SEEKING BASELINES FOR NEGATIVE AUTHORITY: CONSTITUTIONAL AND RULE-OF-LAW ARGUMENTS OVER NONENFORCEMENT AND WAIVER

Zachary S. Price*

ABSTRACT

Recent controversies have called attention to the potential significance of negative executive authority—the authority to limit or undo what Congress has done through nonenforcement or waiver. This symposium essay reflects in several ways on constitutional and rule-of-law debates that have emerged regarding such authority. First, it defends the relevance of constitutional principles to baseline understandings of nonenforcement authority. Second, it identifies a deep tension in the rule of law’s implications for discretionary enforcement. Third, it defends statutorily conferred law-cancellation authority against constitutional challenges and rule-of-law objections. Finally, it proposes presumptive limits on authority to condition statutory waivers.

1. INTRODUCTION

Recent controversies have called attention to the potential significance of negative executive authority—authority, in effect, to limit or undo what Congress has done. Several important recent statutes, including such blockbusters as the No Child Left Behind Act of 2001 (“NCLBA”),¹ the Affordable Care Act of 2010 (“ACA”),² and the Comprehensive Iran Sanctions, Accountability, and

* Associate Professor, University of California Hastings College of the Law, 200 McAllister Street, San Francisco, CA 94102; JD, Harvard Law School; AB, Stanford University. E-mail: pricezh@uchastings.edu. This essay was prepared for a conference in March 2015 at Stanford University’s Hoover Institution on “The Role of Executive Power and Discretion under the Rule of Law.” I am grateful to the Hoover Institution and UC Hastings for research support and to other conference participants, especially the paper’s discussant Michael Asimow, for helpful feedback. I thank Nathan Chapman, Jeff Pojanowski, Ken Scott, Jodi Short, and an anonymous referee for helpful comments on earlier drafts. Allison Pang provided superb research assistance. All errors of course are my own.

¹ Pub. L. No. 107-110, 115 Stat. 1425 (2002).
² Pub. L. No. 111-148, 124 Stat. 119 (2010).
Divestment Act of 2010,\(^3\) expressly allowed executive waiver of central statutory requirements. At the same time, in examples such as the Department of Health and Human Services’ temporary suspension of central ACA requirements,\(^4\) the Department of Justice’s marijuana enforcement policies,\(^5\) and the Department of Homeland Security’s extensive deferred action programs for undocumented immigrants,\(^6\) executive agencies have claimed authority to grant relief from statutory requirements to broad subsets of regulated parties, even without a specific statutory warrant for doing so. In addition, although Congress has now stripped it of this authority, the Department of Education employed conditional waivers under the NCLBA to impose alternative requirements on state education departments, effectively leveraging aspirational requirements in the statute to obtain quite different policy results through executive action.\(^7\) All these actions have sparked controversy, and while the debates have properly centered on questions of statutory authority, critics and proponents have also advanced constitutional and rule-of-law arguments (e.g., Bernstein 2015; Cox & Rodriguez 2015; Cruz 2015; Hamburger 2014; Kalhan 2015; Shane 2014).

In keeping with the theme of this conference, and building on prior work addressing the proper scope of enforcement discretion in its own right (Price 2014), this symposium essay reflects on the implications of these constitutional and rule-of-law debates for ultimate questions of authority regarding these controversial policies. These debates, I suggest, expose an absence of clear baseline principles to govern negative exercises of executive authority. To the extent governing statutes fail to answer these questions directly, how far may executive officials go in declining enforcement of disfavored laws, waiving statutory requirements, and conditioning waivers on alternate conditions? Important questions regarding such baseline authority are unresolved, in part because past executive policies have not fully tested their limits and in part because doctrines of standing and reviewability have limited judicial involvement on these questions. Accordingly, participants in debates over these questions have invoked constitutional and rule-of-law principles to fill in the gaps left by governing statutes. I offer here several related reflections on the relevance or irrelevance of such principles in answering pertinent questions of baseline authority.

First, with respect to nonenforcement initiatives such as the immigration deferred action programs and current federal marijuana policy, I suggest that

\(^3\) Pub. L. No. 111-195, 124 Stat. 1312 (2010).

\(^4\) See infra note 8.

\(^5\) See infra note 10.

\(^6\) See infra notes 11–13.

\(^7\) See infra section 3.4.
constitutional separation-of-powers principles constitute an inevitable and appropriate foundation for baseline statutory understandings. I thus defend against recent criticism the U.S. Justice Department Office of Legal Counsel’s reliance on separation-of-powers principles in framing its analysis of proposed immigration nonenforcement policies. While some have argued that the inquiry is entirely statutory in nature (e.g., Cox & Rodriguez 2015), I argue that in immigration and criminal law, as no doubt in many other areas, the pertinent statutory inquiry is ultimately indeterminate without reference to some constitutionally informed default conception of executive nonenforcement power.

At the same time, as a second observation, I suggest that rule-of-law arguments constitute a less helpful point of reference. While both sides of debates over immigration in particular have invoked rule-of-law principles, the debate exposes a pervasive conflict in executive enforcement practice between two plausible conceptions of what the “rule of law” requires. The “rule of law” is itself a slippery concept, subject to multiple possible meanings and often invoked to elevate the rhetorical level of debate without necessarily contributing to its resolution. In discretionary enforcement contexts, however, it might imply at least two contradictory principles—a principle of nonarbitrariness and a principle of executive subordination to statutory policy. In many areas of administrative law, these principles are aligned: in principle, less arbitrary implementation of regulatory objectives may be more consistent with statutory policies. But with respect to enforcement, as the immigration and marijuana examples illustrate, they break apart: more transparent and definite enforcement policies may be less arbitrary, but by more clearly signaling the limits of enforcement, such policies may yield an on-the-ground law in sharper conflict with statutory requirements. Contrary to what some have claimed, rule-of-law arguments based on transparency and clarity are thus answerable in rule-of-law terms and cannot by themselves provide adequate justification for particular policies.

These same arguments, however, push in sharply different directions with respect to statutes that expressly confer executive authority to cancel legal requirements or grant other forms of relief. Although some have recently questioned their validity (e.g., Hamburger 2014), and while baseline separation-of-powers principles may well support a presumption against such authority when statutes are unclear (Barron & Rakoff 2013; Deacon 2016; Price 2014), constitutional principles provide no compelling reason to disable Congress from conferring such authority on executive officials. I thus offer here a brief defense of such laws’ constitutionality. I further suggest that such administrative arrangements carry considerable rule-of-law advantages over regimes organized instead around implicit agency enforcement discretion, at least if the rule-of-law question is understood in terms of the two conflicting principles I have
proposed. In effect, when executive forbearance has an identifiable statutory basis, the conflict between rule-of-law values of statutory supremacy and nonarbitrariness disappears: Executive action presents no question of authority, and general and consistent application of cancelation authority may again ensure nonarbitrary implementation of statutory objectives. I thus challenge arguments (e.g., Epstein 2011) that waiver authority is inherently troubling from a rule-of-law perspective.

Finally, I also consider briefly here the question of conditional waiver authority. Although recent legislative revision of the NCLB waiver authority gives reason to hope that Congress in the future will provide statutory guidance on this question, statutes that fail to do so (as the original NCLB Act did) will present yet another question of baseline statutory standards. I suggest here tentatively that pertinent constitutional and rule-of-law considerations generally support confining agencies to waiver conditions that comport with identifiable statutory policies and requirements at a relatively low level of generality.

The remainder of this essay proceeds as follows. Part 2 begins by describing recent nonenforcement initiatives, with a focus on marijuana and immigration, and then proceeds to address constitutional and rule-of-law debates over these policies. Part 3 turns to questions presented by express conferral of law-cancelation power. After describing several such statutes and addressing their apparent recent increase in prominence, Part 3 offers a brief rebuttal of constitutional objections, followed by consideration of the rule-of-law question and a brief argument in favor of a confined baseline understanding of waiver-conditioning power. The essay ends with a conclusion summarizing key arguments.

2. RISE OF NONENFORCEMENT

2.1 Recent Policies

Somewhat surprisingly, given nonenforcement’s past political association with deregulatory Republican administrations (Price 2015), assertive use of nonenforcement policies has emerged as a particular area of controversy during the Obama Administration. Controversy has centered on three main examples. First, based on putative organic authority to provide “transition relief” from enforcement of new statutory provisions, the administration made repeated delays implementing key ACA provisions. Second, in a series of policy
memoranda (now partially codified by an appropriations rider\(^9\)), the Justice Department announced increasingly expansive nonenforcement policies with respect to federal marijuana crimes committed in states where marijuana possession and distribution is legal as a matter of state law.\(^{10}\)

Third, and most controversially of all, two immigration nonenforcement initiatives have aimed to shield substantial fractions of the nation’s population of undocumented immigrants from effective risk of removal. The two programs, named “Deferred Action for Childhood Arrivals” (“DACA”) and “Deferred Action for Parents of Americans” (“DAPA”), invite large categories of immigrants to apply for a form of immigration relief known as “deferred action.”\(^{11}\) Though formally nothing more than a revocable promise of nonenforcement, grants of deferred action under the programs will extend for renewable periods of three years, and under applicable regulations deferred action may carry other substantive benefits, including eligibility for work authorization despite a general statutory prohibition on employment of undocumented immigrants.\(^{12}\) DACA may cover over one million immigrants who arrived in

Through October 1, 2016 (March 5, 2014), available at http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf (extending policy with respect to out-of-compliance plans for two years); I.R.S. Notice 2013-45, 2013-31 I.R.B. 116 (July 29, 2013) (providing relief from penalties for employers who fail to provide insurance as required by statute); Shared Responsibility for Employers Regarding Health Coverage, 78 Fed. Reg. 8543, 8569 (February 12, 2014) (extending transition relief from penalties for certain employers); see generally Bagley (2014a, 2016).

\(^9\) Pub. L. No. 113-235 tit. II, § 538, 128 Stat. 2130 (2015) (barring use of Justice Department funds “to prevent . . . States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana”); see also Pub. L. No. 114-53, § 103, 129 Stat. 502 (2015) (extending force of § 538 with respect to continuing appropriations); United States v. Marin Alliance for Medical Marijuana, ___ F. Supp. 3d ___, 2015 WL 6123062 (N.D. Cal. October 19, 2015) (interpreting rider to bar enforcement against marijuana businesses as well as state officials).

\(^10\) See Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding Marijuana Related Financial Crimes (February 14, 2014); Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding Marijuana Enforcement (August 29, 2013); Memorandum from James M. Cole, Deputy Att’y Gen., to All U.S. Att’ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use (June 29, 2011); Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (October 19, 2009).

\(^11\) Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot., et al. (June 15, 2012); Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. (November 20, 2014); see generally Cox & Rodriguez (2015, pp. 138–140).

\(^12\) See generally 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., at 5 (November 19, 2014) (“OLC Immigration Opinion”); see also 8 C.F.R. § 274a.12(c)(14) (allowing
the USA as young children and meet certain other requirements; DAPA applies to roughly four million immigrants who are parents of minor children who are either citizens or legal permanent residents of the USA.\footnote{OLC Immigration Opinion at 30 (OLC Immigration Opinion at 1); U.S. Citizenship & Immigration Services, Number of I-821D, Consideration of Deferred Action for Childhood Arrivals by Fiscal Year, Quarter, Intake, Biometrics and Case Status: 2012-2015 (June 30), available at http://op.bna.com.s3.amazonaws.com/dlrcases.nlm/r%3FOpen%3Dlfrs-9zllyr.}

All three sets of policies, and particularly the marijuana and immigration initiatives, arose in areas where practical challenges and resource constraints made extensive under-enforcement of the restrictions in question practically inevitable. With respect to the ACA, the administration justified initial employer-mandate delays based in part on failure to complete reporting regulations that would have provided necessary information for enforcement.\footnote{See I.R.S. Notice 2013-45 (justifying relief form employer penalties in part because absence of information reporting was “expected to make it impractical to determine which employers owe” penalties). For critical assessment of the ACA delays, see Bagley (2014a, 2016).} As to marijuana, enforcement of federal marijuana crimes has historically been a very low priority relative to other federal offenses; even before the new policies, federal prosecutors effectively left at least low-level marijuana violations to state authorities (Mikos 2009, pp. 1464–1465; Mikos 2012, pp. 1002–1006). And with respect to immigration, the government estimates that even with recently expanded enforcement resources, it could realistically remove only 400,000 immigrants a year out of an overall population of roughly eleven million undocumented immigrants.\footnote{OLC Immigration Opinion at 1.} Nevertheless, the policies’ scale and definitiveness have raised questions about whether organic agency enforcement discretion provides adequate legal authority for them—a question the Supreme Court is now poised to address with respect to the immigration programs.\footnote{Texas v. United States, 809 F.3d 134 (5th Cir. 2015), cert. granted, 577 U.S. ___ (2016). Regarding the marijuana policies’ validity, see, e.g., Feinberg v. Commissioner of Internal Revenue, 808 F.3d 813, 816 (10th Cir. 2015) (observing in dicta that “frankly, it’s not clear whether informal agency memoranda guiding the exercise of prosecutorial discretion by field prosecutors may lawfully go quite so far in displacing Congress’s policy directives as these memoranda seek to do”).}

I have elsewhere addressed these questions directly. In prior work (Price 2014), I have argued that background constitutional and normative considerations support a presumption against understanding an agency’s default none-enforcement authority to entail power to excuse statutory violations ahead of time for broad categories of violations. The Constitution, I argued, imposes...
some default enforcement obligation by requiring the President to “take Care that the Laws be faithfully executed” (U.S. Const. art. II, § 3), even if the precise content of that obligation is often difficult to specify and the duty is subject to incomplete judicial enforcement. From these premises, writing in 2014, I suggested that the ACA delays were unlawful; that the marijuana policies in place at that time were dubious but defensible, given their heavily caveated and noncommittal character; and that the more definitive assurances of nonenforcement provided by DACA, coupled with the associated affirmative benefits such as work authorization, required more specific statutory authority than Congress’s apparent acquiescence to several past programs could provide.

More recently, OLC’s opinion approving DAPA (but not a still more expansive proposed program) recognized that the program’s breadth and prospective character raised “particular concerns” that necessitated a “particularly careful examination” of its validity as an exercise of enforcement discretion. The Office nevertheless deemed DAPA consistent with congressional intent based in part on Congress’s past ratification of putatively analogous executive actions.

Others have offered a range of differing views about the immigration programs in particular and the permissibility of categorical nonenforcement in general. Without fully revisiting these debates on the merits, I address here two arguments that have gained prominent adherents: first, that contrary to my own approach and OLC’s, constitutional principles are irrelevant to the analysis; and second, that rule-of-law values favor more categorical and definitive exercises of nonenforcement, making the immigration programs a potential model of good governance in other areas. In my view, separation-of-powers principles form an essential backdrop to any assessment of the pertinent statutory authority (whether or not my account of the constitutional principles is correct), and the rule-of-law argument for the policies is at best incomplete because it collides with countervailing considerations that also hold deep resonance with rule-of-law values.

### 2.2 Relevance of Constitutional Baselines

The degree to which questions of authority surrounding current nonenforcement initiatives, particularly DAPA and DACA, are properly constitutional rather than statutory in character has sparked considerable debate. OLC

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17 OLC Immigration Opinion at 22, 24.
18 Id. at 31.
19 See, e.g., Andrias (2013); Delahunty & Yoo (2013); Gilbert (2013); Cox & Rodriguez (2015); Kalhan (2015); Margulies (2014, 2015); Markano (2015); Osofsky (2015).
framed the question in constitutional terms. Although it ultimately approved DAPA (but not a second proposed program), the Office recognized that a constitutional obligation of faithful execution imposes outer bounds on executive nonenforcement authority.20 The states challenging DAPA in current litigation, moreover, have argued throughout that the program violates a constitutional duty of faithful execution; and in granting the government’s petition for certiorari in the case the Supreme Court specifically added the question, “Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, §3.”21 Nevertheless, many commentators, including prominent defenders of DAPA, have argued that constitutional principles are irrelevant to the analysis. One leading scholarly analysis, for example, faults OLC for “elevat[ing] an ordinary argument about agency compliance with statutory obligations into a constitutional argument about the President’s Article II obligations” (Cox & Rodriguez 2015, p. 146). Another recent analysis has invoked the Supreme Court’s holding in Dalton v. Specter that “claims that an official exceeded his statutory authority” are distinct from “claims that he acted in violation of the Constitution.”22 According to this commentator, the DAPA litigation likewise involves only questions of statutory authority and “[n]either the Take Care Clause nor any other constitutional provision tells us anything about what the content of those limits might be” (Kinkopf 2016; see also, e.g., Lederman 2016).

Such arguments miss the mark because they overlook the need here, as in many other areas of administrative law, for constitutionally informed baselines. While it is true that the analysis of DAPA and DACA and related nonenforcement initiatives is not entirely constitutional, it is not entirely statutory either. Background separation-of-powers principles necessarily shape the statutory inquiry, often in outcome-determinative ways. In other words, as both my own analysis and OLC’s recognized, some default understanding of faithful execution and executive power will generally be necessary to evaluate any given exercise of nonenforcement authority.

To be sure, statutes may sometimes specify enforcement priorities or authorize particular forms of relief or forbearance.23 More often, however, as both the

20 OLC Immigration Opinion at 6–7.
21 United States v. Texas, No. 15-674, 577 U.S. ___ (January 19, 2016).
22 511 U.S. 462, 474 (1994).
23 See, e.g., 29 U.S.C. § 482 (requiring the Secretary of Labor to bring civil enforcement suits for certain labor violations); Department of Homeland Security Appropriations Act, 2014, Pub. L. No. 113-76, div. F, tit. II, 128 Stat. 5, 251 (directing the Department of Homeland Security to “prioritize the identification and removal of aliens convicted of a crime by the severity of that crime”); 33 U.S.C. § 1344(a) (allowing otherwise-prohibited dumping into waterways if agency grants specified permit).
immigration and marijuana examples illustrate, statutes simply establish prohibitions while also granting official enforcement authority (and sometimes some degree of implicit or explicit interpretive authority). Faced with such statutory silence, how far may executive officials go in disregarding laws they dislike on policy grounds? Assuming they cannot plausibly interpret the statute not to apply to particular conduct, may they nonetheless halt enforcement altogether? May they promise, or even guarantee, nonenforcement ahead of time? Separation of powers largely creates these dilemmas, as it creates the possibility of significant gaps opening up between the preferences of the Congress that enacted a given statute and those of executive officials ultimately charged with enforcing them. By the same token, separation-of-powers principles are relevant to resolving them.

Consider, for example, the current marijuana policies. How might we analyze their permissibility? Whatever its foundations, criminal prosecutorial discretion is undoubtedly an entrenched practice today. Given the breadth and severity of existing federal criminal laws, prosecutors could not pursue every provable violation even if they wished to do so. Moreover, even in cases they do pursue they may choose to enter plea bargains sacrificing some possible charges so as to induce the defendant to forgo trial, thereby freeing up government resources for prosecution of other cases. Congress, accordingly, legislates against a robust background assumption of discretion. Yet by the same token, in adopting criminal prohibitions in the first place, Congress presumably means to restrict the conduct in question; criminal statutes, after all, typically use the mandatory term “shall” to direct punishment of the conduct in question. Unlike in administrative contexts, moreover, prosecutors hold no interpretive authority to resolve ambiguities in statutes (and in any event marijuana prohibitions are sufficiently clear that no such ambiguity plausibly exists). Accordingly, although in this case an appropriations rider now limits federal enforcement with respect to medical (but not recreational) marijuana, the governing substantive statutes generally do not specifically address how far enforcement officials may go in declining enforcement of criminal laws. Could executive officials halt enforcement altogether with respect to some or all categories of cases, or must they maintain some level of deterrence with respect to the prohibited conduct? Could a President announce blanket nationwide narcotics nonenforcement for the duration of his presidency?

24 See supra note 9. Congress adopted this rider only after the administration adopted marijuana nonenforcement policies. What is more, the rider is narrower than the current policy, as the nonenforcement policy extends to recreational as well as medical marijuana use in compliance with state law.
The choice between background constitutional understandings of executive power and responsibility necessarily informs the answers to these questions. On some accounts, the Constitution, by virtue of some combination of the Pardon Clause, Vesting Clause, and Take Care Clause, gives the executive branch an absolute constitutional prerogative to decline enforcement of criminal laws (e.g., Amar 2012, p. 429). From that point of view, one might argue that any nonenforcement policy, no matter how broad or sweeping, is valid—and indeed would be valid even if Congress specifically mandated enforcement or restricted the scope of nonenforcement discretion. From another point of view, one might argue that Congress holds ultimate authority to expand or contract the scope of enforcement discretion, but the practical inevitability of discretion in criminal law gives the executive branch such plenary discretion as a matter of presumed statutory authority (cf. Stith 2008, p. 1423). As a third possibility, one might argue (as I have) that some obligation of faithful execution operates in the background of any given statutory regime, making some policies presumptively permissible and others presumptively impermissible (Price 2014). Or, finally, one might assert that faithful execution requires the President to make the best possible effort to bring about compliance in all cases, exercising pardon authority to excuse violations if he or she wishes to do so (cf. Barnett 2015; Blackman 2015, pp. 230–232; Lain 2013). The choice between these frames—these competing default conceptions of executive authority—will often be outcome-determinative with respect to whether a given policy is viewed as lawful or unlawful. With respect to the marijuana policies, the first two theories render them clearly permissible, the third renders them dubious but defensible (Price 2014), while the fourth suggests they exceed executive authority.

Much the same difficulty attends the immigration policies now before the Supreme Court. Although immigration statutes today includes isolated references to deferred action and generally contemplates adoption of “enforcement policies and priorities,” the code neither specifically authorizes nor specifically forbids large-scale programs like DACA and DAPA. Accordingly, if the

25 See, e.g., 6 U.S.C. § 202(5) (2012) (assigning “responsibility” to the Department of Homeland Security for “[e]stablishing national immigration enforcement policies and priorities”); 8 U.S.C. § 1103(a) (2012) (generally “charge[ing]” the Secretary of Homeland Security with “the administration and enforcement” of the immigration code); REAL ID Act of 2005, § 202(c)(2)(B)(viii), Pub. L. No. 109-13, div. B, 49 U.S.C. § 30301 note (2012) (referring to “approved deferred action status” as a basis for obtaining a stat driver’s license meeting specified federal requirements); 8 U.S.C. § 1154(a)(1)(D)(i) (2012) (identifying a specified class of petitioners as “eligible for deferred action and work authorization”).

26 OLC acknowledged that the overall “practice of granting deferred action ‘developed without express statutory authorization,’” and it characterized the program it approved as “an exercise of enforcement discretion rooted in DHS’s authority to enforce the immigration laws and the President’s duty to take care that the laws are faithfully executed.” (OLC Immigration Opinion at 13, 20 (quoting...
Constitution imposed no background enforcement obligation at all, then executive officials could presumably halt enforcement altogether, and announce their plans in however definitive a form they liked. Similarly, if executive officials’ only obligation is to spend their full enforcement budget on some enforcement-related activity, then presumably they could grant deferred action as broadly as they wished, so long as they continue to remove roughly 400,000 immigrants a year (cf. Legomsky 2015, p. 6). Alternatively, one prominent defense of the initiatives asserts that presidential authority for the programs has arisen dynamically through interactions between Congress and the President over decades, interactions establishing that in immigration “a perfect world is not a world of perfect enforcement” (Cox & Rodriguez 2015, p. 203; see also Cox & Rodriguez 2009). Even this view, however, seems to presume that absent such dynamic interaction, some tighter baseline enforcement obligation might obtain.27

In an approach closer to my own, OLC viewed the “breadth of [the] programs,” in combination with deferred action’s unusually overt and definitive character and the additional benefits that result from it, as requiring more specific assurance of consistency with statutory policies.28 OLC purported to identify such assurance in past congressional ratification or acquiescence with respect to putatively analogous programs.29 Some others, again, have argued that faithful execution is an obligation to proceed with subjective good faith (e.g., Barnett 2015; Blackman 2015, pp. 230–232). On that view, DACA and DAPA are invalid because the President previously indicated that the executive branch lacked authority to take such dramatic steps without legislative reform. Once again, the choice between these default positions is crucial in framing the statutory analysis and rendering it manageable. Insofar as the statute specifies no default rule of its own, constitutional considerations necessarily inform the

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27 Arguing that “the way the Executive exercises its enforcement discretion over time powerfully shapes the meaning and significance of the law,” these authors distinguish immigration enforcement from areas such as tax where they argue “the system’s goal is maximal compliance with the law” (Cox & Rodriguez 2015, pp. 126, 213).

28 OLC Immigration Opinion at 20–23.

29 Id. at 23.
choice of default and the assessment of whether particular statutory authorities or the gloss placed on them by past practice have shifted those baselines.

Rather than looking directly to the Constitution, of course, one might attempt to answer such questions by looking instead to the Administrative Procedure Act and other applicable background legal principles. But with respect to the APA at least, the Supreme Court has in fact interpreted the statute in light of a putative background “tradition” of prosecutorial discretion—and invoked the Take Care Clause as one basis for doing so. Under the APA, all “final agency action” is generally subject to judicial review, and the statute expressly defines “agency action” to include “failure to act.” Accordingly, insofar as nonenforcement constitutes “failure to act,” the Court might plausibly have read the APA to permit judicial review of any choice not to enforce a given statutory or regulatory prohibition (either in a given case or as a matter of policy). On that view, courts would review and “set aside” such decisions, as with other agency actions, if they were “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” a standard the Court has generally interpreted to require reasoned decision-making based on consideration of all pertinent factors. The Court, indeed, has generally interpreted the APA to support a robust presumption in favor of judicial review. Yet the Court in Heckler v. Chaney held instead that enforcement decisions presumptively fall within an APA exception to review for matters “committed to agency discretion by law.”

As noted, the Heckler Court based its holding on a putative “tradition” of “absolute” enforcement discretion, a tradition it characterized as “attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.” It then traced this “unsuitability” for review to several factors, including the complexity of assessing agency choices about where to focus effort and resources, the potential absence of any discrete

30 Heckler v. Chaney, 470 U.S. 821, 832 (1985).
31 5 U.S.C. §§ 551(13), 701(a), 704 (2012).
32 Id. § 706(2).
33 See, e.g., Nat’l Ass’n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (discussing Motor Vehicle Mfrs. Ass’n of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983)).
34 See, e.g., Mach Mining, LLC v. EEOC, 135 S. Ct. 1645, 1651 (2015); Sackett v. EPA, 132 S. Ct. 1367, 1372-73 (2012); Abbott Labs. v. Gardner, 387 U.S. 136, 141 (1967). For critique of this presumption, see Bagley (2014b)).
35 5 U.S.C. § 701(a)(2).
36 470 U.S. at 832.
agency decision to review, the putative absence of any coercive effect on individual liberties, and an analogy to “the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed’.”37

Given its weak fit with the statutory text and conflict with the general presumption of review, *Heckler* is difficult to explain without reference to constitutionally informed background assumptions about proper executive and judicial roles. Indeed, the Court’s analysis is suffused with such assumptions: on the one hand, according to the Court, the multifaceted challenge of setting priorities and weighing opportunity costs is one that “[t]he agency is far better equipped than the courts to perform,” while on the other hand enforcement decisions implicate a “special province of the Executive Branch.”38 By the same token, however, the presumption of reviewability itself is hardly textually compelled (e.g., Bagley 2014b); it too reflects constitutional values (e.g., Manning 2010; Jaffe 1965).

As Gillian Metzger (2010) has argued, many basic administrative law decisions, and in particular decisions regarding the scope and character of judicial review, amount in effect to a form of “constitutional common law”—an effort to establish baseline principles that give effect to background constitutional values, even when doing so requires contorting the language and intent of the APA and other applicable statutes. In general, this approach has led to expansive review: the Court has sought to assuage doubts about the legitimacy and constitutionality of administrative governance in part by presuming reviewability and interpreting the “arbitrary and capricious” standard broadly to require reasoned decision-making by agencies. But from that point of view, *Heckler* amounts to constitutional common law cutting the other way: If Court’s general presumption of reviewability seeks to legitimate effectively legislative and adjudicatory actions by executive agencies by exposing those actions to judicial arbitrariness review, *Heckler* reflects an impulse to insulate a quintessentially executive form of decision—the choice not to enforce a particular law in a particular case—from the same intrusive judicial oversight.39

*Heckler* might of course be read to answer the question of substantive authority raised by the immigration and marijuana policies. Characterizing

37 Id. (quoting U.S. Const. art. II, § 3).
38 Id.
39 For further elaboration of this point, see Price (2016). Two other key unreviewability decisions also presumptively insulate areas within another branch’s traditional responsibility from judicial oversight. See *Webster v. Doe*, 486 U.S. 592 (1988) (termination of national security employee); *Lincoln v. Vigil*, 508 U.S. 182 (1993) (allocation of funds within lump-sum appropriation).
enforcement questions as “committed to agency discretion by law,” in other words, might signify that anything goes when it comes to nonenforcement. Lower courts have not read Heckler so expansively, however, and in any event this reading is mistaken. As I argue elsewhere (Price 2016), Heckler and other key judicial decisions limiting judicial review of nonenforcement reflect limitations on judicial capacity rather absence of executive obligation; the enforcement discretion recognized by Heckler is “absolute” only in the sense that courts are ill-equipped to second-guess agency choices. Indeed, far from recognizing any more preclusive executive nonenforcement prerogative, the Court pointedly held that Congress could authorize review, presumed that agencies would consider likelihood of success and “general deterrence value” (rather than raw disagreement with the statute) in setting priorities, and hinted in a footnote that the APA might well permit review if an agency altogether “abdicat[ed]” its enforcement responsibilities. At any rate, the key point here is that Heckler effectively grounded its interpretation of the APA—presumptive exclusion of nonenforcement from review, subject to an ill-defined anti-abdication backstop—in background constitutional understandings about proper executive and judicial roles. By the same token, further elaboration of Heckler’s meaning and application may properly make reference to the same principles.

Apart from Heckler, numerous other decisions have likewise invoked constitutional background principles in resolving questions about enforcement discretion. In its recent decision in Utility Air Regulatory Group v. EPA, the Court held that the discretionary resource-allocation authority acknowledged in Heckler provided no basis for a rule that (in the Court’s view) altered the effective legal content of a clear statutory requirement. As support for this conclusion, the Court invoked separation-of-powers principles, observing that “[u]nder our system of government, Congress makes laws and the President, acting at times through agencies like EPA, ‘faithfully execute[s]’ them.” The Court has similarly invoked the Take Care Clause and associated separation-of-powers principles to justify limiting criminal selective-

40 See, e.g., Crowley Caribbean Transp., Inc. v. Pena, 37 F.3d 671, 675-76 (D.C. Cir. 1994) (understanding Heckler to insulate only “single-shot” nonenforcement decisions, and not general policies, from judicial review); Kenney v. Glickman, 96 F.3d 1118, 1123 (8th Cir. 1996) (“Chaney applies to individual, case-by-case determinations of when to enforce existing regulations rather than permanent policies or standards”).

41 Heckler, 470 U.S. at 832-33 & n.4.

42 134 S. Ct. 2427 (2014).

43 Id. at 2446 (quoting U.S. Const. art. II, § 3).
prosecution defenses, to support limited Article III standing to challenge
government inaction, to reject presidential authority to give domestic legal
effect to non-self-executing treaties, and to deny certain claims of inherent
executive authority.

Historically, although Heckler and other modern administrative decisions
considerably qualify this conclusion, the Supreme Court went so far as to
hold that the presidential responsibility of faithful execution was a nonjusti-
ciable political question, akin to the presidential duty to appoint officers
deemed nonjusticiable in Marbury v. Madison. For their part, lower courts
have routinely grounded conclusions about judicial review of enforcement-
related decisions in asserted background separation-of-powers principles.

44 See, e.g., United States v. Armstrong, 517 U.S. 456, 464 (1996) (holding that federal prosecutors hold
broad prosecutorial discretion because they are “designated by statute as the President’s delegates to
help him discharge his constitutional responsibility to ‘take Care that the Laws be faithfully exe-
cuted’” (quoting U.S. Const., Art. II, § 3)); cf. Reno v. Am.-Arab Anti-Discrimination Comm.,
525 U.S. 471, 490-91 (1999) (extending Armstrong’s principles to civil immigration enforcement).

45 See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 577 (1992) (“To permit Congress to convert the
undifferentiated public interest in executive officers’ compliance with the law into an ‘individual
right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the
Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully
executed’” (quoting U.S. Const. art. II, § 3)).

46 Medellín v. Texas, 552 U.S. 491, 532 (2008) (rejecting claimed authority under the Take Care Clause).

47 Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizures Case), 343 U.S. 579, 587 (1952) (“In the
framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

48 5 U.S. (1 Cranch) 137 (1803). See Mississippi v. Johnson, 71 U.S. (4 Wall.) 475, 499 (1866). For
general discussion of Mississippi’s political-question holding, see Price (2016).

49 See, e.g., In re Aiken County, 725 F.3d 255, 262-63 (D.C. Cir. 2013) (separate opinion of Kavanaugh,
J.) (characterizing prosecutorial discretion as “rooted in Article II” and concluding that “Congress
may not mandate that the President prosecute a certain kind of offense or offender”); Nat’l Roofing
Contractors Ass’n v. Dep’t of Labor, 639 F.3d 339, 343 (7th Cir. 2011) (“‘Agencies take care that the
Laws be faithfully executed’ (Art. II, § 3) by doing the best they can with the resources Congress
allows them.”) (quoting Chicago Bd. of Trade v. SEC, 883 F.2d 525, 531 (7th Cir. 1989)); Baltimore
Gas & Elec. Co. v. FERC, 252 F.3d 456, 459 (D.C. Cir. 2001) (observing that “[t]he power to take care
that the laws be faithfully executed is entrusted to the executive branch—and only the executive
branch” and that “[o]ne aspect of that power is the prerogative to decline to enforce a law, or to
enforce a law in a particular way”); Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375,
379 (2d Cir. 1973) (invoking separation-of-powers principles to justify judicial aversion to compel-
ing criminal prosecution); Pagach v. Klein, 193 F. Supp. 630, 634 (S.D.N.Y. 1961) (interpreting Take
Care Clause to establish that “[t]he prerogative of enforcing the criminal law was vested by the
Constitution . . . not in the Courts, nor in private citizens, but squarely in the executive arm of the
government”); cf. Ponzi v. Fessenden, 258 U.S. 254, 262 (1922) (describing the Attorney General as
“the hand of the President in taking care that the laws of the United States in protection of the
interests of the United States in legal proceedings and in the prosecution of offenses, be faithfully
executed”). For a historical account of prosecutorial discretion’s association with separation of
powers and the Take Care Clause, see Krauss (2009).
All these decisions reinforce the potential relevance of background constitutional principles in establishing baselines against which any given enforcement policy’s permissibility might be assessed. As a matter of both first principles and case law, background understandings of the Take Care Clause and separation of powers should properly inform default understandings of the scope of executive enforcement obligation, whether or not those obligations are fully judicially enforceable. Interpretation of the Take Care Clause is thus relevant to enforcement questions in much the same way that the Supremacy Clause is relevant to determining the preemptive effect of federal statutes. As the Supreme Court has emphasized, whether federal law preempts state law is ultimately a question of congressional intent: Congress may specify whether a given federal law does or does not preempt specified categories of state law.50 Yet in decisions going back to *McCulloch v. Maryland*,51 the Supreme Court has articulated default principles, rooted in its understanding of the Supremacy Clause, that determine a given statute’s preemptive force absent congressional specification to the contrary.52 By the same token, some constitutional understanding of faithful execution may properly set the baseline for evaluation of executive discretion, even if the given statutory context provides particular reasons to depart from that baseline in one direction or the other.

OLC was therefore correct to make reference to such principles in its analysis of DAPA. The Supreme Court should do the same if it reaches the issue.

### 2.3 Rule-of-Law Debate

Apart from constitutional arguments (and debates over their relevance), debates over the recent nonenforcement initiatives have centered to an unusual degree on the “rule of law” and whether policies in question advance or undermine rule-of-law values. Proponents argue that the clarity, transparency, and rule-like definiteness of the policies advance the rule of law by constraining the discretion of line-level enforcement officials and ensuring accountability for overall enforcement priorities (e.g., Cox & Rodriguez 2015; Kalhan 2015). Opponents have contended, sometimes in highly partisan terms, that the policies undermine the rule of law by subverting statutory rules of conduct and eroding norms of executive respect for statutory policy (e.g., Bernstein 2015;

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50 *See, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (“the purpose of Congress is the ultimate touchstone in every preemption case” (internal quotation marks and citation omitted)).

51 17 U.S. (4 Wheat.) 316 (1819).

52 *See, e.g.*, *Arizona v. United States*, 132 S. Ct. 2492, 2500-01 (2012) (summarizing grounds for imputing preemptive effect to federal law even without express preemption provision).
Cruz 2015; Paxton 2015; Reid 2014). Much as constitutional considerations may properly shape an indeterminate statutory inquiry, rule-of-law arguments may be pertinent to default conceptions of enforcement discretion. Insofar as rule-of-law arguments capture important background normative commitments, all ties, in a sense, should go to the rule of law. Yet the debate on this score is ultimately less helpful than a more grounded constitutional analysis. In fact, the debate highlights a deep tension in rule-of-law commitments that arises with respect to heavily discretionary areas of enforcement like immigration and federal criminal law.

The rule of law itself is a slippery term, subject to multiple possible meanings and often invoked more as a rhetorical cudgel than a precise concept (e.g., Waldron 2002). Scholars have identified numerous, often conflicting, ideals with the rule of law. In particular, some advocate a purely formal or “thin” conception of the rule of law, while others advocate a “thicker” understanding that incorporates substantive values such as respect for individual rights or democracy. Nevertheless, as Peter Shane observes, “‘[r]ule of law’ is one of those concepts that can seem hopelessly nuanced to academics, but commonsensical to most citizens” (Shane 2009, p. 115).

In one “familiar understanding” with at least “a glint of truth,” the concept signifies the ideal in American political and constitutional discourse that “the law—and its meaning—must be fixed and publicly known in advance of application, so that those applying the law, as much as those to whom it is applied, can be bound by it” (Fallon 1997, p. 2). On this account, “[i]f courts (or the officials of any other institution) could make law in the guise of applying it, we would have the very ‘rule of men’ with which the Rule of Law is supposed to contrast” (Fallon 1997). Fellow conference participant Richard Epstein has offered a similar approximation of the rule of law’s meaning: “The rule of law requires that all disputes—whether among private parties or among the state and private parties—be tried before neutral judges, under rules that are known and articulated in advance” (Epstein 2011, p. 39). Somewhat more precisely, a recent broader study of the concept by Brian Tamanaha associates the “rule of law” ideal with three general “themes”: (i) government limited by

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53 Further reflecting this line of critique, one unenacted bill to deny funding for DAPA and DACA (among other things) was titled the “Immigration Rule of Law Act of 2015” (S. 534, 114th Cong. (introduced February 26, 2015)).

54 Tamanaha (2004, pp. 91–113) catalogs competing conceptions of the rule of law based on whether they are relatively thinner or thicker and relatively more formal or substantive. For another recent survey of competing definitions, see Eyer (2008, pp. 654–657). Ever observes, that “[e]verything from the predictability of legal norms to the extent of liberalization of the economy and the existence of laws guaranteeing basic substantive human rights is designated by some (but not all) rule-of-law theorists as necessary components of the rule-of-law ideal” (id. at 654).
law, meaning that “officials must abide by currently valid positive law”; (ii) “formal legality,” in the sense of rule-bound governance in accordance with predetermined “public, prospective laws” and “the availability of a fair hearing within the judicial process”; and (iii) the “rule of laws, not men,” in the sense of limiting arbitrary discretion, so that citizens are “not subject to the unpredictable vagaries of other individuals—whether monarchs, judges, government officials, or fellow citizens” (Tamanaha 2004, pp. 114–126).

Attempting any more precise definition would go well beyond the scope of this brief essay. Yet even this basic exposition exposes how commentators can hold such opposite intuitions with respect to the rule of law’s implications for enforcement discretion. To the extent it holds content independent of a simple debate over authority, the current rule-of-law debate over nonenforcement policies highlights how the rule-of-law ideal might yield at least two contradictory implications with respect to choices about when and how to enforce general laws.

The first, invoked by the policies’ defenders, is a principle of nonarbitrariness—a notion that the rule of law means treating like cases alike, drawing distinctions based on principled rather than irrelevant or invidious criteria. Vaguely associated with due process, this idea appears to animate arguments that ad hoc or random administrative action offends the rule of law. It also undergirds longstanding arguments that regulatory schemes such as federal criminal law that depend heavily on prosecutorial discretion violate rule-of-law ideals, as they open the door to divergent outcomes in practice based on which prosecutor receives a particular case or, still more troublingly, on the race, class, or personal characteristics of the offender (e.g., Stuntz 2001, pp. 578–579). On this view, knowing what the law means in advance, at least from the perspective of regulated citizens, means knowing how it is likely to be applied, so that regulated parties can organize their lives without fear that official whim will lead to punishment for generally tolerated conduct.

A second countervailing principle, however, is one of legislative constraint on executive action. On this view, executive officials charged with enforcing statutory prohibitions should respect their position within the hierarchy of lawmaking authorities—the hierarchy of democratic legitimacy running down from the people through their legislative representatives to executive agencies.

Tamanaha (2004, pp. 137–141) ultimately concludes that the first of these “clusters of meaning” captures a “universal human good,” while the second is “supremely valuable” but not necessarily a universal human good and the third “follows whenever the first or second is adopted.”

Arguments rooted in a hierarchy of legitimacy implicate a “traditional” model of agency authority, famously identified and critiqued by Stewart (1975), under which agencies function as “mere transmission belt[s] for implementing legislative directives in particular cases.” While this traditional
Executive officials, from this point of view, should respect the primacy of positive law over official preference, “law” over “men,” and such respect will normally mean seeking to effectuate policy choices reflected in the statute, as opposed to personal or partisan preferences. This perspective seems to animate arguments that tendentious or implausible interpretations of governing statutes, particularly in contexts where formal correction through judicial review is unlikely, raise rule-of-law concerns over and above the simple objection that the asserted interpretation is flawed on the merits. To quote just one recent example of this form of argument, one tax scholar (Zelenak 2012) has raised rule-of-law concerns regarding the Internal Revenue Service’s practice of making “customary deviations” from the statutory definition of taxable income. This scholar worries that such past administrative actions that may have “bred a disrespect for the rule of law on the part of the Treasury Department and IRS, so that tax administrators now believe they have the power and the authority to disregard any Code section when doing so would further their notion (not Congress’s notion) of good tax policy” (Zelenak 2012, p. 851; cf. Ramseyer & Rasmusen 2011, p. 5). On this view, knowing what the law means in advance means expecting official adherence to formal legal requirements, even if enforcement officials find those requirements unappealing.

These two principles may well align in many administrative contexts. Indeed, in a recent essay, Thomas Merrill (2015) characterizes modern administrative law as a synthesis of “substantive” and “procedural” theories of legitimacy rooted in these two competing conceptions of the rule of law. For example, a better reasoned, less arbitrary interpretation of a regulation or statute—one informed by consideration of all relevant factors, and not motivated by impermissible considerations, as required by APA arbitrariness standards—might in principle better accord with presumed statutory objectives, particularly if ambiguous or open-ended statutory language leaves broad effective policymaking discretion to the agency. Yet the two principles break apart with respect to legal regimes like immigration and federal criminal law where statutory model of agency legitimacy is widely recognized as inadequate to account for current administrative practice, Seifter (2014) correctly observes that “values associated with the model of congressional control . . . retain purchase.” For further discussion of legitimacy theories and the continued relevance of the traditional model, see, e.g., Merrill (2015) and Bressman (2003).

57 In her contribution to this symposium, Jennifer Arlen (2016) similarly associates the rule of law with pursuit of an externally derived conception of the public good.

58 See, e.g., Nat’l Ass’n of Home Builders, 551 U.S. at 658.
requirements are relatively clear but heavily discretionary enforcement is endemic.\textsuperscript{59}

In such contexts, because statutory restrictions can neither be interpreted away nor fully enforced with available resources, heavily discretionary enforcement is inevitable, and the ideas of nonarbitrariness and positive constraint push in different directions. More regularized enforcement, guided by more definitive, publicly announced policies, addresses rule-of-law concerns about potential arbitrariness in application. Proponents of DACA, DAPA, and other similarly overt and definitive nonenforcement policies thus argue that, insofar as discretion is inevitable, regularizing its exercise with centrally directed, rule-like criteria is desirable in rule-of-law terms, as it ensures more equivalent treatment of materially comparable cases by line-level officials (e.g., Cox & Rodriguez 2015; Kalhan 2015). Relatedly, proponents assert that more transparent, and thus more predictable, policies may advance the rule of law because they provide greater notice to the public of what conduct will be treated as unlawful, while at the same time allowing greater political accountability for policy choices reflected in enforcement plans (e.g., Cox & Rodriguez 2015; Kalhan 2015; Andrias 2013). Insofar as these arguments take the form of rule-of-law claims, they depend on an anti-arbitrariness conception of the rule of law: more transparent, definitive, and rule-like enforcement policy is more consistent with the rule of law because it ensures that like cases are more often treated alike.

These arguments collide, however, with considerations rooted in the other identified rule-of-law principle, legislative constraint on executive action. If enforcement officials’ proper mission is to effectuate statutory policies to the greatest degree possible, then transparent articulation of definitive enforcement criteria is not necessarily the paramount value. On the contrary, transparency may be counterproductive. A more transparent enforcement policy is one that regulated parties may more easily evade; for that very reason, enforcement policies are often exempt from disclosure under the Freedom of Information Act.\textsuperscript{60} The IRS and other enforcement agencies normally keep their priorities secret so as to avoid alerting regulated parties to the likelihood of punishment.

\textsuperscript{59} For another discussion identifying divergent conceptions of the rule of law in debates over immigration reform and unauthorized migration, see Motomura (2012).

\textsuperscript{60} 5 U.S.C. § 552(b)(7) (2012); \textit{Mayer Brown LLP v. IRS}, 562 F.3d 1190, 1193 (D.C. Cir. 2009). Reflecting the same principle, the Internal Revenue Code specifically provides that “[n]othing in [a preceding disclosure provision], or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.” 26 U.S.C. § 6103(b)(2).
Critics, indeed, have faulted such agencies on rule-of-law grounds for announcing overly definitive policies at odds with apparent statutory requirements (e.g., Zelenak 2012; cf. Lawsky 2013).61

Defenders of DAPA and DACA point out that these concerns may well carry less force with respect to immigration (e.g., Cox & Rodriguez 2015). Many undocumented immigrants have lived in the USA for extended periods and formed deep ties to their communities; DACA beneficiaries arrived in the USA as young children and have known no other home. To the extent compliance in this context means leaving the USA, such individuals are exceedingly unlikely to comply on their own, regardless of federal enforcement policy. This point is well taken, and in any event any sensible set of enforcement priorities should assign low priority to removal of such immigrants (and to my mind any sensible Congress should afford such immigrants legislative relief). Nevertheless, even in the immigration context, more regularized, rule-like enforcement practice—and in particular a practice organized around prospective assurances of none-nforcement and conferral of otherwise unavailable legal benefits, as opposed to mere prioritization of other groups for removal—may chafe against statutory policy insofar as it establishes an effective rule of law distinct from the rule of the statute. At the least, this worry appears to motivate rule-of-law objections to the policy rooted in concerns about executive resistance to legislative constraints.

In fact, even when agencies hold arguable interpretive authority to exempt particular conduct from regulation, lower courts have held that overly definitive enforcement policies may amount in practice to legislative rules requiring notice-and-comment procedures.62 Whatever the merits of this case law,63 the conflict is still more stark with respect to a true enforcement policy—one the agency can adopt only as a matter of enforcement practice, because it cannot plausibly interpret governing statutory provisions not to cover the conduct in question. Accordingly, if rule-of-law values generally require executive officials to act in a manner consistent with statutory policies even when they find those policies objectionable (e.g., Shane 2009), then enforcement transparency and definitiveness are potential rule-of-law vices as well as virtues.64

61 I have elaborated on this theme elsewhere in Price (2015) and Price (2016).
62 See, e.g., Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 252-53 (D.C. Cir. 2014).
63 For varying assessments see, e.g., Anthony (2000); Franklin (2010); Gersen (2007); Manning (2004); Seidenfeld (2011).
64 Some have also advanced a related concern that encouraging an optional conception of law enforcement may erode the public respect for law on which compliance in many areas ultimately depends. This concern presents difficult empirical and philosophical questions; precisely why people follow laws, particularly when actual enforcement is unlikely, remains a matter of debate. At any
Resolving this dilemma thus circles back to questions of authority. As Heckler reflects, courts have interpreted the APA to give agencies wide effective discretion over resource allocation and prioritization of effort; whether because of limitations on judicial capacity or some more fundamental understanding of agency authority, courts will rarely second-guess agency choices about what to do when they cannot do everything. Yet the question raised by controversial current policies is not so much whether agencies may set priorities, as whether doing so in particular forms exceeds an appropriate understanding of executive authority (and relatedly whether any such understanding is judicially enforceable). Again, should agencies presume authority to adopt and publicly announce broad, categorical, definitive exclusions from enforcement, or does such action undercut statutory compliance and enforcement to a degree that renders it more legislative than executive in character? The rule-of-law ideal provides no easy answer to this question; it supports arguments both ways. Arguments that self-constraint advances the rule of law collide with arguments that statutory policy should limit, as a default matter, what self-restraints executive officials may adopt.

Reflecting on these trade-offs, two of DACA and DAPA’s leading defenders aptly describe critics’ view of enforcement policy as involving a “tragic choice” between competing values, neither of which can be maximized without undercutting the other (Cox & Rodriguez 2015, pp. 197–198). These proponents claim, happily, to sidestep the tragedy by providing a firm grounding in authority for the programs. And indeed if adequate legal authority for the programs exists, legitimate rule-of-law objections might well disappear. Yet if one views the question of authority as in doubt, then the choice is indeed tragic. An enforcement regime generally cannot simultaneously maximize compliance and regularity, legislative primacy and executive transparency. Trade-offs are inevitable, and the trade-off is doubly tragic in areas like criminal law and immigration where enforcement in any one case may have devastating effects for the individual. Yet the rule-of-law argument in favor of transparent and regularized nonenforcement cannot resolve the antecedent question whether authority to act in such a manner exists. Transparency is a mode of exercising rate, because this rule-of-law concern would apply equally to legislative and executive reforms, it carries limited relevance to the question of executive authority on which this essay concentrates.

65 I advocate this interpretation in Price (2016).

66 See, e.g., WildEarth Guardians v. EPA, 751 F.3d 649, 656 (D.C. Cir. 2014) (deferring to agency’s decision to delay requested rulemaking because of competing priorities). For general discussion of this principle, see Sunstein & Vermeule (2014) and Biber (2008).
otherwise legitimate power; it is not a basis for inferring such power in the first place.67

Another means of avoiding these dilemmas, however, would of course be to obviate the need for default rules in the first place by providing more explicit statutory direction. That brings us to a second, more promising development—the apparent rise of explicit statutory cancelation authorities in key regulatory statutes.

3. RISE OF STATUTORY WAIVER

3.1 Recent Examples

In rough parallel to the rise of nonenforcement as an important category of executive action, statutory provisions expressly authorizing executive cancelation of key features of substantive statutes also appear to have grown in salience.68 In the leading analysis to date of this development, David Barron and Tod Rakoff (2013) coin the term “big waiver” to describe it. As Barron and Rakoff observe, “its prominence as a tool of governance has never been greater.” An increasing number of statutes, or at the very least several politically salient examples, have expressly provided statutory authority to administrators to wipe away key features of those very statutes.69

For example, beginning in 2017, President Obama’s signature legislative achievement, the ACA, will permit the Secretary of Health and Human Services to waive central requirements of that law if a state presents an alternative proposal that (among other things) guarantees health coverage “at least as comprehensive” as under the Act.70 Similarly, the George W. Bush Administration’s signature domestic law, the NCLBA, allowed the Secretary

67 Merrill (2015) raises a related concern that legitimating executive policy initiatives based solely on their transparent and accountable adoption “offers limitless possibilities for rationalizing unilateral policy initiatives taken at the direction of the President with or without any sanction in law.”

68 I focus here on statutory authority to remove statutory (rather than regulatory) requirements. Regulatory waivers typically constitute an exercise of the agency’s delegated affirmative authority to interpret and apply the statute underlying the regulation (Rossi 1997, pp. 1361–1363). I treat both “waivers,” which eliminate legal requirements in particular cases, and legal cancelations or suspensions, which do so on a general basis, as related examples of a parallel form of negative delegation. For discussion of terminology relating to waivers, variances, and more general legal cancellations, see Deacon (2016).

69 Daniel Deacon (2016) has pointed out that a number of longstanding agency organic statutes include law-cancellation authorities (what Deacon calls “administrative forbearance authority”). Nevertheless, such provisions’ centrality to major recent statutes addressing contested areas of policy suggests an increase in prominence.

70 42 U.S.C. § 18052.
of Education to waive central requirements of the law upon application by states and local education agencies.\textsuperscript{71} Though recently replaced by a new statute that differs in fundamental respects, even the new statute, the Every Student Succeeds Act, retains an expansive waiver provision.\textsuperscript{72} Among other recent examples, the REAL ID Act of 2005 authorized the Secretary of Homeland Security to cancel any provision of law that would impede “expeditious construction” of a fence along the border with Mexico.\textsuperscript{73} The statute repealing the military’s “Don’t Ask Don’t Tell” policy prescribed that specified statutory amendments would occur only after the executive branch completed certain steps and reached certain conclusions.\textsuperscript{74} And key sanctions statutes targeting Iran in 2010 and 2013 allowed waiver of some statutory prohibitions based on a presidential determination that waiver was “in the national interest”\textsuperscript{75} or “vital to the national security of the United States.”\textsuperscript{76} In a powerful demonstration of waiver’s potential practical significance, the administration implemented its controversial 2015 agreement to halt Iran’s nuclear program in part by employing such negative authorities under various statutes.\textsuperscript{77}

In rough parallel to the debates described earlier over nonenforcement, “big waiver” provisions have sparked debates about constitutional validity and normative desirability. Yet here objections carry less force. Constitutional arguments against such negative delegations are unpersuasive, and at least

\textsuperscript{71} Pub. L. No. 107-110, § 901, 115 Stat. 1425, 1972 (2002) (adopting now-amended provision codified at 20 U.S.C. § 7861 allowing waiver of most statutory requirements pursuant to specified procedures).

\textsuperscript{72} Pub. L. No. 114-95, § 8013 (2016).

\textsuperscript{73} Pub. L. No. 109-13, div. B, § 102, 49 U.S.C. § 30301 note; see also Neely (2011, pp. 144–150) (discussing waivers under this provision); \textit{Save Our Heritage Organization v. Gonzales}, 533 F. Supp. 2d 58, 63-64 (D.D.C. 2008) (rejecting constitutional challenge to waiver authority); \textit{County of El Paso v. Chertoff}, No. EP–08–CA–196–FM, 2008 WL 4372693 (W.D. Tex. August 29, 2008) (same); \textit{Defenders of Wildlife v. Chertoff}, 527 F. Supp. 2d 119, 124 (D.D.C. 2007) (same)).

\textsuperscript{74} 10 U.S.C. § 654 note.

\textsuperscript{75} Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, § 401(b), Pub. L. No. 111-195, 124 Stat. 1312, 1350. In addition to other waiver provisions scattered throughout, this statute also allowed cancellation of certain provisions following a more specific presidential determination. \textit{Id.} § 401(a).

\textsuperscript{76} 22 U.S.C. §§ 8803(i), 8804(g), 8805(e), 8806(f).

\textsuperscript{77} See, e.g., John F. Kerry, \textit{Waiver Determination and Findings} (October 18, 2015) (implementing agreement by waiving certain sanctions, effective upon confirmation of Iran’s compliance with specified requirements, pursuant to specified statutory authorities). The Iran Nuclear Agreement Review Act of 2015, Pub. L. No. 114-17, 129 Stat. 201, barred the President from exercising certain waiver authorities during a specified period following transmittal of the agreement to Congress. For an overview of statutory authorities employed to implement the agreement, see Kenneth Katzman, Congressional Research Service, \textit{Iran Sanctions}, CRS Report RS20871 (January 21, 2016).
insofar as normative objections center on the rule-of-law principles identified earlier, the balance should tip in favor of such delegations rather than against them.

3.2 Constitutional Validity

Although some have questioned its validity, statutorily conferred law-cancellation authority is constitutional. Absent such authority, to be sure, the Constitution might well support a default rule that executive officials lack law-canceling power.78 By obliging the President to “take Care that Laws be faithfully executed,” the Constitution makes clear that executive officials must execute the law as it is and not as they might wish it to be; at the least, one central historic meaning of the Take Care Clause was to deny law-cancelation power to executive officials.79 Yet when Congress does authorize waivers or other forms of law cancelation, the authorizing statute is itself a law that the executive branch may faithfully execute by issuing the waiver.

As I have argued elsewhere (Price 2014, pp. 707–710), both longstanding legislative practice and judicial precedent confirm this understanding. So does the broader American constitutional tradition. Although many state constitutions expressly forbid executive suspensions of law, many such state constitutional provisions also contemplate legislative authorization of suspensions (Price 2014, p. 692 & n.71, 708–709 & nn.141–142). In light of this background, the relevant provisions of the U.S. Constitution, which do not even explicitly address the issue, present no obstacle to a statutorily authorized power to cancel law.

78 See, e.g., Deacon (2016) (arguing that such authority must be granted with “relatively clear language”); Price (2014) (advocating presumption against such authority); Barron & Rakoff (2013) (advocating a clear statement rule in some circumstances); cf. MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 231 (1994) (refusing to imply authority to make “fundamental revision of the statute” through a permissive policy).

79 Scholars including Cox & Rodriguez (2015), Delahunty & Yoo (2013), Metzger (2015), and Reinstein (2009) have accepted this interpretation. For my own views, see Price (2014). The APA and associated background principles of administrative law might in principle have shifted this constitutional default, so that agencies now hold law-cancellation power as a default matter, even when they cannot plausibly interpret statutory requirements not to apply. The Supreme Court’s recent decision in $UARG$, however, strongly rejects this understanding. There, the Court rejected a permissive statutory interpretation as contrary to clear congressional intent and held that an exercise of enforcement discretion cannot “alter [legal] requirements and ... establish with the force of law that otherwise-prohibited conduct will not violate the Act.” $Util. Air Regulatory Grp. v. EPA$, 134 S. Ct. 2427, 2445 (2014). Thus, although agencies may have authority to waive statutory requirements by failing to enforce them (the question addressed above in Part 2 of this essay), under $UARG$ they appear to lack authority to alter the content of central statutory requirements more definitively.
Some arguments to the contrary (Kitchen 2013; Neely 2011) invoke the Supreme Court’s cryptic holding in *Clinton v. New York*.80 In that case, the Court invalidated the Line Item Veto Act, a provocatively named budget-control statute that authorized presidential discretion to “cancel” certain expenditures if the President so notified Congress within five days of the measure’s enactment.81 Despite acknowledging that the Constitution “is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes,” the Court in *Clinton* “constru[ed] this constitutional silence as equivalent to an express prohibition.”82 The Court also emphasized, however, the peculiarly legislative quality of the presidential actions at issue. In the Court’s view, not only did the President’s cancellation authority amount to “unilateral power to change the text of duly enacted statutes,” but the Act required presidential action shortly after the law’s enactment, without any intervening change in circumstances.83 Furthermore, the Line Item Veto Act established a general authority to cancel spending items against which all future budget legislation would be enacted. This statute thus arguably involved a general departure from the constitutional process of bicameralism and presentation, one that might systematically weaken the bargaining power of individual Senators and Members of Congress in future budget debates.84

Waiver and cancelation provisions in the context of particular statutes, in contrast, will typically lack these features. They will not require immediate execution and may well form an essential part of the legislative bargain by which Congress achieves agreement on policy. Insofar as other statutory waiver provisions lack the peculiar features of the Line Item Veto Act, *Clinton* thus should not be understood to prohibit them.85

Indeed, given the modern acceptance of broad affirmative delegations of regulatory power, singling out waiver authority for particular disfavor would be perverse. It is true that waiver provisions may present special concerns about congressional control over the exercise of the authority it has delegated. Overturning affirmative regulatory action (which has often proved difficult enough) requires congressional agreement only to restore the status quo of nonregulation. Overturning an executive cancelation, in contrast, requires agreement on an affirmative choice to regulate (or at least to restore preexisting

80 524 U.S. 417 (1998).
81 Id. at 436–37.
82 Id. at 439.
83 Id. at 439–41.
84 See id. at 451 (Kennedy, J., concurring).
85 For further discussion of this view, see Barron & Rakoff (2013, pp. 313–318).
statutory requirements), a task that in principle may be more difficult. Yet for that very reason policing executive cancelations—insofar as Congress has authorized them—may be less important. Cancelations remove regulatory constraints instead of imposing them; the risk they present is thus that executive officials will bail out of a policy when Congress itself would not have chosen to do so. But if Congress itself has built this safety-valve into the statute, then exercising such authority on terms Congress has prescribed may be a proper means of executing congressional policy.

Recently, Philip Hamburger has launched a more fundamental attack on the practice of law cancelation and waiver, characterizing waivers as an inherently “extralegal” exercise of power that the Constitution repudiates and more general suspensions of law as a form of legislative authority that the federal constitution bars Congress from delegating (2014, pp. 81–82, 120–126). Again, however, the Constitution does not expressly bar Congress from authorizing such forms of executive action. Hamburger draws a negative inference of impermissibility from such silence and from broader separation-of-powers principles. He recognizes, however, that several early state constitutions expressly allowed state legislatures to authorize executive suspensions of statutory law (77–78), and he also acknowledges that the English Declaration of Rights of 1689 (an important precursor to American constitutions) “expressly left room for the Crown to exercise the dispensing and suspending powers when they were authorized by statute” (69, 72). In any event, although some ratifying conventions proposed amending the federal constitution to specifically deny suspending powers to the President, the First Congress included no such restriction in the proposed amendments eventually adopted as the Bill of Rights (May 1998, p. 16; Price 2014, pp. 193–194). Hamburger’s argument collides, moreover, with the longstanding acceptance of legislatively

86 Cf. Christiansen & Eskridge (2014, p. 1414) (observing, with respect to legislative overrides of Supreme Court decisions, that “Congressional overrides are expensive for the political system to pass and implement, for they gobble up scarce congressional resources and they may interfere with reliance interests based upon the overridden judicial decisions”); Nourse (2014, p. 216) (emphasizing the “transaction costs” associated with legislative overrides of faulty statutory interpretations by courts). In their empirical examination of legislative overrides of judicial decisions, Christiansen and Eskridge found that overrides restoring regulatory interpretations have been significantly more common that overrides weakening agency authority. See Christiansan & Eskridge (2014, p. 1397) (“when Congress resets the statutory rules through an override, it tends to support a more regulatory baseline than the Court had set”). While this result might suggest that Congress will also find overriding waivers easier than overriding regulations, this inference seems doubtful, as Christiansen and Eskridge also found that overrides are more likely when the executive branch (i.e., the agency that lost in court) favor them. Id. at 1395–1396.
authorized waivers and suspensions of statutory provisions under the U.S. Constitution.\(^87\)

As discussed below, nondelegation concerns may reinforce arguments for narrow construction of particular waiver authorities, and as already discussed executive policies that effectively cancel legal requirements without specific statutory authorization present different concerns. But when Congress grants executive authority to waive or cancel a statutory provision’s legal effect, the Constitution should not preclude executive officials from exercising that authority.\(^88\)

### 3.3 Comparative Rule-of-Law Desirability

Rule-of-law objections to big waiver are equally unpersuasive, at least insofar as they seek grounding in the principles identified earlier. In fact, statutorily conferred law-cancelation authority may hold significant benefits in rule-of-law terms, as it may sidestep the tragic rule-of-law conflict described earlier: When Congress has made clear that executive officials may cancel particular statutory obligations or provide other specified forms of relief, then as a general matter questions about whether doing so comports with statutory policies will disappear. Executive officials may grant such relief on a general basis or according to transparent, definitively specified criteria without creating any conflict with

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87 Although Hamburger acknowledges that at least one nineteenth-century statute authorized waivers, he appears to address some other historic examples by distinguishing between executive action that cancels legal requirements for regulated parties and “statutes that subjected executive officers to rules but then allowed them to depart from these rules” (2014, pp. 80–81 & n.b, n.40). Hamburger also acknowledges, however, that a number of early embargo statutes effectively allowed executive officials to authorize otherwise-prohibited conduct (2014, pp. 107–110). A 1794 statute, for example, imposed a thirty-day embargo on U.S. shipping to foreign ports, but then allowed clearances for ships “under the immediate directions of the President of the United States.” Act of March 26, 1794, 1 Stat. 400. Other early laws had the same form. See, e.g., Act of April 25, 1808, ch. 47, § 6, 2 Stat. 499, 500 (imposing embargo and providing “nor shall any clearance be furnished to any ship or vessel, bound as aforesaid, without special permission of the President of the United States”); Act of February 25, 1799, § 1, 1 Stat. 619 (allowing Treasury Secretary “to vary or dispense with [certain] regulations applicable to” required shipping reports and entries so as to conform to health-related state quarantines); cf. Act of March 3, 1795, 1 Stat. 444 (providing that, notwithstanding general ban on arms exports, “in cases connected with the security of the commercial interest of the United States, and for public purposes only, the President of the United States be, and hereby is authorized to permit the exportation of arms, cannon and military stores”); Act of May 7, 1794, 1 Stat. 401 (authorizing the President, notwithstanding general embargo, “to direct clearances to be granted to any ship or vessels belonging to citizens of the United States, which are now loaded, bound from any port in the United States, for any port beyond the Cape of Good Hope”).

88 For a more extensive functional defense of negative delegations rooted in normative and constitutional justifications for delegation more generally, see Deacon (2016).
the statute, because the statute itself contemplates such action. Values of nonarbitrariness and legislative supremacy may once again align, even if complete enforcement of default statutory proscriptions would be impossible.

Indeed, insofar as placing policy responsibility higher up in the hierarchy of democratic legitimacy is itself a rule-of-law value, such statutory regimes unambiguously advance the rule of law. Such provisions enable Congress to assert greater control over the details of regulatory policy, while at the same time building in administrative flexibility to adapt the effective law to changing circumstances. Critics of more conventional delegations have long worried that they enable a form of congressional punt: Congress can enable regulation, but by leaving the hard choices to the agency, individual Senators and Representatives can hedge their bets, retaining the freedom to criticize any particular regulatory requirements the agency chooses (Aranson 1982; Schoenbrod 1993; cf. Baker & Krawiec 2004). A model of detailed statutory requirements coupled with expansive waiver authority may well limit this problem. As Barron & Rakoff (2013) observe, by providing a detailed first draft of the law, subject to executive cancelation, Congress takes more direct responsibility for the details of policy, while nonetheless allowing executive officials to make a politically accountable choice to dispense with some or all of those details.

That said, as Barron and Rakoff also acknowledge, this new structure may give rise to a different form of punt: Congress may impose unrealistic statutory standards and then blame executive officials for failing to adhere to them. The No Child Left Behind Act, for example, required state educational agencies to meet standards by 2014 (ten years after the law’s enactment) that many concluded were in fact unobtainable (Black 2015). The law thus highlights the danger that legislators may tout the toughness of standards they have adopted, while pushing blame onto the executive branch for the policy’s inevitable failure. Even acknowledging this risk, however, the greater congressional control over policy enabled by this structure seems desirable in rule-of-law terms. Tough legal standards, after all, may carry greater democratic legitimacy when imposed by Congress rather than an administrative agency—that is a central implication of rule-of-law arguments rooted in notions of institutional hierarchy. What is more, congressional policy-making may be more transparent, and less susceptible to interest-group capture, than agency policy-making. Finally, concerns about pushing blame onto executive officials in this context seem exaggerated, as in many cases the authority to free constituents from burdens of regulation could be politically beneficial.

At any rate, as compared to Congress’s usual approach to imposing aspirational legal requirements while relying on implicit enforcement discretion to narrow those requirements’ effective scope, an administrative scheme that
makes use of explicit law-cancellation authority seems clearly preferable. An explicit cancelation authority, much like an affirmative delegation, creates clear lines of accountability: Congress is responsible for both the baseline policy and the delegation of executive authority to revise the policy; the executive branch is responsible for the cancelation. And since the statute itself authorizes the executive’s action, executive officials may exercise it in a transparent and regularized fashion without raising concerns about statutory fidelity discussed earlier in connection with transparent and regularized nonenforcement.89

Some have argued to the contrary that waiver-based legal regimes pose special risks for rule-of-law values. Epstein (2011), for example, worries that waiver-based regimes necessitate “currying the favor of capricious government officials,” thereby placing regulated parties in a position of groveling subservience instead of “healthy tension” with regulators. Hamburger (2014, pp. 126–127) similarly faults waiver-based legal structures for creating special risks of favoritism and arbitrariness. Yet these problems, again, may often be addressed through application of more transparent and definitive criteria, and doing so in this context again raises none of the countervailing rule-of-law concerns identified earlier with respect to nonenforcement. An agency might, for example, adopt specified criteria (to the extent the statute does not already do so) for granting waivers. Doing so might effectively limit executive officials’ discretion to grant favors, yet insofar as clear statutory authority exists for granting waivers in the first place, arguments that exercising such authority conflicts with the statute will often appear weak. In short, executive self-restraint in this context does not come at the cost of legislative constraint if the legislature itself has affirmatively authorized the cancellation authority being exercised.

That said, there may be sound reasons not to fully regularize agency discretion in some contexts. Particularly if Congress intended a waiver provision to enable experimentation, agencies should be free to allow some experiments without necessarily allowing every other applicant to follow the same course.90 But by the same token when an agency regularizes its discretion as a matter of policy, there will generally be less risk that doing so conflicts with underlying statutory requirements. Arguments that waiver regimes necessarily defy the rule of law thus have it backwards. Any regime of pervasive and deliberately overbroad regulation risks creating powerful incentives for regulated parties to curry favor with regulators. As compared to more informal means of

89 For another discussion of permitting regimes’ normative advantages over enforcement discretion, see Biber & Ruhl (2014, pp. 218–219).

90 See, e.g., Reno v. Shalala, 30 F.3d 1057, 1069 (9th Cir. 1994) (interpreting Medicaid waiver provision, 42 U.S.C. § 1315(a), to require that approved projects be experimental in nature).
relief such as nonenforcement, waivers carry the benefit of requiring definite, overt action by regulators and guaranteeing future legal security to waiver recipients. Particular risks of abuse may be addressed through thoughtful administrative designs, such as requirements of uniform waiver criteria and reasoned explanation for particular actions.  

In short, the sort of administrative structure enabled by statutory waiver provisions—a structure in which Congress enacts detailed requirements, but confers authority on the agency to cancel those requirements under specified conditions—may carry substantial rule-of-law benefits, not only in terms of regularity and predictability, but also in terms of legislative supremacy. From this perspective, at least, and particularly when compared to legal regimes predicated instead on enforcement discretion, inclusion of express waiver or cancellation authority in statutory regimes is not only constitutional, but also desirable.

### 3.4 Questions about Conditional Waivers

One further question of baseline authority, however, relates to the extent of executive authority to condition any express waiver or cancellation power on acceptance of alternative regulatory conditions. Should waiver provisions afford only waiver authority and no more—a sort of on/off switch that forces an all-or-nothing choice onto the executive branch? Or should they be understood to provide implicit authority for intermediate measures—authority, that is, to grant conditional waivers that effectively impose an alternative regulatory regime? This question gained salience as a result of the Secretary of Education’s recent exercise of express waiver authorities in the NCLBA to impose alternative funding conditions on states that many experts viewed as fundamentally divergent from the statute’s own baseline requirements (Black 2015). Congress has now replaced the NCLBA, and its experience here may well induce greater clarity with respect to waiver criteria in comparable future provisions. Nevertheless, insofar as Congress fails to provide such express guidance, some baseline understanding of conditioning power may be necessary, just as with respect to nonenforcement.

Without attempting full development of such a theory here, I propose tentatively that the same constitutional and rule-of-law considerations addressed throughout this essay may support a relatively narrow understanding of such default authority. As Barron & Rakoff (2013) argue, presuming some conditioning power seems likely to comport with Congress’s goals in providing the waiver authority in the first place. In allowing waivers, Congress presumably did

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91 Biber & Ruhl (2014) assess possible designs for permitting regimes.
not intend to authorize outright cancelation of statutory provisions based on mere executive disagreement with statutory requirements (Barron & Rakoff 2013, pp. 331–332). At the least, to maintain appropriate accountability and responsibility in Congress, its laws should not readily be construed as unserious experiments that legislators desired to see canceled on the basis of political convenience or administrative whim. On the contrary, waiver provisions should generally be understood as a serious legislator most likely would have understood them—as a safety valve to release pressure when changed conditions or administrative experience reveals that baseline statutory obligations are unobtainable. In conditional spending contexts, moreover, Congress may aim to provide administrators with flexibility to provide concessions when bargaining with reluctant grant beneficiaries, so as to induce their continued participation in a program that has proved burdensome (Bagenstos 2013b, pp. 231–232). Finally, in some contexts, as noted, Congress may aim to enable experimentation with better ways of achieving statutory goals, so as to permit more informed legislative or administrative policy-making in the future.

In light of these presumed objectives, inferring executive power to condition makes eminent sense. Waiver conditions may often permit executive officials to obtain half Congress’s loaf instead of none. That is, by imposing appropriate conditions, executive officials may effectuate statutory objectives to the greatest degree possible even if obtaining full compliance is impracticable. Likewise, administrators may bargain for the most complete adherence to program requirements when demanding full adherence would lead a state or other funding recipient to pull the plug. Finally, to the extent waivers enable experimentation, waiver conditions may ensure that the experiment remains oriented toward achieving rather than undermining basic statutory goals. Conditioning, in short, may serve as the waiver analog to affirmative delegation of adaptable policy-making power (Barron & Rakoff 2013, pp. 326–327).

Yet by the same token there are sound reasons not to presume agency authority to impose unrelated conditions. In analogous contexts, courts have required that alternative conditions be germane to underlying regulatory objectives, so as to prevent conversion of one governmental authority into another unauthorized form of power.92 Similarly, in this context, if waiver provisions

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92 See, e.g., Koontz v. St. Johns River Water Mgmt. Dist., 133 S. Ct. 2586, 2595 (2013) (holding in the takings context that “the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts”); S. Dakotas v. Dole, 483 U.S. 203, 207-08 (1987) (holding that “conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs.”) (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)).
are understood to provide an adaptable policy-making authority rather than a power of wholesale policy revision, then the power to condition, like the power to waive itself, should be understood as a power to effectuate statutory objectives, not as a power to impose a fundamentally different regulatory regime as a condition of waiving the regime Congress imposed (Barron & Rakoff 2013, p. 326). At the least, an agency’s presumed authority over resource allocation and prioritization cannot provide a basis for imposing such divergent requirements through conditional waivers. The choice to waive is a choice to authorize, not simply to place a particular task in the back of the queue. And when waiver authority is deployed to impose alternate conditions, it amounts effectively to a choice to regulate—an affirmative exercise of authority that normally requires a clear underlying delegation of power.

All that said, the question of how related waiver conditions must be—how germane is germane?—reduces to a difficult question of how to determine a statute’s objectives, or more precisely about the level of generality at which statutory objectives should be identified. The No Child Left Behind waivers again illustrate this problem. At a high level of generality, the statute aimed to improve the nation’s schools by tying federal funding to accountable measures of student and teacher performance. But the Act pursued this basic objective through specific means. Debates over the waiver conditions’ validity amounted in effect to a dispute over whether the agency could properly pursue the statute’s high-level objectives through conditions imposing specific requirements that critics viewed as fundamentally at odds with the statute’s low-level policy choices (Black 2015).

Every statutory regime is ultimately different, and the answer will often depend on interpretation of the particular waiver provision in its particular statutory context. In the new Every Student Succeeds Act, for example, Congress has barred the Secretary of Education from disapproving key waivers based on “conditions outside the scope of the waiver request” and has further specifically barred waiver conditions prescribing certain academic standards (as the Secretary sought to do through conditional NCLB waiver). Nevertheless, insofar as future statutes are unclear, as the NCLBA was, some baseline understanding of conditioning power will again be necessary.

On this question, background considerations addressed earlier might well support a default rule of relatively tight adherence to specific statutory policies—policies determined at a low level of generality rather than a high level. As already noted, if the principal benefit of authorized waivers, from a rule-of-law

93 Pub. L. No. 114-95, § 8013 (2016). Provisions in the 2010 Iran sanctions legislation that expressly allow waiver based on the President’s view of the “national interest” might provide a counter-example of explicitly unbounded waiver authority.
perspective, is that they permit Congress to take greater ownership over the
details of policy, then their principal danger is that they may enable Congress to
adopt wholly aspirational policies, fully expecting that the executive branch will
waive onerous statutory requirements (and take the credit or blame for doing
so). In other words, if Congress can anticipate an executive waiver in the event
the baseline statutory standards prove too severe, then they may play it both
ways—currying favor with tough-minded constituents by writing unrealistic
goals into the statute, while at the same time assuring regulated parties that the
waiver provision will enable ultimate imposition of less burdensome standards.
Yet such provisions, coupled with unrestricted conditioning power, might end
up giving the executive agency undue policy-making authority. If baseline
statutory requirements are themselves unrealistic, then the executive branch
will hold great leverage in negotiating waiver conditions. A default understand-
ing that waiver provisions grant only limited conditioning authority—an au-
thority, for example, to impose substantially related requirements, but not
different or unrelated conditions—would respond to this risk by cabining ex-
cutive authority to leverage unrealistic statutory policies into alternative re-
quirements that Congress did not clearly authorize.

Again, case law from other areas offers support by analogy. Takings cases, for
example, reflect a principle that government officials may not leverage regula-
tory requirements serving one set of purposes to obtain voluntary compliance
with a different set of policy objectives.94 Insofar as conditional waivers carry an
analogous risk of leveraging the economic impact of regulations to advance
different regulatory objectives, a similarly tight nexus between statutory object-
ives and imposed conditions might be required.

At the same time, the example of deferred prosecution agreements addressed
in Jennifer Arlen’s (2016) contribution to this conference highlights the poten-
tial hazards of unconstrained conditioning power. In such agreements, federal
prosecutors postpone proceeding on criminal charges in exchange for specified
commitments from the defendant.95 Yet federal criminal law provides tremen-
dous leverage to the government in such bargains.96 Arlen notes the risk that

94 See, e.g., Koontz, 133 S. Ct. at 2595.
95 A statute, 18 U.S.C. § 3161(h)(2), provides authority for such agreements. For recent accounts of the
practice, see, e.g., Golumbic & Lichy (2014), Garrett (2014), and O’Sullivan (2014).
96 In a justice system where some 95% of prosecutions result in guilty pleas, liability standards and
associated penalties are already set above optimal levels, so as to induce defendants to accept guilty
pleas (Alschuler 2013; Barkow 2006). Some have suggested that in negotiating corporate DPAs the
government holds even greater bargaining power, given the risk of firm collapse, and attendant
collateral harm to employees and stakeholders, following criminal conviction or even indictment of
the corporation (e.g., Golumbich & Lichy 2014, p. 1313).
prosecutors holding such bargaining chips, and subject to little effective judicial or administrative oversight, will pursue idiosyncratic perceptions of the public good. And indeed prosecutors have obtained concessions from corporate defendants that bear little connection to underlying statutory objectives, including not only extensive reforms to the company’s business and operations but also, in some cases, requirements to endow a law school professorship or maintain a specified number of jobs within a state (Garrett 2014, pp. 917–919). These examples highlight the hazards in treating statutory standards as a warrant for open-ended executive negotiation of alternative requirements (cf. Epstein 2011).

Background constitutional principles also reinforce this understanding. In the most thorough analysis of conditional waivers to date, Derek Black (2015) questions whether even explicit statutory authorization of uncabined conditioning power would be constitutional. Black proposes, for example, that authority to condition waivers on any terms the Secretary deems “appropriate” or “consistent with improvement of education” would be unconstitutional. Whether that is so seems debatable; the Supreme Court’s nondelegation cases have been highly permissive.97 Nevertheless, it is true that ensuring congressional authorization for any exercise of delegated administrative power is at least an important sub-constitutional norm that courts have sought to effectuate through statutory interpretation. Recent Supreme Court decisions have emphasized that “[w]e expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”98 By the same token, courts should uphold authority to convert waiver authority into open-ended policy-making power only if conventional statutory interpretation supports the conclusion that Congress so intended.

Similarly, some have argued—and at least one state asserted in litigation99—that executive imposition of unforeseeable waiver conditions on states is unconstitutionally coercive. As a constitutional claim, this argument is again debatable. It is true that in the National Federation of Independent Businesses v. Sibelius (Health Care Cases),100 the Supreme Court held that Congress impermissibly commandeered states by conditioning continued participation in

97 See, e.g., Whitman v. Am. Trucking Associations, 531 U.S. 457 (2001).

98 Utility Air Regulatory Group v. EPA, 134 S. Ct. 2427, 2444 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)); see also Whitman, 531 U.S. at 468 (“Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.”).

99 See Jindal v. U.S. Dep’t of Educ., Civil Action No. 14-CV-534, 2015 WL 854132, at *1 (M.D. La. February 26, 2015) (argument by state of Louisiana).

100 132 S. Ct. 2566 (2012).
Medicaid, a large, entrenched federal program, on acceptance of a significant expansion of the program to new beneficiaries. By analogy, some assert that conditional waivers may unconstitutionally coerce a state into accepting requirements it never would have agreed to as an initial matter (Black 2015). Yet the controlling opinion in the Health Care Cases need not be read so expansively. That opinion might instead establish only that spending conditions are unconstitutionally coercive when “Congress takes an entrenched federal program that provides large sums to the states and tells states they can continue to participate in that program only if they also agree to participate in a separate and independent program” (Bagenstos 2013a). The latter requirement will normally be absent when waiver conditions are at issue. Waiver conditions, by definition, are not separate and independent from the program being waived. Instead, they amount to a reformulation of the program itself—one that is presumably beneficial, or the state would not accept it (Bagenstos 2013a). In any event, insofar as the state accepted funds with at most the expectation, not the entitlement, of receiving a waiver, the state cannot readily complain that it would not have accepted funds had it known the terms on which the executive branch would grant waivers.

That said, even if the Court’s coercion holding in the Health Care Cases has little bearing on waiver conditions, the distinct requirement of unambiguous notice for funding conditions reinforces arguments for presuming limited rather than extensive conditioning power, absent statutory specification to the contrary. As the Supreme Court has held, “legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract’.”101 Hence, “if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously . . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.’”102 In the spending context at least, a default norm that Congress must make its intent plain if it intends to grant open-ended conditioning power would give subconstitutional force to this background constitutional norm by ensuring that states have clear notice of executive authorities before signing up for the program.

In sum, absent statutory direction to the contrary, executive officials should presume authority to impose conditions on waivers, but the conditions they

101 Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981).
102 S. Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting Pennhurst, 451 U.S. at 17).
select should aim to achieve basic objectives of the statute to the greatest degree possible. Executive officials should not presume open-ended authority to impose whatever conditions they believe best, but should instead treat waiver authorities as mechanisms for maximizing attainment of statutory objectives where full attainment is impossible. Assessing how best to do so will often be a matter or judgment and degree, and courts may well have a limited role in policing such decisions. But as a matter of executive mind-set if not judicial enforcement, executive conditioning power should be limited to avoid unaccountable lawmaking by Congress and enforce sub-constitutional requirements of statutory authorization and clear notice for potential exercises of executive authority.

4. CONCLUSION

Negative executive choices—nonenforcement policies and statutory “big waivers”—seem likely to remain an important feature of federal administration given our divided politics and gridlocked legislature. These practices, however, raise questions about the propriety of executive action that governing statutes often fail to answer expressly. A search for baseline principles—default rules to structure any statutory inquiry—is thus vital in this area.

Building on previous work, this symposium essay has aimed to contribute to ongoing debates about these baseline principles. In evaluating the propriety of nonenforcement policies, some reference to background constitutional principles is inevitable and appropriate. In contrast, rule-of-law debates over appropriate default principles appear indeterminate. Rule-of-law principles point in both directions and the concept of the rule of law itself is notoriously indistinct. With respect to statutorily authorized executive cancelations of statutory requirements—what two leading scholars have termed “big waiver”—constitutional objections miss the mark, and the rule-of-law conflict that characterizes debates over nonenforcement disappears. Administrative structures organized around express statutory waiver authorities thus appear normatively preferable to structures organized instead around extensive enforcement discretion. Such statutory provisions may nevertheless raise difficult questions about whether administrators may condition waivers on alternative requirements. Although Congress, chastened by its experience with NCLB waivers, may well provide more explicit guidance on this question in the future—as indeed it has done in the new Every Student Succeeds Act—a general baseline rule of limited conditioning power may best accord with background separation-of-powers principles and the rule-of-law considerations that make such waivers an appealing model of administrative design in the first place.
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