its decision “address[ed] only whether the agency complied with the procedural requirement that it provide a reasoned explanation for its action.”⁷⁵ All this muddled narrowness and fact-specific reasoning seems designed to telegraph that *UC Regents* is another *Bush v. Gore*—a precedent, to be sure, but not one intended to have broad scope.

Indeed, if one pulls back from the legal arguments to the case’s broader context, it is hard not to view *UC Regents* as a product of its particular political moment. DACA’s beneficiaries are sympathetic and the program accordingly appears quite popular. Recent polling suggests some seventy-four percent of Americans, including fifty-four percent of Republicans, support continuing the program.⁷⁶ Yet opinion on this issue, and immigration more generally, is nonetheless highly polarized, which could make political compromise in Congress difficult, particularly in an election year. The Court’s ruling thus produces a popular result while sparing Congress the trouble of enacting it.

Furthermore, along with some other decisions last term, particularly the Court’s decision in *Bostock v. Clayton County, Georgia* interpreting the Civil Rights Act of 1964 to preclude discrimination based on sexual orientation or gender identity⁷⁷ and its decision in *June Medical Services LLC v. Russo* invalidating Louisiana abortion restrictions,⁷⁸ *UC Regents* seems designed to broadcast the Court’s bipartisan good faith, signaling to a polarized electorate

⁷⁵ 591 U.S. __ (2020) (slip op. at 29).

⁷⁶ Jens Manuel Krogstad, *Americans Broadly Support Legal Status for Immigrants Brought to the U.S. Illegally as Children*, PEW RESEARCH CENTER (June 17, 2020), <https://www.pewresearch.org/fact-tank/2020/06/17/americans-broadly-support-legal-status-for-immigrants-brought-to-the-u-s-illegally-as-children/>.

⁷⁷ 590 U.S. __ (2020).

⁷⁸ 591 U.S. __ (2020).

that the justices will distribute wins and losses across partisan divides rather than simply enacting one coalition or the other's agenda through legal interpretation. From that point of view, *UC Regents* and other recent decisions reflect a generally admirable impulse I have called "symmetric constitutionalism": deliberately spreading case outcomes and doctrinal benefits across major partisan divides so as to preserve judicial legitimacy and shared legal commitments.⁷⁹

But *UC Regents*, at least, does so in an unprincipled and ad hoc fashion that in the long run may undermine the Court's legitimacy rather than enhancing it. True symmetry depends instead on anchoring decisions that disappoint one faction today in generalizable principles that may disappoint their rivals tomorrow.⁸⁰ Such symmetry makes clear the Court is a forum of principle and not just an instrument of politics; it thus accords with the institutional reasons for separating judicial power from the other branches, as well as the legal logic of affording courts the awesome power of counter-majoritarian judicial review. By contrast, dispensing wins and losses with transparently ungeneralizable reasoning feeds a perception that the Court is simply channeling policy preferences in the manner of a legislature, yet if that is all the Court is doing there is little reason for political actors to defer to unfavorable rulings. Even from a raw political perspective, moreover, *UC Regents* may be a gift horse best not examined in the mouth. Though a progressive "win" in its immediate result, the decision (not unlike *Bostock* and *June Medical*) may ultimately redound to the GOP's benefit by depriving Democrats of a beneficial wedge issue in the 2020 election.

In sum, *UC Regents* reaches an attractive result, but does so through flawed and destructive reasoning. The Court should have shown more respect for the political process, and a greater appreciation for its limited institutional role, by allowing DACA's rescission while making clear that any comparable forbearance policies from the current administration or any future ones will be likewise revocable with a minimal burden of explanation. Its contrary ruling instead undermines judicial legitimacy and creates undesirable incentives for the executive branch. Lower courts might well contain the damage by giving the decision limited effect, but as with all new precedents only time will tell what course the law follows from here.

IV. WHAT COMES NEXT?

In *UC Regents*'s immediate aftermath, the ball is very much in the executive's court. Will it act on a broad interpretation of the decision or

⁷⁹ Zachary S. Price, *Symmetric Constitutionalism: An Essay on Masterpiece Cakeshop and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273 (2019).

⁸⁰ *Id.*

instead maintain prudent self-restraint? As it happens, the executive branch might have been interested in considering best practices in any event. Earlier this year, White House’s Office of Management and Budget issued a request for information seeking input regarding “[t]he growth of administrative enforcement and adjudication over the last several decades” and whether any reforms would better guarantee that “administrative enforcement and adjudication operate subject to requirements that ensure they are fair, speedy, accurate, transparent, and respectful of the rights of Americans.”⁸¹ Though since overshadowed by the coronavirus pandemic, protests seeking criminal-justice reform, and an accelerating presidential contest, among other things, the request suggested a potential good-government initiative to establish best practices, albeit with a likely deregulatory emphasis. To the extent such an initiative remains on the table, considering now how executive officials should and should not respond to *UC Regents* seems particularly appropriate.⁸²

To begin with the political reality, given the powerful existing incentives for further programmatic nonenforcement, any officials advocating a broad reading of *UC Regents* may find themselves pushing on an open door. Nonenforcement, again, can provide a potent means of circumventing a paralyzed legislative process to deliver on-the-ground legal change to important constituencies who object to existing legal requirements. Those incentives may well explain the Obama Administration’s marijuana and immigration initiatives, as well as the Trump Administration’s various regulatory cancellations. Although the Trump Administration has generally avoided the temptation to go even farther, it may feel emboldened to do so post-*UC Regents*.

For its part, a Biden Administration, or any future Democratic presidency, would probably face pressure within its electoral coalition to programmatically suspend enforcement of numerous laws as well, particularly in areas such immigration and federal criminal law. Local progressive prosecutors have already led the way in doing so, suggesting a model that a particularly insistent faction within the Democratic Party would like to generalize. At the very least, DACA would likely be safe from rescission and nonenforcement guidance equaling or exceeding the Obama Administration’s marijuana policies would likely be forthcoming.

We may then be on the cusp of a renewed cycle of tit-for-tat nonenforcement. Court decisions halting DAPA in the Obama Administration and deregulatory policies in the Trump Administration, as

⁸¹ *Improving and Reforming Regulatory Enforcement and Adjudication*, Office of Mgmt. and Budget (Jan. 30, 2020), 85 FED. REG. 5483.

⁸² For a broader survey of potential reforms to enforcement procedures, see Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016).

well as the Trump Administration's earlier refusal to expand nonenforcement into other areas such as the ACA, had seemed to halt the slide, but now once again the downward slope beckons. Not only could such a trajectory defy appropriate legal and prudential limits on executive discretion, for all the reasons addressed earlier. It could also do irreparable damage to shared public commitments to positive law, rather than administrative policy, as the appropriate basis for social organization. Whether any given set of nonenforcement measures sticks in the long run, moreover, would likely depend on whether one political coalition or the other is able to establish dominance. So long as our political divides remain unsettled and evenly matched, any nonenforcement policy adopted in one administration may remain subject to rescission in the next—and if such policies extend into still more contested policy areas, the risks of such enforcement whipsaws may increase, at significant cost to the law's stability and predictability for regulated parties.

To mitigate these problems, if executive officials do take steps to mitigate the impact of disfavored laws, they should at least adhere to the key legal limit discussed earlier: the policies, like the Obama Administration's marijuana guidance, should be framed in terms of relative priorities and avoid any categorical assurance of nonenforcement, let alone any sort of prospective permission of the sort involved in DACA. In addition, though this hope may well be quixotic at present, such policies should generally be promulgated internally rather than publicly announced. Although some scholars have advocated publicly disclosing such policies to ensure consistency and enable accountability,⁸³ agencies genuinely seeking compliance with the law generally do not broadcast their enforcement practices. The IRS, for example, does not publish its audit criteria, for the obvious reason that doing so would invite evasion. Indeed, the Obama Administration's marijuana policy well illustrates this problem. Despite the policy's appropriately non-committal and tentative quality, regulated parties appear to have interpreted it as a green light to violate federal marijuana prohibitions, with the consequence that a multi-billion-dollar marijuana industry now operates openly in multiple states in flagrant disregard for federal narcotics laws. Adopting internal enforcement priorities might avoid this problem, and thus keep greater pressure on Congress to enact substantive legal changes, while nonetheless promoting restraint and consistency among

⁸³ See, e.g., Peter Shane, *Faithful Nonexecution* (draft paper on file); Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785, 801-06 (2012).

individual prosecutors making charging decisions.⁸⁴

Ultimately, to the extent substantive law extends further than the public desires, thus giving prosecutors undue discretion to bring pretextual or abusive charges, the best remedy is to amend the substantive laws themselves. With respect to federal criminal law, although partisan gridlock often impedes major legislation these days, Congress did succeed in enacting significant reform legislation during the Trump Administration. In the First Step Act of 2018, Congress, among other things, reduced the penalties for certain offenses and retroactively shortened certain sentences. Like the rise of progressive prosecutors, this law, which was supported by an odd-bedfellows coalition of progressives, small-government libertarians, and evangelical reformers,⁸⁵ suggests that crime politics have softened to a degree few would have anticipated even a decade ago. To the extent this reforming impulse retains political strength, further legislation limiting federal criminal law's scope and severity would directly limit prosecutors' discretion over whom to charge, as well as their capacity to extract harsh plea bargains by stacking multiple charges in indictments.

If Congress lacks the institutional capacity to reform laws itself, it might consider delegating authority to eliminate criminal prohibitions to the Attorney General or some other administrative body such as a multi-member commission. As I have explained elsewhere, although executive officials lack authority to suspend statutes on their own, Congress may authorize executive suspensions provided it does so clearly by statute.⁸⁶ Indeed, it has done just that in statutes going back to the earliest days of the Republic.⁸⁷ If anything, such delegations should be less suspect than affirmative delegations from a separation-of-powers perspective, considering that eliminating prohibitions may restore baseline liberties instead of restricting them. In any event, although some Supreme Court justices have suggested doubts about delegation in general, a negative delegation authorizing cancellation of criminal statutes should be permissible under current doctrine so long as Congress provides some general principle to guide executive decisions.

Short of such provisions for actual legal change, Congress could also employ its so-called power of the purse—its control over resources afforded for federal executive functions—to dictate enforcement priorities or even forbid enforcement of certain laws altogether. Although presidents on occasion have mistakenly claimed that their duty of faithful execution entails

⁸⁴ For more extended rebuttal of the argument against transparent enforcement policies, see Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments Over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235 (2016).

⁸⁵ See Goldstein, *supra* note __, at 463-65.

⁸⁶ Price, *Enforcement Discretion*, *supra* note __, at 707-11.

⁸⁷ *Id.*; see also Price, *Seeking Baselines*, *supra* note __.

a power to disregard appropriations limits on enforcement, this view is misguided. In fact, funding limits are themselves laws the president is obliged to see executed, and because executive enforcement powers are entirely dependent on resources provided by Congress, Congress can employ its control over resources to direct how those powers are exercised.⁸⁸

Congress regularly employs this power to block disfavored regulations from taking effect. In recent years, as noted, Congress employed it to prevent criminal prosecution of state-compliant medical marijuana businesses. So long as it preserves discretion to decline prosecution of suspects the executive branch judges to be innocent, Congress could employ this same authority as well to compel enforcement or at least prioritization of certain laws when the executive branch is dragging its feet. Because appropriations laws must be passed every year to keep the government running, Congress often has greater leverage in this context to impose its preferences on the executive branch. It should employ this power liberally to shape executive enforcement efforts.⁸⁹

Finally, both courts and executive officials might cabin prosecutorial discretion to a degree by construing criminal statutes narrowly. To counteract pathologies in the criminal law-making process, I have advocated reinvigorating the “rule of lenity”—the traditional interpretive canon that penal laws should be construed as narrowly as possible to benefit defendants.⁹⁰ As I argued back in 2004, courts should interpret criminal prohibitions narrowly because a tough-on-crime electorate has historically exerted “a sort of hydraulic pressure pushing criminal legislation towards unreasonable extremes.”⁹¹ By enacting broad prohibitions, legislatures could ensure that wrongdoers do not escape justice, yet at the same time prosecutorial discretion spared legislatures accountability for the full breadth of their enactments. Construing criminal statutes narrowly counteracts these pressures by forcing legislators to specify the true extent of prohibitions, instead of hiding behind broad language. It also forces prosecutors to indicate the real conduct they are punishing in their charging decisions. For these reasons, even if the politics of crime have now shifted to mitigate distortions in criminal legislation, the substantial overhang of past enactments continues to justify narrow judicial construction as a general rule.⁹²

⁸⁸ For my elaboration of this argument, see Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 437-49 (2018).

⁸⁹ *See id.*

⁹⁰ Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885 (2004).

⁹¹ *Id.* at 911.

⁹² For similar reasons, courts or executive officials should understand specific criminal statutes, such as the prohibition on credit card fraud, to preclude charging the same conduct under more general statutes with harsher penalties. *See* Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 554 (2012). I endorsed this

In recent years, the Supreme Court has at least sporadically embraced this outlook. In several recent cases, it has reversed convictions based on narrowing constructions of applicable statutes—and invoked concerns about prosecutorial overreach as a key rationale for doing so.⁹³ Courts should build upon this trend, but executive officials need not wait for them to do so. Insofar as criminal statutes should properly be interpreted as narrowly as possible, executive officials might themselves commit to charging defendants only on the basis of such narrow interpretations. Doing so would not defy any obligation to enforce the law as written, because the law as written should properly be interpreted narrowly.

For their part, administrative agencies should likewise consider trimming any excess away from regulations they enforce. Unlike criminal prosecutors, administrative agencies often do not need help from Congress to pare away unnecessary or outdated conduct rules; they can do so themselves through administrative procedures. As explained earlier, doing so typically cannot be accomplished without issuing a new regulation through notice-and-comment procedures; agencies must therefore invest the time and resources to do so, at the expense of any other priorities they may have. Perhaps for that reason, critics have viewed past efforts, including three executive orders by President Obama encouraging retrospective review,⁹⁴ as having “limited success.”⁹⁵ Yet the goal is worthy and important and warrants renewed attention.

In sum, though *UC Regents* may well compound existing political incentives to employ nonenforcement aggressively as a policy tool, executive officials should respect the legal limits on their authority to change law through enforcement policy and channel reform efforts instead into legislative proposals or other means of lawfully reducing legal burdens. Should they fail to do so and instead employ enforcement discretion to formally or functionally suspend governing law, courts should stand ready to invalidate the executive’s actions, just as courts did with respect to DAPA and the Trump Administration’s administrative cancellations.

proposal in Price, *Enforcement Discretion*, *supra* note __, at 766.

⁹³ See, e.g., *Kelly v. United States*, __ S. Ct. __ (2020) (rejecting fraud convictions based on exercise of regulatory authority to punish political opponents); *McDonnell v. United States*, 136 S. Ct. 2355 (2016) (narrowly interpreting the “official act” requirement of the federal bribery statute); *Yates v. United States*, 574 U.S. 528 (2015) (rejecting conviction for destroying a “tangible object” where defendant threw overboard an illegally caught fish); *Bond v. United States*, 572 U.S. 844 (2014) (rejecting application of chemical weapons statute to attempted poisoning).

⁹⁴ Exec. Order No. 13,610, 3 C.F.R. 258 (2012); Exec. Order No. 13,579, 3 C.F.R. 256 (2011); Exec. Order No. 13,563, 3 C.F.R. 215 (2011).

⁹⁵ Sofie E. Miller & Susan E. Dudley, *Regulatory Accretion: Causes and Possible Remedies*, 1 ALR ACCORD 98, 111 (2016).

CONCLUSION

Some degree of enforcement discretion is an inevitable and welcome feature of any publicly administered legal regime. No set of legal rules can cover every circumstance, and officials should always temper the law's rigor with forbearance and mercy. Over time, however, first through a slow accumulation of practice and then with dizzying acceleration in recent years, enforcement discretion has threatened to supplant the law itself as the basis around which law-abiding citizens are expected to organize their behavior in key areas. Although this trend responds to some real problems and pathologies in our legal system, it carries significant costs to separation of powers, legal predictability, and the rule of law. Above all, it accelerates a trend toward executive rather than legislative governance, and does so in a form that courts cannot completely restrain.

Building on prior work addressing these points in greater depth, this essay has sketched the basic legal principles governing enforcement discretion in the federal system. While federal executive officials charged with enforcing broad laws with limited resources may set priorities for enforcement, they may not alter the law itself as a matter of enforcement discretion, nor may they do the functional equivalent by prospectively suspending legal prohibitions for broad categories of offenders based on disagreement with the policy reflected in enacted statutes. To restrain executive officials from altering the law by inviting reliance on promised forbearance, moreover, regulated parties' reliance on nonenforcement policies generally should not receive legal protection as a matter of due process or administrative law. These principles generally apply equally in criminal, civil, and administrative contexts, though in some administrative settings executive enforcement policies may reflect an exercise of delegated interpretive or law-making authority, as opposed to enforcement discretion *per se*. Courts may protect reliance on such policies to ensure administrative fair dealing, but only because of the nature of the administrative action at issue.

In its recent *UC Regents* decision, the Supreme Court badly misapplied nearly all these principles. The Court's reasoning, however, was narrow and muddled, suggesting that the Court did not intend to establish any generalizable precedent, but instead only to slash a crude path out of a political thicket. Accordingly, executive officials should spurn any invitation in the opinion to expand enforcement discretion's use as a policy tool, though they could consider various means of moderating existing laws' scope to reduce any resulting executive enforcement discretion. Valid means of doing so include proposing or supporting statutes to eliminate outdated or unnecessary laws, delegate administrative authority to make such legal changes, and structure enforcement efforts through appropriations

restrictions. In addition, executive officials might properly construe criminal statutes narrowly and employ administrative authorities to prune away unnecessary regulations.

Along with many other good-government norms, our polarized politics threaten baseline expectations about enacted statutes' supremacy over executive policy. Neither national political coalition today fully embraces our current legal inheritance, but partisanship impedes legislative compromise, creating a powerful temptation to edit the federal code instead through deliberate nonenforcement. In our legal order, however, federal statutes are the supreme law of the land, second only to the Constitution itself. Further weakening the public's commitment to that understanding is a development we may come to regret.