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# Politics of Nonenforcement

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# POLITICS OF NONENFORCEMENT

*Zachary S. Price*<sup>†</sup>

## ABSTRACT

Constitutional controversies over executive nonenforcement have emerged as a major theme of the Obama Presidency. Yet similar controversies arose in other recent administrations—and in past debates, the two political parties’ positions on this issue were often reversed. Building on previous work addressing constitutional principles that properly govern executive enforcement discretion, this brief symposium contribution reflects on these principles in light of our current, highly polarized politics. It does so in three ways. First, Part I provides historical perspective on current debates by describing major enforcement-related controversies from the Reagan and George W. Bush Administrations. Second, Part II proposes criteria for assessing how faithful an agency’s enforcement policy is to the agency’s underlying statutory mandate. As Part II explains, several qualities—most importantly, transparency and clarity—that are generally considered virtues in administrative law are often counterproductive in the enforcement context. Finally, Part III tentatively explores possible practical, political implications of weakening norms of executive enforcement obligation.

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Constitutional controversies over executive authority to decline enforcement of federal laws have emerged as a major theme of the Obama Presidency. The current administration has caused controversy with nonenforcement policies relating to marijuana, implementation of the Affordable Care Act, and immigration.<sup>1</sup> Congressional Republicans seized on the issue as a means to attack a President whose policies they adamantly oppose.<sup>2</sup> One rather ironic result is a lawsuit by the House of Representatives to compel enforcement of provisions in a statute (the Affordable Care Act) that House leaders denounce in the same breath as unconstitutional and even un-American.<sup>3</sup> On immigration, Republican legislators have undertaken efforts to strip executive authority or leverage congressional appropriations power to induce executive changes.<sup>4</sup>

Newcomers to separation-of-powers controversy might be surprised that in other recent administrations the two political parties' positions on this very issue were reversed. As one component of a broader deregulatory effort, officials in the Reagan Administration dramatically reduced enforcement of legal requirements that they considered bad policy.<sup>5</sup> At the same time, executive branch lawyers and allied scholars advanced legal theories—now partially reflected in Supreme Court case law<sup>6</sup>—to insulate such executive inaction from judicial reversal, based in part on a claimed inherent executive authority of enforcement discretion.<sup>7</sup> The two Bush administrations continued this pattern; if anything, the George W. Bush Administration pursued a more determined

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1. For discussion of these policies, see *infra* Part I.C.
  2. *Id.*
  3. See *U.S. House of Representatives v. Burwell*, Case No. 14-cv-01967 (D.D.C., compl. filed Nov. 21, 2014); H.R. Res. 676, 113th Cong. (as passed by House, July 30, 2014) (authorizing lawsuit); John Boehner & Mitch McConnell, *Now We Can Get Congress Going*, WALL ST. J., Nov. 5, 2014, <http://www.wsj.com/articles/john-boehner-and-mitch-mcconnell-now-we-can-getcongress-going-1415232759> (calling the ACA “a hopelessly flawed law that Americans have never supported” and announcing Republican leaders’ renewed “commitment to repeal ObamaCare, which is hurting the job market along with Americans’ health care”).
  4. See, e.g., Preventing Executive Overreach on Immigration Act of 2014, H.R. 5759, 113th Cong. (as passed by House, Dec. 4, 2014) (proposed legislation to limit executive immigration relief).
  5. See *infra* Part I.A.
  6. See *Heckler v. Chaney*, 470 U.S. 821, 827–35 (1985) (holding that agency enforcement decisions are generally unreviewable under the APA).
  7. See *infra* Part I.A.

agenda of “deregulation through non-enforcement.”<sup>8</sup> Then, as now, critics in Congress howled in protest, decrying executive actions as inconsistent with executive responsibility.<sup>9</sup>

In this brief symposium contribution, I highlight this historical counterpoint as a vehicle for reflection on appropriate norms of executive conduct. Given intense political polarization and partisan disagreement over policy, selecting norms of executive obligation with respect to law enforcement requires stepping behind a veil of ignorance with respect to whether one’s own party will control Congress or the executive branch. The current political reality of divided government, intense partisan hostility, and legislative gridlock places pressure on the executive branch to address popular demands through executive action. At the same time, the scope and severity of existing laws, coupled with political contestation over the policy merits of many past statutes, has made nonenforcement a potentially significant form of executive action. Yet parallels between current and past examples demonstrate how forms of executive power claimed in one administration may be deployed to quite different policy ends during a future presidency. While this practical reality should give pause to both sides, it also demonstrates that any objective theory of executive power should seek foundations beyond the politics of the moment.

In previous work, I have addressed constitutional principles governing executive enforcement discretion.<sup>10</sup> The constitutional structure properly implies a default rule of limited executive enforcement discretion, most centrally because the Take Care Clause of Article II imposes a duty on the President to “take Care that the Laws be faithfully executed.”<sup>11</sup> While resource constraints on enforcement make more expansive discretion inevitable in many areas of modern regulation, the Constitution nonetheless supports a basic executive obligation to effectuate statutory policies rather than deliberately subverting them through nonenforcement.

Without repeating my full constitutional argument, I add to it here in three ways. First, in Part I, I provide context for current debates by offering a brief (and fairly unsystematic) historical account of enforcement-related controversies from the Reagan, George W. Bush, and Obama Administrations. I focus on these three administrations because significant political controversies over executive nonenforcement arose during all of them and because the Reagan and Bush examples provide useful counterpoints to current debates

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8. Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795, 796 (2010). For discussion of examples, see *infra* Part I.B.

9. See *infra* Parts I.A–B.

10. See Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673 (2014).

11. U.S. CONST. art. II, § 3.

regarding the Obama Administration's policies. Officials in the Reagan and Bush Administrations reduced enforcement in key areas of concern to their core constituents, including environmental, labor, and civil rights regulation. In several areas of core concern to his own constituents, President Obama has continued this pattern yet has done so (at least in the most controversial cases) through more overt and deliberate policies than his predecessors.

In Part II, I draw from these recent examples from ideologically disparate administrations to propose criteria of faithful execution. Assuming, as I have argued, that executive agencies are duty-bound to enforce statutory policies, how might we assess their performance in doing so? In areas of regulation where resource constraints necessitate vast discretion, agencies must choose between a wide range of possible enforcement practices and policies. The degree to which those practices and policies accord with underlying statutory requirements will often be more a matter of mindset and degree than any sort of bright-line legal determination.<sup>12</sup> Some criteria may nevertheless be identified, yet those criteria often run counter to conventional intuitions about best practices in other areas of administrative law. In particular, apart from the obvious measures of overall intensity of effort and success in inducing compliance, criteria of transparency, clarity, and central direction may be relevant—but often as vices rather than virtues. In the enforcement context, transparency enables evasion, clarity risks shifting the effective rule of law from the statute itself to the enforcement policy, and central direction invites political pressure on more neutral agency judgments. Thus, although some have advocated more transparent, definite, and centrally directed policies as a means of assuring greater public accountability, such policies may at times undermine the very value of agency fidelity to statutory requirements that administrative law generally seeks to maximize.

In Part III, having framed possible criteria for faithful execution, I raise the question of how strong or weak the norm of executive enforcement responsibility should be. Building on my earlier, more formal analysis of this question, I speculate here about practical, political consequences of eroding enforcement norms. In particular, I tentatively propose three possible reasons to prefer a strong norm of executive enforcement obligation. First, the durability of legislative achievements often depends on enforcement by future administrations with different policy preferences. Any further weakening of executive enforcement obligations may thus imperil important legislative victories for both sides. Second, to the extent Congress perceives executive policies as unexpected or illegitimate, broadened executive nonenforcement could heighten interbranch tensions and exacerbate political gridlock. Third, although the political dynamics surrounding each particular law may vary, in general extensive executive nonenforcement may weaken

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12. See Price, *supra* note 10, at 677, 755.

political pressures on Congress to conform laws to current public preferences. As recent examples illustrate, such executive action may provide an outlet for short-term political demands for change. Yet doing so may weaken the pressure on Congress to undertake more fundamental, long-term legal change. Insofar as that is true, maintaining a strong sense of the executive obligation to enforce laws, whether or not the President agrees with them, not only is more consistent with the formal constitutional structure but also might stand the best chance of giving us a sensible, responsive set of laws in the long run.

## I. NONENFORCEMENT, REPUBLICAN AND DEMOCRAT

The Constitution, of course, divides legislative and executive power. As the legislative branch of the federal government, Congress holds lawmaking power (subject to the President's limited veto power).<sup>13</sup> The President, as head of the executive branch, bears responsibility for executing acts of Congress, a responsibility reflected most directly in the President's textually assigned duty to "take Care that the Laws be faithfully executed."<sup>14</sup> With respect to statutory enforcement, this division of responsibility means that Congress passes general laws that the executive branch enforces in particular cases subject to applicable requirements of judicial or administrative due process.<sup>15</sup>

The separation of lawmaking and law-enforcing powers is a deliberate feature of the constitutional design. Indeed, the framers considered it an important protection for individual liberty.<sup>16</sup> Yet this division of responsibility can give rise to friction, as members of Congress may feel the executive branch is dragging its feet in enforcing laws that Congress has adopted. The problem seems particularly pronounced in the post-New Deal (and particularly postwar) period. The scale of modern federal administration combined with resource constraints on enforcement of the many statutes Congress has passed over time makes extensive enforcement discretion a practical necessity

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13. U.S. CONST. art. I, §§ 7–8.

14. *Id.* art. II, § 3.

15. Modern administrative agencies, of course, combine functions of lawmaking and law enforcement, but in principle a parallel division between regulatory policy and enforcement of that policy obtains even in the agency context. In any event, I concentrate here on the paradigm case of executive enforcement of statutory requirements.

16. *See, e.g.*, THE FEDERALIST NO. 47, at 300 (James Madison) (Clinton Rossiter ed., 1961) (quoting Baron De Montesquieu) ("When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise, lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.").

within the executive branch. One consequence is potential controversy over the exercise of that discretion.<sup>17</sup>

Such friction may arise from differences between the constituencies that elect Congress and the President. Again, this source of friction is a deliberate feature of the constitutional structure. By design, Congress includes geographically distributed representation—two senators from each state in the Senate and representatives from specific geographic districts, allocated by state, in the House of Representatives.<sup>18</sup> In contrast, the Electoral College selects the President. Although the Constitution also allocates electors by state,<sup>19</sup> in practice the President holds a more broadly national constituency. At present, many believe the national political landscape favors Democrats in presidential races, while the residential sorting of voters by party may (at least in combination with existing districting arrangements) give Republicans a natural advantage in the House of Representatives, if not also the Senate.<sup>20</sup> This divergence, moreover, appears particularly pronounced in midterm elections, when core Democratic constituencies have tended to turn out in lower numbers.<sup>21</sup> In the recent past, however, these relative advantages were reversed. Democrats controlled the House throughout the Reagan and George H.W. Bush presidencies; they controlled the Senate as well for roughly six of those twelve years.<sup>22</sup>

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17. For my elaboration of this historical argument, see Price, *supra* note 10, at 742–46. Relatedly, Sean Farhang argues that interbranch conflict and the “fragmented state structures” of the American polity have encouraged Congress to rely on private rather than public enforcement of statutory policies. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 5 (2010). I focus here on conflicts over public enforcement policy rather than the choice between public and private enforcement.
  18. U.S. CONST. art. I, §§ 2–3; *Id.* amend. XVII; 2 U.S.C. § 2c (2012).
  19. U.S. CONST. art. II, § 1; 3 U.S.C. §§ 1–21 (2012).
  20. See Aaron Blake, *People Move to Places that Fit Their Politics. And It’s Helping Republicans*, WASH. POST, Jun. 13, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/06/13/people-move-to-places-that-fit-their-politics-and-its-helping-republicans/> (discussing the effect of “natural gerrymandering” based on a preference to live near those with similar political ideologies).
  21. See Aaron Blake, *The Democrats’ Midterm Turnout Problem—in 6 Charts*, WASH. POST, Oct. 24, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/10/24/the-democrats-midterm-turnout-problem-in-6-charts/> (reporting general demographic trends); Philip Bump, *How Obama Misunderstands 2014 Turnout*, WASH. POST, Dec. 29, 2014, <http://www.washingtonpost.com/blogs/the-fix/wp/2014/12/29/how-obama-misunderstands-2014-turnout/>.
  22. *Party Divisions of the House of Representatives, 1935–Present*, HISTORY, ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Party-Divisions/74-Present/> (last visited Feb. 14, 2015) [hereinafter *Party Divisions of the House*]; *Party Division in the*

During the George W. Bush Administration, Republicans controlled at least one house of Congress until the midterm elections of 2006 delivered control of both houses to Democrats.<sup>23</sup>

As a practical matter, these structural divisions between the two branches may yield sharp differences in policy priorities between Congress and the executive branch, and enforcement controversies may be one important manifestation of such political disagreements. In the following discussion, I briefly sketch ways in which these dynamics have played out in recent administrations, concentrating in particular on the presidencies of Ronald Reagan, George W. Bush, and Barack Obama. This sketch is deliberately brief and impressionistic rather than exhaustive and systematic. My chief aim is to provide context for my normative analysis in Parts II and III by highlighting the degree to which the politics of nonenforcement are reversed today as compared to the recent past.

*A. President Ronald Reagan*

President Reagan assumed office with a perceived mandate to deregulate.<sup>24</sup> Reagan advanced this objective principally by reducing or eliminating affirmative regulatory burdens. He thus established on his first full working day in office a Task Force on Regulatory Relief.<sup>25</sup> Chaired by Vice President George H.W. Bush, the task force undertook “a review of existing and proposed regulations to generate a list of those to be eliminated or scaled back.”<sup>26</sup> Within a month, the President had also issued the landmark Executive Order 12,291, “Federal Regulation,” which required regulatory agencies to submit proposed regulations for cost-benefit review by the Office of Information and Regulatory Affairs (“OIRA”), a component of the Office of Management and Budget (“OMB”) within the Executive Office of the President.<sup>27</sup> One lasting legacy of Executive Order 12,291 and subsequent orders regarding “regulatory review” has been increasingly centralized control over

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*Senate, 1789–Present*, U.S. SENATE, <http://www.senate.gov/history/partydiv.htm> (last visited Feb. 14, 2015) [hereinafter *Party Division in the Senate*].

23. *Party Divisions of the House*, *supra* note 22; *Party Division in the Senate*, *supra* note 22.
24. See generally JAMES T. PATTERSON, *RESTLESS GIANT: THE UNITED STATES FROM WATERGATE TO BUSH V. GORE* 174–77 (2005).
25. BARRY D. FRIEDMAN, *REGULATION IN THE REAGAN-BUSH ERA: THE ERUPTION OF PRESIDENTIAL INFLUENCE* 38 (1995).
26. Reuel Schiller, *An Unexpected Antagonist: Courts, Deregulation, and Conservative Judicial Ideology, 1980–94*, in *MAKING LEGAL HISTORY: ESSAYS IN HONOR OF WILLIAM E. NELSON* 264, 267 (Daniel J. Hulsebosch & R.B. Bernstein eds., 2013).
27. Exec. Order No. 12,291, 3 C.F.R. 127 (1982).



regulatory policy within the White House.<sup>28</sup> At the time, however, a key objective was to impose the administration's deregulatory objectives onto an unwieldy bureaucracy suspected of excessive enthusiasm for regulation.<sup>29</sup>

While affirmative reduction in regulatory burdens thus took center stage in the Reagan Administration's deregulatory effort, nonenforcement also played an important role. As Kate Andrias reports, although President Reagan "put no formal mechanism of enforcement coordination into place," his administration generally sought budget reductions that limited the enforcement capacity of disfavored agencies.<sup>30</sup> At the same time, his "political appointees in the various agencies gave life to his deregulatory commitments in part through the exercise of administrative enforcement discretion."<sup>31</sup> In some areas, the declines were dramatic: between 1980 and 1982, citations by the Occupational Safety and Health Administration fell 27 percent, while penalties assessed fell by 78 percent; new EPA cases under a key environmental statute fell from forty-three in fiscal year 1980 to three in 1982; and EPA's regional offices forwarded only thirty-six cases to the agency's central office for enforcement in 1981 after forwarding 313 in 1980.<sup>32</sup> In the area of civil rights, a 1989 report complained that "during the 1980s federal agencies virtually abandoned trial and appellate litigation as a tool to enforce most civil rights laws"; suits by the Equal Employment Opportunity Commission alone fell 70 percent between 1981 and 1982.<sup>33</sup>

In at least some instances, declining enforcement reflected deliberate policy. The administration formally abolished the EPA's Office of Enforcement and transferred its functions to the agency's legal office—a fairly dramatic signal of reduced commitment to adversarial environmental enforcement.<sup>34</sup> OSHA's leadership deliberately altered

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28. One classic defense of this development is found in Elena Kagan's article, *Presidential Administration*, 114 HARV. L. REV. 2245, 2277–78 (2001). For a more recent account, see Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1054–69 (2013).
29. See Schiller, *supra* note 26, at 267 (describing Reagan's actions to de-regulate after he assumed office).
30. Andrias, *supra* note 28, at 1059.
31. *Id.*
32. FRIEDMAN, *supra* note 25, at 84.
33. CITIZEN'S COMMISSION ON CIVIL RIGHTS, ONE NATION INDIVISIBLE: THE CIVIL RIGHTS CHALLENGE FOR THE 1990S, at 6, 12, 14 (Riginald C. Govan & William L. Taylor eds., 1989). See generally Farhang, *supra* note 17, at 173 ("Once in office, Reagan curtailed administrative enforcement of civil rights by numerous objective measures.").
34. RICHARD W. WATERMAN, PRESIDENTIAL INFLUENCE & THE ADMINISTRATIVE STATE 126 (1989).

the agency's inspection practices and reduced field officers' authority to issue certain citations.<sup>35</sup> In the antitrust context, the administration pursued enforcement practices predicated on its policy view that "virtually all business activity except horizontal price fixing is good for the American consumer and good for the economy."<sup>36</sup>

The administration and its intellectual allies advanced legal theories to justify these deregulatory actions. With respect to deregulation itself, administration lawyers developed arguments (many ultimately rejected by the courts) that deregulatory agency actions should receive reduced judicial scrutiny as compared to affirmative regulatory actions.<sup>37</sup> With respect to nonenforcement, Assistant Attorney General William Baxter, the controversial head of the Justice Department's Antitrust Division, published a law review article in 1982 defending the administration's use of prosecutorial discretion to shape antitrust policy.<sup>38</sup> Despite acknowledging that the Take Care Clause "imposes the duty . . . on the executive branch to enforce the law,"<sup>39</sup> Baxter argued that "the Antitrust Division as an organ of the executive branch has considerable discretion in the selection of cases to prosecute and in the exercise of this discretion is not required to prosecute every type of conduct susceptible to challenge under existing judicial precedents."<sup>40</sup> Baxter also argued that the common-law character of antitrust law made policy-driven uses of prosecutorial discretion particularly appropriate in that context. "Congress relied upon the interaction of the judicial and executive branches to ensure the development of a workable and responsive law of competition," Baxter wrote.<sup>41</sup> Accordingly, the executive branch was "under no duty to prosecute cases involving conduct that has been found [unlawful] in the past or for which

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35. GEORGE C. EADS & MICHAEL FIX, RELIEF OR REFORM? REAGAN'S REGULATORY DILEMMA 196-97 (John L. Palmer & Isabel V. Sawhill eds., 1984).
36. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 947 (1987). See also WILLIAM FRENCH SMITH, LAW AND JUSTICE IN THE REAGAN ADMINISTRATION: THE MEMOIRS OF AN ATTORNEY GENERAL 42-55 (1991) ("[O]ver the four years of the first term we produced a revolution in the government's attitude toward enforcement of the antitrust laws.").
37. See Schiller, *supra* note 26, at 268-69. For critical analysis of these arguments and judicial responses, see Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505 (1985).
38. William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 60 TEX. L. REV. 661 (1982).
39. *Id.* at 674.
40. *Id.* at 681-82.
41. *Id.* at 702.

colorable arguments of illegality can be made unless the prosecution of these cases will promote the public interest.”<sup>42</sup>

A year later, then-Judge Antonin Scalia (appointed to the D.C. Circuit by Reagan in 1982) offered a spirited defense of executive nonenforcement in a well-known lecture on *The Doctrine of Standing as an Essential Element of the Separation of Powers*.<sup>43</sup> Attacking the notion that courts should “enforce upon the executive branch adherence to legislative policies that the political process itself would not enforce,”<sup>44</sup> Scalia argued:

Does what I have said mean that, so long as no minority interests are affected, “important legislative purposes, heralded in the halls of Congress, [can be] lost or misdirected in the vast hallways of the federal bureaucracy?” Of *course* it does—and a good thing, too. Where no peculiar harm to particular individuals or minorities is in question, lots of once-heralded programs ought to get lost or misdirected, in vast hallways or elsewhere. Yesterday’s herald is today’s bore . . . . The ability to lose or misdirect laws can be said to be one of the prime engines of social change.<sup>45</sup>

Then-Professor Frank Easterbrook similarly poked fun at “attacks” taking the “form” that “some rule is ‘the law,’ it has been enforced as the law in the past, so how dare today’s law-enforcement officials not enforce it?”<sup>46</sup> Easterbrook argued: “Prosecutorial discretion is as much part of ‘the law’ as any other rule.”<sup>47</sup>

For their part, the President’s opponents in Congress and elsewhere resisted the administration’s nonenforcement practices.<sup>48</sup> President

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42. *Id.*

43. Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

44. *Id.* at 896.

45. *Id.* at 897 (quoting *Calvert Cliffs Coordinating Comm. v. Atomic Energy Comm’n*, 449 F.2d 1109, 1111 (D.C. Cir. 1971)).

46. Frank H. Easterbrook, *On Not Enforcing the Law*, REGULATION: AEI J. ON GOV’T & SOC’Y 14 (Jan./Feb. 1983).

47. *Id.* at 15. Easterbrook nevertheless correctly emphasized the limits of prosecutorial discretion and the basic obligation of agencies to implement statutory policies. He argued, “When the Antitrust Division [of the Justice Department] stops filing prosecutions [in certain cases], . . . it does not send its staff away to take knitting lessons. It puts the lawyers to work on other cases. A conscientious department keeps changing its enforcement decisions until it gets the most benefit it can out of them.” *Id.*

48. See, e.g., SMITH, *supra* note 36, at 52–53 (describing media and congressional opposition to antitrust policies); KENNETH J. MEIER, REGULATION: POLITICS, BUREAUCRACY, & ECONOMICS 231 (1985) (noting contentious oversight of OSHA); Farhang, *supra* note 17, at 178–80 (discussing congressional oversight of civil rights enforcement in the 1980s).

Reagan's environmental enforcement policies produced particularly acute opposition in Congress. Concerned that the President's EPA Administrator was failing to enforce the powerful toxic waste cleanup provisions in the newly minted Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of 1980, House committees held repeated oversight hearings and subpoenaed enforcement-related documents.<sup>49</sup> In 1983, after the administration, claiming executive privilege, refused to produce subpoenaed materials, the House of Representatives held the Administrator in contempt.<sup>50</sup> In language that resonates with contemporary debates, a House committee's contempt referral asserted:

The power conferred by the Constitution under [the Take Care Clause] is primarily to empower the President simply to carry out the laws enacted by Congress. It neither expressly nor impliedly authorizes the President, or any agency, to withhold documents essential to evaluating the administration of the laws passed by Congress which the President is to "faithfully" execute.<sup>51</sup>

The administration ultimately softened its posture on environmental enforcement and negotiated a deal to release the disputed documents.<sup>52</sup> Yet Congress remained suspicious of the administration's commitment to environmental protection, as reflected in a series of statutes confining its discretion to evade regulatory mandates.<sup>53</sup> In at least one environmental statute, Congress specifically required executive enforcement of any violations not pursued by states.<sup>54</sup> President Reagan objected in a signing statement, asserting that the statute's suggestion that "some enforcement actions are

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and describing the decade as "marked by implacable conflict over civil rights policy between Congress and the executive branch").

49. See generally Jeffrey K. Stine, *Natural Resources and Environmental Policy*, in *THE REAGAN PRESIDENCY: PRAGMATIC CONSERVATISM AND ITS LEGACIES* 233, 241–42 (W. Elliot Brownlee & Hugh Davis Graham eds., 2003) (describing the controversy and the subsequent committee investigation).
50. See Philip Shabecoff, *House Charges Head of E.P.A. with Contempt*, N.Y. TIMES, Dec. 17, 1982, at A1.
51. H.R. REP. NO. 97-968, at 11 (1982).
52. See Stine, *supra* note 49, at 242–43; WATERMAN, *supra* note 34, at 133–37.
53. See Sidney A. Shapiro & Robert L. Glicksman, *Congress, the Supreme Court, and the Quiet Revolution in Administrative Law*, 1988 DUKE L.J. 819, 825–27 (1988) (describing congressional effort in the late 1980s to impose "more effective legislative controls on the EPA").
54. Safe Drinking Water Act Amendments of 1986, Pub. L. No. 99-339 § 102, 100 Stat. 642 (codified at 42 U.S.C. § 300h-2(a)).

mandatory” was of “questionable validity” because “Congress cannot bind the Executive in advance and remove all prosecutorial discretion without infringing on the powers of the Executive.”<sup>55</sup>

As the Reagan Administration drew to a close, leading administration lawyers and academic supporters complained about a “fettered presidency.”<sup>56</sup> Amid a litany of asserted congressional excesses, one former Assistant Attorney General for the Office of Legal Counsel lamented that “legislation is often proposed, and occasionally passed, that would strip the president’s discretion to decide not to prosecute a particular offense.”<sup>57</sup>

*B. President George W. Bush*

While President George H.W. Bush appears to have continued (or in some cases softened) patterns set by President Reagan,<sup>58</sup> the next Republican President, President George W. Bush, arguably pushed nonenforcement further.<sup>59</sup> The familiar Reagan-era tools of budget cuts and appointment of deregulatory agency heads produced aggregate declines in enforcement rates and less aggressive enforcement tactics in many areas.<sup>60</sup> The breadth and pervasiveness of these shifts, however, have prompted some observers to posit that “Bush exercised more extensive control over enforcement than did many of his predecessors,” even if “the White House rarely claimed responsibility for [enforcement] decisions.”<sup>61</sup>

White House fingerprints were perhaps most visible on key aspects of environmental enforcement. Taking its cue from Vice President Dick Cheney’s controversial Energy Task Force, the EPA promulgated regulations that effectively exempted many power plant renovations

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55. Ronald Reagan, Statement on Signing the Safe Drinking Water Act Amendments of 1986 (June 19, 1986).

56. THE FETTERED PRESIDENCY: LEGAL CONSTRAINTS ON THE EXECUTIVE BRANCH (L. Gordon Crovitz & Jeremy A. Rabkin eds., 1989).

57. Theodore B. Olsen, *The Impetuous Vortex: Erosion of Presidential Authority*, in THE FETTERED PRESIDENCY, *supra* note 56, at 225, 233.

58. On President Bush’s approach to regulation and domestic policy generally, see FRIEDMAN, *supra* note 25, at 160–68; PATTERSON, *supra* note 24, at 240; JOHN ROBERT GREENE, THE PRESIDENCY OF GEORGE BUSH 61–63 (2000). I omit discussion of President Clinton so as to concentrate on President Obama’s Republican predecessors and because enforcement-related controversies appear not to have been a dominant theme of the Clinton Presidency. See Andrias, *supra* note 28, at 1059–60.

59. See Andrias, *supra* note 28, at 1061–63.

60. *Id.*

61. *Id.* at 1061.

from so-called “new source review” requirements of the Clean Air Act.<sup>62</sup> Although these statutory provisions generally require otherwise-grandfathered power plants to comply with stricter pollution controls following certain renovations, the EPA’s regulations carved out an extensive safe harbor from this statutory mandate.<sup>63</sup> The D.C. Circuit ultimately invalidated the safe harbor, calling it consistent with the statutory language “[o]nly in a Humpty Dumpty world.”<sup>64</sup> Nevertheless, the agency continued to exempt such plants from the statute as a matter of enforcement practice.<sup>65</sup>

Steep declines were also evident at other key agencies. For example, the number of warning letters issued by the FDA declined by more than 50 percent between 2000 and 2005 while the number of seizures of dangerous products fell by 44 percent.<sup>66</sup> The Department of Labor’s Inspector General faulted the agency for inadequate mine inspections and insufficient attention to employers with serious workplace safety issues.<sup>67</sup> In both cases, the Inspector General blamed management inattention as well as resource constraints for the problems.<sup>68</sup> Similarly, the Government Accountability Office found that the Labor Department’s Wage and Hour Division followed an “ineffective” complaint-processing system that included, among other flaws, excessive reliance

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62. See generally Jonathan Remy Nash & Richard L. Revesz, *Grandfathering and Environmental Regulation: The Law and Economics of New Source Review*, 101 NW. U. L. REV. 1677, 1681–1705 (2007) (providing background on New Source Review); Thomas O. McGarity, *When Strong Enforcement Works Better Than Weak Regulation: The EPA/DOJ New Source Review Enforcement Initiative*, 72 MD. L. REV. 1204 (2013) (describing New Source Review enforcement during the George W. Bush administration).
  63. See McGarity, *supra* note 62, at 1243–70; Nash & Revesz, *supra* note 62, at 1702–04.
  64. *New York v. EPA*, 443 F.3d 880, 887 (D.C. Cir. 2006).
  65. Andrias, *supra* note 28, at 1063. For my own critical analysis of this policy, see Price, *supra* note 10, at 762–63.
  66. STAFF OF H. COMM. ON GOV. REFORM, SPECIAL INVESTIGATIONS DIVISION, 109TH CONG., *PRESCRIPTION FOR HARM: THE DECLINE IN FDA ENFORCEMENT ACTIVITY* 11, 13 (Comm. Print 2006) [hereinafter *PRESCRIPTION FOR HARM*] (prepared for Rep. Henry A. Waxman).
  67. DEP’T OF LABOR, OFFICE OF INSPECTOR GENERAL—OFFICE OF AUDIT, REPORT NO. 02-09-203-10-105, *EMPLOYERS WITH REPORTED FATALITIES WERE NOT ALWAYS PROPERLY IDENTIFIED & INSPECTED UNDER OSHA’S ENHANCED ENFORCEMENT PROGRAM* (2009); DEP’T OF LABOR, OFFICE OF INSPECTOR GENERAL—OFFICE OF AUDIT, REPORT NO. 05-08-001-06-001, *UNDERGROUND COAL MINE INSPECTION MANDATE NOT FULFILLED DUE TO RESOURCE LIMITATIONS AND LACK OF MANAGEMENT EMPHASIS* (2007).
  68. *EMPLOYERS WITH REPORTED FATALITIES*, *supra* note 67, at 3; *UNDERGROUND COAL MINE INSPECTION*, *supra* note 67, at 1.

on noncoercive conciliatory measures against employers in response to complaints.<sup>69</sup>

Perhaps most controversially, the Civil Rights Division of the Justice Department shifted enforcement priorities in ways that administration critics viewed as political.<sup>70</sup> The Division filed significantly fewer employment discrimination cases under Title VII of the Civil Rights Act of 1964,<sup>71</sup> with particularly steep declines in cases on behalf of African Americans.<sup>72</sup> The Division also brought fewer voting-rights cases under section two of the Voting Rights Act of 1965.<sup>73</sup> According to critics, “[t]he Division appeared to displace its traditional concern for the voting rights of African-Americans with a predominant focus on Hispanic voters through its choice of section 2 litigation and through its enforcement of the language access provisions of the Voting Rights Act.”<sup>74</sup> At the same time, the Division’s political leadership repeatedly overruled staff recommendations on other voting-rights issues, particularly where Republican Party interests appeared to be at stake.<sup>75</sup>

As during the Reagan Administration, President Bush’s political opponents detected such enforcement trends and sought to hold the administration accountable. For instance, after regaining control of Congress, Democrats exercised vigorous oversight over Justice Department practices.<sup>76</sup> A House committee conducted oversight hearings on the Department’s civil rights enforcement.<sup>77</sup> Even earlier, minority staff on a House committee issued a scathing report faulting the FDA for

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69. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-458T, DEP’T OF LABOR: WAGE & HOUR DIVISION’S COMPLAINT INTAKE AND INVESTIGATIVE PROCESSES LEAVE LOW WAGE WORKERS VULNERABLE TO WAGE THEFT, at i, 9, 19–21, 24–25 (2009).
70. See, e.g., Goodwin Liu, *The Bush Administration & Civil Rights: Lessons Learned*, 4 DUKE J. CONST. L. & PUB. POL’Y 77 (2009); Sen. Edward M. Kennedy, *Restoring the Civil Rights Division*, 2 HARV. L. & POL’Y REV. 211 (2008).
71. 42 U.S.C. § 2000(e) (2012).
72. Liu, *supra* note 70, at 80.
73. 42 U.S.C. § 1973 (2012); Liu, *supra* note 70, at 79.
74. Liu, *supra* note 70, at 79 (footnotes omitted).
75. *Id.* at 82–86.
76. See *id.* at 87–88, n.50.
77. See, e.g., *Changing Tides: Exploring the Current State of Civil Rights Enforcement Within the Department of Justice*, Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties, H. Comm. on the Judiciary, 110th Cong. 44 (2007). See also Kennedy, *supra* note 70, at 234–35.

abdicating its statutory mission.<sup>78</sup> Addressing the administration's record of civil rights enforcement, a Democratic subcommittee chairman complained, "If the rule of law is to have any meaning, if the civil rights laws this Committee produces are to have any value, then we must be assured that those laws will be enforced without fear, favor, or political contamination."<sup>79</sup>

*C. President Barack Obama*

Given nonenforcement's use as a deregulatory tool in previous administrations, the close political identification of nonenforcement with President Obama—a President strongly committed to the social utility of regulation—is surprising, as is congressional Republicans' insistence on a strong executive enforcement obligation. Yet the Obama Administration has provoked controversy with nonenforcement policies in several key areas.

To begin with, in a series of memoranda from the Deputy Attorney General to the U.S. Attorneys, the Justice Department adopted an overt policy of giving low priority to prosecution of federal marijuana offenses where the offender complied with state law.<sup>80</sup> Although federal law criminalizes marijuana possession and distribution, federal officials have not devoted significant resources to ground-level enforcement of

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78. *PRESCRIPTION FOR HARM*, *supra* note 66.

79. *Changing Tides*, *supra* note 77, at 2 (prepared statement of Rep. Jerrold Nadler).

80. Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding Marijuana Related Financial Crimes (Feb. 14, 2014), available at <http://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20%282%29.pdf>; Memorandum from James M. Cole, Deputy Att'y Gen., to U.S. Att'ys, Guidance Regarding Marijuana Enforcement 3 (Aug. 29, 2013) [hereinafter 2013 Cole Enforcement Memorandum], available at <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>; Memorandum from James M. Cole, Deputy Att'y Gen., to all U.S. Att'ys, Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use 1–2 (June 29, 2011), available at <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>; Memorandum from David W. Ogden, Deputy Att'y Gen., to Selected U.S. Att'ys, Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana 1–2 (Oct. 19, 2009), available at <http://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf>. The Department recently extended the same treatment to Native American tribes. See Memorandum from Monty Wilkinson, Dir., Executive Office of U.S. Attorneys, U.S. Department of Justice, to U.S. Att'ys, Policy Statement Regarding Marijuana Issues in Indian Country (Oct. 28, 2014), available at <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>.



these prohibitions.<sup>81</sup> States, however, began liberalizing their own marijuana prohibitions, and in 2012 Colorado and Washington decriminalized recreational use of the drug.<sup>82</sup> While in some sense the new federal policy simply preserved traditional federal enforcement priorities in the face of these state law changes, the practical effect of the Department's publicly stated policy was to get federal law out of the way of new state experiments in liberalization.<sup>83</sup> The result has been a remarkable boom in overt marijuana businesses in some areas, particularly Colorado.<sup>84</sup>

A second set of controversial policies involved implementation of the Affordable Care Act. Although the statute set clear effective dates for key provisions, the Department of Health and Human Services effectively postponed these deadlines for lengthy periods for two key sets of statutory requirements: first, the requirement that health insurance plans meet certain coverage requirements; and second, the so-called employer mandate, which penalizes employers above a certain size for failing to provide health insurance for their employees.<sup>85</sup> In support of both policies, the agency claimed organic authority to provide "transition relief" by declining enforcement of statutory restrictions while the law was first taking effect.

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81. See 2013 Cole Enforcement Memorandum, *supra* note 80, at 2. For figures on recent enforcement, see Price, *supra* note 10, at 757 n.368.
  82. COLO. CONST. art. XVIII, § 16 (amended 2014); Wash. Initiative Measure No. 502 (July 8, 2011).
  83. For my own qualified defense of the policy's legality, see Price, *supra* note 10, at 757–59.
  84. See Niraj Chokshi, *Marijuana Could Deliver More Than \$800 Million in Revenue to Washington and Colorado*, GOVBEAT, WASH. POST (Sept. 26, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/26/marijuana-could-deliver-more-than-800-million-in-revenue-to-washington-and-colorado/>.
  85. See Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Dep't of Health & Human Servs., to State Ins. Comm'rs (Nov. 14, 2013), *available at* <http://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf> (indicating that health plans "will not be considered to be out of compliance" with statutory insurance requirements under specified circumstances); Bulletin from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, Extension of Transitional Policy Through October 1, 2016 (Mar. 5, 2014), *available at* <http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/transition-to-compliant-policies-03-06-2015.pdf> (extending policy to plan years beginning before October 1, 2016); 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, 79 Fed. Reg. 8543, 8569 (Feb. 12, 2014) (extending transition relief from penalties for certain employers).

Finally, President Obama's most controversial executive actions relate to immigration. As a result of decades of failed immigration enforcement, the United States is home to a substantial population of undocumented immigrants—individuals who either entered the United States unlawfully or overstayed visas allowing their entrance. In two bold policy initiatives, the Department of Homeland Security (DHS) exercised its “prosecutorial discretion” to shield substantial components of this population from removal. DHS announced its first initiative in 2012: the so-called “Deferred Action for Childhood Arrivals” (DACA). DACA addressed some of the most compelling candidates for immigration relief: the so-called “dreamers”—individuals who entered the United States as young children and have grown up to be law-abiding Americans.<sup>86</sup> In 2014, the Department announced a similar program for undocumented immigrants who are parents of U.S. citizens or legal permanent residents.<sup>87</sup> In both programs, the Department invited immigrants in covered groups to apply for “deferred action,” a form of immigration relief in which the government promises for a specified renewable period (three years under these policies) not to seek the immigrant's removal from the United States.<sup>88</sup> Though technically revocable at any time, “deferred action” normally amounts in practice to a temporary guarantee of non-removal. Under immigration regulations, moreover, it entails eligibility for work authorization,<sup>89</sup>

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86. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't of Homeland Sec., for David Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), *available at* <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.
87. Memorandum from Jeh Charles Johnson, Sec'y, U.S. Dep't of Homeland Sec., for Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents (Nov. 20, 2014), *available at* <http://www.aila.org/File/DownloadEmbeddedFile/57134>.
88. For a general description of deferred action, see Memorandum Opinion from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, U.S. Dep't of Justice, for the Sec'y of Homeland Sec. & the Counsel to the President, 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 at 12–18 (Nov. 19, 2014), *available at* <http://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [hereinafter Authority to Prioritize Removal].
89. Classes of Aliens Authorized to Accept Employment, 8 C.F.R. § 274a.12(c)(14) (2014).

notwithstanding general statutory prohibitions on employment of undocumented workers.<sup>90</sup>

Although the administration and its allies invoked executive precedents to support these policies,<sup>91</sup> congressional Republicans have fiercely attacked their legality. In a report advocating legislation to authorize congressional suits against the President, the House Committee on Rules declared:

[T]he President has failed on numerous occasions to fulfill his duty under Article II, section 3 of the Constitution of the United States to faithfully execute the laws passed by Congress. He has ignored certain statutes completely, selectively enforced others, and bypassed the legislative process to create his own laws by executive fiat. These unilateral actions have led to a shift in the balance of power in favor of the presidency, challenging Congress' ability to effectively represent the American people.<sup>92</sup>

## II. CRITERIA OF FAITHFUL EXECUTION

Recent presidents, then, have used nonenforcement as a policy-making tool with increasing boldness. Presidents Reagan and Bush helped to normalize policy-driven exercises of enforcement discretion by dramatically reducing or diverting enforcement efforts with respect to laws they disfavored. President Obama has not only continued the trend toward policy-driven nonenforcement but also brought this executive practice into the open by publicly announcing nonenforcement policies on high-profile issues and claiming credit for them to a degree earlier presidents did not. As Professor Andrias observes, although presidents since Reagan have consistently claimed ownership and control over regulatory policy, “presidential attention to agency enforcement efforts has been comparatively informal, episodic, and opaque.”<sup>93</sup> President Obama may thus herald a shift toward more transparent and centralized control over enforcement decisions.

Powerful structural forces underlie these developments. On the one hand, increasing partisan division in Congress and the resulting difficulty of legislative action place pressure on Presidents to address

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90. 8 U.S.C. § 1324a(a) (2012).

91. *See, e.g.*, Authority to Prioritize Removal, *supra* note 88, at 18–20, 23–24 (approving legality of deferred action program for parents of U.S. citizens and legal permanent residents based on asserted congressional acquiescence in past exercise of “categorical” deferred action); I.R.S. Notice, *supra* note 85 (invoking past provision of “transition relief” as authority for temporary suspension of ACA’s employer mandate).

92. H.R. REP. NO. 113-561, at 2 (2014).

93. Andrias, *supra* note 28, at 1069.

constituent demands through executive action.<sup>94</sup> On the other hand, the accretion of regulatory statutes over time, resulting in “a world thick with federal statutes,”<sup>95</sup> heightens the policy significance of nonenforcement. During the Reagan and Bush Administrations, nonenforcement advanced deregulatory goals with respect to social and economic regulation. The Obama Administration, in contrast, has applied nonenforcement to weaken harsh immigration and drug statutes. In both cases, political contestation over the social value of previously enacted statutes drove executive efforts to weaken those statutes’ practical effect.

Nonenforcement thus appears likely to remain an important category of executive action. To the extent that is true, we need criteria for assessing the fidelity of an administration’s enforcement practices to underlying statutory policies. If executive officials are duty-bound to enforce statutory policies but nevertheless must exercise tremendous discretion in doing so, how may we assess their faithfulness to statutory policies?

I have elsewhere argued that, although faithful execution is often more a matter of mindset and degree than any sort of bright-line legal determination, policies with a strongly categorical and prospective character should generally be impermissible without specific statutory authorization.<sup>96</sup> If enforcement discretion is fundamentally an authority to turn a blind eye to some violations so as to concentrate on others—that is, to set priorities for enforcement without altering the basic policy of the statute—then policies that amount in practice to a prospective guarantee of nonenforcement to broad categories of offenders should be presumptively improper. Even within the outer bounds of legal permissibility, however, some enforcement policies may be more or less faithful to underlying statutes.

Without attempting an exhaustive analysis here, I offer in this Part some reflections on pertinent criteria of faithful execution, with an emphasis on ways in which enforcement differs from other forms of executive action. Some pertinent measures of faithful execution are

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94. For an account of political polarization, see Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 275 (2011) (“American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization.”).

95. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 270, 301–03 (2013) (“As much as the modern federal administrative state depends upon the delegation of regulatory discretion to make law, it also involves a dramatic upsurge in the federal statutory presence.”).

96. See Price, *supra* note 10, at 677, 754–55, 759–61. That is not to say that such policies should necessarily be subject to judicial review and invalidation. For my views on the proper judicial role on enforcement questions, see Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. (forthcoming 2015) (on file with author).

straightforward and obvious: As the Reagan and Bush examples illustrate, reductions in enforcement intensity and diversion of resources from core statutory priorities may be important measures of an agency's fidelity to legislative mandates. But some other criteria are more complex. In particular, transparency, clarity, and central direction—qualities that are often considered virtues in other administrative contexts—will often be vices with respect to enforcement, at least if the standard by which executive action is judged is fidelity to statutory policies.

Consider transparency first. Although it has the virtue of making an administration's priorities clear, enforcement transparency will often be counterproductive: the more public the nonenforcement policy, the stronger the signal to regulated parties that they may organize their behavior around the enforcement policy rather than the statute or regulation.<sup>97</sup> Many politically volatile regulatory regimes—ranging from tax enforcement and workplace safety regulation to environmental and consumer protection—depend on maintaining the deterrent effect of statutory prohibitions that the agency can realistically enforce in only a tiny fraction of cases. The Internal Revenue Service, for instance, can audit only a small fraction (roughly 1 percent) of the tax returns it receives.<sup>98</sup> Accordingly, although it employs internal criteria to identify returns for audits, it quite properly keeps those criteria secret—for the obvious reason that disclosure would enable tax evasion.<sup>99</sup> The Justice Department's contrary choice to disclose its marijuana enforcement policy illustrates the same point. Despite the policy's vague and noncommittal character, it has nevertheless prompted a remarkable flourishing of illegal marijuana businesses in Colorado and elsewhere.<sup>100</sup> It seems doubtful that entrepreneurs and state officials would have felt the same legal security had the federal government adopted the same enforcement priorities but kept them secret. As these examples illustrate, transparent enforcement policies may provide clarity and predictability to regulated parties, but precisely by doing so they may undermine statutory policies to a degree that nonpublic internal guidance would not.

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97. For this reason, an exemption to the Freedom of Information Act shields agency documents whose production “would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.” 5 U.S.C. § 552(b)(7) (2012). According to the D.C. Circuit, “the importance of deterrence explains why the exemption is written in broad and general terms.” *Mayer Brown LLP v. I.R.S.*, 562 F.3d 1190, 1193 (D.C. Cir. 2009).

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

99. *Id.*

100. See *supra* notes 80–84 and accompanying text.

Of course, the worst of all worlds may be a policy that is transparent to regulated parties but not to the public. Some have proposed greater transparency as a means of preventing such sweetheart arrangements and ensuring public accountability for agency enforcement choices.<sup>101</sup> As a practical matter, executive officials will likely resist disclosing (or even memorializing) policies whose disclosure would be politically disadvantageous. But in any event, if non-public assurances are easier for executive officials to provide, they may also be easier to recant. To the extent publicly announced policies provide a stronger assurance of nonenforcement to regulated parties, publicly disclosed policies may thus pose the greater threat to statutory policies.

Furthermore, examples discussed above suggest that initial public disclosure may not always be necessary to ensure political resistance and accountability. The Reagan and Bush Administrations' practices with respect to the environment, workplace safety, and civil rights were all evident to congressional critics and interest groups, even without any public announcement of new priorities.<sup>102</sup> And while some of these policies might have been harder to adopt had they been publicly announced, political opponents and congressional critics nevertheless often succeeded in imposing political costs and even in some cases inducing a change of direction.<sup>103</sup> At any rate, on a systemic level, more transparent nonenforcement risks normalizing a perception that

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101. *See, e.g.*, Andrias, *supra* note 28, at 1117 (“[D]isclosure of enforcement policy decisions, accompanied by explanations rooted in law, would discipline exercises of presidential enforcement discretion.”); Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1690–91 (2004) (advocating agency “reason-giving” with respect to enforcement decisions in part because “[w]hen agencies offer open, public-regarding, and otherwise rational reasons, they reduce opportunities for covert, private-interested, or otherwise arbitrary ones”).

102. *See supra* Parts I.A–B.

103. Reagan-era congressional opposition to environmental deregulation was particularly successful in forcing legal and administrative changes. *See generally* WATERMAN, *supra* note 34, at 133–37 (explaining that although the Reagan administration successfully accomplished many of its goals during its first two years by reducing enforcement activity and delegating authority to the states, a “counterrevolution” forced the administration to “moderate its environmental policy”). Congress admittedly exercises more effective oversight during periods of divided government. For discussion of the importance of divided government to separation of powers generally and proposals to enhance minority rights as a means of ensuring more effective oversight, see Daryl J. Levinson & Richard H. Pildes, *Separation of Parties not Powers*, 119 HARV. L. REV. 2312 (2006) (“The practical distinction between party-divided and party-unified government rivals in significance, and often dominates, the constitutional distinction between the branches in predicting and explaining interbranch political dynamics.”).

statutory enforcement is optional. Hence, if the goal of transparency is to enable accountability for inappropriate under-enforcement, then transparency may erode the very norm it seeks to maintain.

Centralization is a double-edged sword too. Ever since President Reagan kick-started “presidential administration” by established centralized regulatory review,<sup>104</sup> scholars have debated the virtues of White House control over regulatory policy.<sup>105</sup> While centralized control promises the benefit of increased political accountability for exercises of delegated discretion,<sup>106</sup> it carries the risk of political manipulation and reduced reliance on neutral agency expertise.<sup>107</sup> Centralized decision-making with respect to enforcement involves similar potential benefits. To the extent mismatched statutory mandates and agency budgets necessitate extensive enforcement discretion, centralized political accountability for how that discretion is exercised seems desirable; indeed, some degree of centralized accountability may even be constitutionally essential.<sup>108</sup> What is more, insofar as different agencies hold overlapping or conflicting mandates, centralized coordination may be essential to maintaining coherent executive branch policy.<sup>109</sup>

But centralized control also carries analogous risks. Insofar as greater centralization invites greater political pressure on enforcement practices, centralization might push agencies toward policies less faithful to underlying statutory mandates. Positing that individual prosecutorial decisions present the greatest risk of political manipulation (or even corruption), Professor Andrias thoughtfully proposes a norm of centralized control over general agency priorities

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104. *See supra* Part I.A.

105. For a small sampling of the literature on this question, see Rena Steinzor, *The Case for Abolishing Centralized White House Regulatory Review*, 1 MICH. J. ENVTL. & ADMIN. L. 210 (2012); Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260 (2006); Kagan, *supra* note 28; Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995); Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1082 (1986).

106. *See, e.g.*, Kagan, *supra* note 28, at 2331–39.

107. *See, e.g.*, Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 757 (2007).

108. *See Morrison v. Olson*, 487 U.S. 654, 693 (1988) (upholding the for-cause removal limitation for federal prosecutor because the Court did “not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws”).

109. *See* Andrias, *supra* note 28, at 1084–90, for discussion of this imperative of inter-agency enforcement coordination.

and dispersed control over individual prosecutorial decisions.<sup>110</sup> As the examples addressed above illustrate, however, greater centralization might invite even wilder swings in enforcement levels in politically volatile areas of regulation. Left to their own devices, mission-driven agencies might adopt different priorities from politically-driven presidents.<sup>111</sup> In practice, a shift toward stronger presidential control might thus mean a shift toward weaker norms of statutory supremacy.<sup>112</sup>

A final, related measure of agency fidelity to statutory policies is the degree of clarity in enforcement practices. To some minds at least, more rule-like policies are more consistent with rule-of-law values—the “rule of law as a law of rules,” as Justice Scalia famously put it.<sup>113</sup> As Gillian Metzger has argued, moreover, categorical policies may ensure tighter centralized control (and thus accountability) by leaving individual officers with less discretion to depart from centrally directed priorities.<sup>114</sup> Yet more categorical policies also depart more starkly from the policy of the statute. By eliminating risks of enforcement outside the designated priorities, categorical policies—particularly if they are publicly announced—may shift the on-the-ground rule of law from the rule of the statute to the rule of the enforcement policy.<sup>115</sup>

Accordingly, one important way in which executive agencies express their subservience to statutory policies is precisely by maintaining some indefiniteness in their enforcement policies—by framing those policies as priorities rather than guarantees. By doing so, executive

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110. Andrias, *supra* note 28, at 1136–41.

111. Professor Andrias acknowledges that “[i]n theory, agencies with a clear mission are less likely to deviate from statutory purpose than is a President facing multiple pressures.” Andrias, *supra* note 28, at 1098. She argues, however, that presidential influence is happening anyway, and “[d]rift is less likely if this role is more public.” *Id.* Recent examples, particularly President Obama’s action on immigration, suggest that this surmise may not always be correct: Ability to claim political credit for enforcement policies may sometimes encourage more aggressive nonenforcement policies, particularly in a polarized electoral environment where motivating core constituencies is central to electoral success.

112. I borrow the term “statutory supremacy” from Eric Biber. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 5, 24 (2008).

113. Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

114. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. (forthcoming 2015).

115. See Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 176 (1996) (“it is a relatively elementary legal realist insight that when there is a single enforcement authority, a decision not to enforce under stated circumstances is indistinguishable from amending the underlying ‘rule’ to exempt the affected conduct from prohibition”).



officials avoid, to the greatest extent possible, either definite prospective assurances of nonenforcement or rule-like categorical distinctions between offenders—two forms of nonenforcement that, as noted earlier, will often amount to implementing a different policy from the statute itself.<sup>116</sup> Courts police this norm indirectly in the APA context by insisting that agency policies may qualify as “general statement[s] of policy,” and thus avoid notice-and-comment procedures required for promulgation of rules,<sup>117</sup> only if they retain a degree of indefiniteness.<sup>118</sup>

It is true, as Professor Metzger argues, that the Take Care Clause also imposes a duty to supervise on the President: as the clause’s “passive [construction] and the sheer practical impossibility of any other result” make clear, “the actual execution of the laws will be done by others,” thus making the duty imposed by the clause one of mandatory supervisory responsibility.<sup>119</sup> Insofar as transparent, categorical policies impose greater constraint on low-level officials, Metzger argues that this constitutional duty to supervise may provide a constitutional foundation for them.<sup>120</sup> In the enforcement context, however, the duty to supervise is not freestanding but rather serves a specified purpose—to ensure faithful execution. The duty to supervise, then, presents once again the problem of assessing faithful execution. For the reasons noted, more definite categorical policies (particularly when publicly revealed) may often be less faithful to underlying statutory mandates.<sup>121</sup>

Some have also argued that agency policies should seek to minimize arbitrariness, and from that perspective, too, less definite enforcement policies may seem less desirable.<sup>122</sup> After all, by retaining a degree of case-by-case decision-making and avoiding any firm commitment,

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116. See *supra* note 96 and accompanying text.

117. 5 U.S.C. § 553(b)(3)(A) (2012).

118. See, e.g., *Gen. Elec. Co. v. E.P.A.*, 290 F.3d 377, 383 (D.C. Cir. 2002) (“[A]n agency pronouncement will be considered binding as a practical matter [and thus subject to notice and comment procedures] if it either appears on its face to be binding or is applied by the agency in a way that indicates it is binding.”) (internal citations omitted); *United States Tel. Ass’n v. FCC*, 28 F.3d 1232, 1234 (D.C. Cir. 1994) (stating that policy statements using mandatory, definitive language are rules subject to notice and comment procedures); *Alaska v. United States Dep’t of Transp.*, 868 F.2d 441, 445–46 (D.C. Cir. 1989) (a “general statement of policy” must “genuinely leave[] the agency . . . free to exercise discretion”) (quoting *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 945–46 (D.C. Cir. 1987)).

119. Metzger, *supra* note 114 (manuscript at 30–31) (on file with author).

120. *Id.* (manuscript at 72–73) (on file with author).

121. *Cf. id.* (manuscript at 73) (on file with author) (acknowledging that “this does not mean that recognizing the duty [to supervise] requires accepting all instances of presidential direction and administration”).

122. See Bressman, *supra* note 101, at 1692–93.

indefinite enforcement guidelines may invite a degree of randomness that more definite policies might avoid. Again, however, if the rule of law is the rule of the statute, then treating all violators identically may not be the paramount value. On the contrary, although rank favoritism, corruption, and bias of course have no place in an appropriate enforcement regime, one violator's avoidance of sanctions does not necessarily make the next violator more sympathetic. At any rate, as compared to more definite policies, framing enforcement priorities as guidelines rather than rules may often strike an appropriate balance by assuring consistency and top-down direction without signaling to regulated parties a fundamental change in the underlying rule of law.

Thus, in addition to overall enforcement intensity and appropriate selection of priorities, transparency, centralization, and definiteness are axes along which the fidelity of enforcement policies to statutory mandates may be assessed. All else being equal, clear, transparent, centrally directed guarantees of nonenforcement may conflict with statutory policies to a degree that internal, agency-derived, indefinite enforcement policies do not. Values of transparency, centralization, and clarity, though virtues in other administrative contexts, are potential vices here, at least if the overall objective is ensuring executive fidelity to statutory policies.

But trend lines are running in the opposite direction. As the historical sketch above illustrates, recent administrations have claimed authority to shift enforcement in ways that conform to presidential policy preferences. The current administration has given renewed impetus to this trend. The central question, then, is what norms the public should expect or desire. Is greater policy-driven nonenforcement a positive or negative development? Should we prefer transparent, definite, centrally directed nonenforcement? Or should we prefer norms that induce executive officials to enforce laws to the best of their ability even when they disfavor the policies those laws reflect?

### III. PRACTICAL BENEFITS OF STRONG ENFORCEMENT

On some level, these questions have formal answers. Notwithstanding the difficulty of identifying clear outer boundaries of appropriate enforcement discretion, the formal constitutional structure supports maintaining a strong norm of executive obligation to implement statutory policies. The Take Care Clause, by its terms, obligates the President to ensure faithful implementation of statutory policies. Likewise, the President's limited role in lawmaking implies an executive obligation to carry out enacted laws even if the President disagrees with them.<sup>123</sup> Indeed, the sheer difficulty of deciding upon appropriate

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123. See Price, *supra* note 10, for elaboration of the argument in this paragraph.

interbranch norms through more abstract analysis reinforces the value of resolving the question by reference to the formal constitutional structure. To be sure, some have questioned the distinctive tendency of American constitutionalism to divert policy disagreements into battles over constitutional principle.<sup>124</sup> But in principle constitutional analysis may permit resolution of heated political controversies in a manner that looks beyond the politics of the moment and thus establishes more durable legal norms.

Nevertheless, to the extent we stand at a crossroads, it is worth thinking too about practical benefits and costs. What systemic effects might weakening norms of executive enforcement obligation have on interbranch relations? To put the point more starkly, what benefit might a clear-eyed, politically motivated President, locked in partisan battle and buffeted by capricious swings in public opinion, derive from maintaining such a norm? Although my observations on this point are speculative and provisional, eroding norms of executive enforcement obligation could carry at least three significant costs.

The first, and most important, is that bold nonenforcement initiatives by one administration may weaken parallel constraints on future administrations with different policy objectives. As a general matter, the constitutional process of bicameralism and presentment makes lawmaking hard. To become a law, a bill must surmount multiple hurdles: approval by appropriate congressional committees, passage by both houses of Congress, and ultimately presidential approval (or a veto override). In some contexts, to be sure, legislative bargains between the President and the two houses of Congress might enable passage of stronger regulation than any one house or the President would consider optimal.<sup>125</sup> But, in general, the multiple veto gates built into the constitutional process favor inertia.<sup>126</sup> What is more, as Dino Christenson and Douglas Kriner explain in their contribution to this symposium, super-majoritarian features of the lawmaking process, such as Senate filibuster rules and the constitutional requirement of a two-thirds majority for veto overrides, create a

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124. See, e.g., LOUIS MICHAEL SEIDMAN, *ON CONSTITUTIONAL DISOBEDIENCE* (2013); cf. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 185 (2009) (describing the early emergence of “the peculiar American tendency to discuss political issues in constitutional terms—a tendency that had the effect of turning quarrels over policy into contests over basic principles”).

125. AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS & PRINCIPLES WE LIVE BY* 427–28 (2012) (discussing this possibility).

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

“gridlock interval” in which legislative action is impossible even though a median voter would favor legal change.<sup>127</sup>

The upshot of this lawmaking structure is that major legislative achievements—laws like the Affordable Care Act, the Clean Air Act, or the 1996 welfare reform<sup>128</sup>—may be possible in some political moments but not others. Both sides of our divided politics may thus have an interest in ensuring that their own legislative victories stick. Yet ensuring that one side’s victories stick requires permitting the other side’s to stick too. In short, executive branch precedent matters, both legally and practically.<sup>129</sup> Future Presidents can be expected to act with greater latitude when they can point to analogous actions by their predecessors.

Ironically, although current political alignments mask this reality, Democrats may have more at stake than Republicans in maintaining strong norms of statutory enforcement. Admittedly, political opposition to President Obama’s nonenforcement initiatives makes plain that core Republican constituencies care about at least some forms of regulation. But in general, amid our deeply polarized politics, Democrats are the party more committed in principle to the value of regulation in promoting social change and restraining undue private power. Nonenforcement is fundamentally a deregulatory power: it is a power to strip force from enacted legal requirements. As examples described in Part I demonstrate, Republican Presidents with deregulatory agendas have used it that way. What is more, they have done so in many areas of regulation (such as environmental protection, workplace safety, antitrust, consumer protection, and civil rights) that Democrats have traditionally favored. Many such areas involve practical challenges and resource constraints similar to those used to justify the current administration’s marijuana and immigration nonenforcement policies. Democrats may thus have reason to worry about what future Republican presidents might do with precedents this administration has set.

A second potential cost to bolder nonenforcement is that it might mean ratcheting up still further the current toxic level of interbranch conflict. To be sure, how precisely current congressional-executive disagreements over enforcement practice will play out remains to be

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127. See generally Dino P. Christenson & Douglas L. Kriner, *Political Constraints on Unilateral Executive Action*, 65 CASE W. RES. L. REV. 897 (2015).

128. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

129. See, e.g., *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (observing that “the longstanding practice of the government can inform our determination of what the law is” (internal citations and quotation marks omitted)); Authority to Prioritize Removal at 18 (relying in part on past executive actions and presumed congressional acquiescence to justify immigration program).

seen. Characterizing President Obama's policies as a form of constitutional self-help, David Pozen has argued that violating general executive enforcement norms might sometimes be justified as a proportional countermeasure for congressional violations of legislative norms (such as conventional limits on filibusters and other obstructive tactics).<sup>130</sup> By reconceptualizing interbranch relationships in terms of self-help, Professor Pozen suggests, the two branches may arrive at a stable equilibrium despite formal constitutional violations on both sides.<sup>131</sup> Yet Pozen also concedes the risk of reciprocal escalation inherent in self-help remedies,<sup>132</sup> and the risk seems significant here, given Congress's perception of its own actions as legitimate (or at least constitutional) and the President's as unconstitutional. Thus, whether or not Pozen is correct that otherwise unconstitutional actions may become valid as remedies for another branch's abuses, broadening use of policy-driven nonenforcement may carry the risk of encouraging further bare-knuckle responses from Congress and thus exacerbating—as well as or instead of correcting or managing—political gridlock.

A final practical consequence to consider is the effect of nonenforcement on the structure of federal law as a whole. The systemic effects of enforcement discretion are paradoxical: While prosecutorial discretion provides a crucial safety valve against rigorous enforcement of outdated or unrealistic laws, persistent nonenforcement also permits laws to remain in place that would be politically intolerable if fully enforced.<sup>133</sup> President Ulysses Grant once remarked, "I know no method to secure the repeal of bad or obnoxious laws so effective as their stringent execution."<sup>134</sup> Modern presidents, responsible for executing laws that cannot possibly be fully enforced with available resources, normally choose enforcement priorities that accord with public preferences (or at least the preferences of their constituents). Yet one cost of doing so may be to relieve pressure on Congress to adjust laws that accord poorly with current preferences.

More overt and specific nonenforcement policies, such as the current marijuana and immigration initiatives, might implicate the same troubling dynamics to an even greater degree. To begin with, as a

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130. David E. Pozen, *Self-Help and the Separation of Powers*, 124 *YALE L.J.* 2, 7 (2014).

131. *Id.* at 8, 70.

132. *Id.* at 50 ("Self-help can also generate negative spillovers, paradigmatically in the form of escalating cycles of recrimination, retaliation, and violence.").

133. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 546–49 (2001).

134. Ulysses S. Grant, First Inaugural Address (Mar. 4, 1869); see also Jessica Bulman-Pozen & David E. Pozen, *Uncivil Obedience*, 115 *COLUM. L. REV.* (forthcoming 2015) (manuscript at 19–20) (on file with author) (discussing potential of rigorous enforcement to provoke legal change).

general matter, weakened expectations of executive enforcement might reduce incentives for lawmakers to undertake the hard bargains and difficult votes that are often necessary to enact significant legislation. Why vote for the bad side of a legislative bargain if a future President may cancel the good side through nonenforcement? With respect to any given law, moreover, while executive action may provide a short-term outlet for political pressures for legal change, precisely by doing so executive action may weaken pressure on Congress to enact legislative reforms. Yet executive relief is a fragile achievement: Especially when it takes forms that do not require notice and comment or other procedural formalities, it can be undone with the stroke of a future President's pen. In contrast, undoing legislative change requires further legislative change, with all the attendant difficulties of bicameralism and presentment and multiple veto gates to enable opposition.

Precisely how these dynamics play out with respect to any given law may well vary with the politics of each particular issue. The politics surrounding marijuana and immigration, the two most significant nonenforcement initiatives of the Obama Administration, remain volatile. It seems doubtful that the public today would support either rigorous federal marijuana penalties or removal of all the country's eleven million undocumented immigrants, though formal statutory policies call for both those actions.<sup>135</sup> For that reason, low-level marijuana enforcement and removal of law-abiding immigrants have long been low priorities for federal enforcement. Yet it remains to be seen whether the administration's more definite nonenforcement initiatives in these areas will hinder or hasten more meaningful legislative change.

With respect to marijuana, as broad political support for medical use at the state level has emerged, Congress enacted a recent appropriations rider barring use of Justice Department funds "to prevent such States from implementing their own State laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>136</sup> Congress, however, has yet to adopt statutory reforms, nor has it validated administration policy with respect to recreational

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135. See Lydia Saad, *Majority Continues to Support Pot Legalization in U.S.*, GALLUP (Nov. 6, 2014), <http://www.gallup.com/poll/179195/majority-continues-support-pot-legalization.aspx>; Mark Murray, *NBC/WSJ Poll: Nearly Half Oppose Executive Action on Immigration*, NBC NEWS (Nov. 19, 2014), <http://www.nbcnews.com/storyline/immigration-reform/nbc-wsj-poll-nearly-half-oppose-executive-action-immigration-n251631> (reporting poll finding that "a majority of Americans (57 percent) favoring a pathway to citizenship for undocumented immigrants, and that increases to 74 percent when respondents are told that such a pathway requires paying fines and back taxes, as well as passing a security background check").

136. Pub. L. No. 113-235, tit. II, § 538 (2015).

marijuana.<sup>137</sup> On immigration, Republicans remain divided over the appropriate response to the President's action; but despite strong popular support for changes to immigration law,<sup>138</sup> comprehensive legislative reform at least seems unlikely in the short term.<sup>139</sup> In both cases, executive action in the long run may help entrench constituencies favoring change: profitable marijuana businesses now have a vested interest in advocating reform, and the deferred action programs will only strengthen the economic integration and community ties of undocumented immigrants who benefit. At least in the immigration context, however, executive action has also provoked intense political opposition to legislative change.

President Reagan's experience with environmental deregulation offers a thought-provoking, if imperfect, historical analogy. As one historian explains, while "legislation passed since the late 1960s had represented a bipartisan consensus that stressed, on the one hand, ever greater regulation, and, on the other, increasing conservation," President Reagan "sought to move government in a different direction."<sup>140</sup> Yet the choice to pursue this objective through aggressive executive action, rather than legislative reform (or even more modest administrative action), proved counterproductive. After stagnating in the 1970s, membership in environmental organizations, and the resulting political pressure on Congress, spiked in response to such controversial executive actions as the elimination of the EPA's enforcement office.<sup>141</sup> The president capitulated to demands for more robust enforcement; environmental concern became a more strongly partisan issue; and deregulatory environmental legislation, to the extent

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137. See Evan Halper, *Congress Quietly Ends Federal Government's Ban on Medical Marijuana*, L.A. TIMES, Dec. 16, 2014, <http://www.latimes.com/nation/la-na-medical-pot-20141216-story.html> ("Even as Congress has shifted ground on medical marijuana, lawmakers remain uneasy about full legalization.").

138. See *supra* note 135.

139. See Molly K. Hooper, *GOP Chairman Wants to Move Immigration Reform Early Next Year*, THE HILL (Dec. 10, 2014) <http://thehill.com/video/lawmaker-interviews/226712-gop-chairman-republicans-wants-to-move-immigration-reform-early> (describing incoming House Judiciary Committee Chairman's plans to "tackle the thorny matter on two fronts: challenging President Obama's executive action to grant millions of undocumented workers temporary legal status and moving bills that passed in his committee last Congress"); Paul Waldman, *Why the GOP Won't Pass Real Immigration Reform Anytime Soon*, WASH. POST, Dec. 31, 2014, <http://www.washingtonpost.com/blogs/plum-line/wp/2014/12/31/why-gop-wont-pass-real-immigration-reform-anytime-soon/> ("Most Republicans in Congress don't really want to do anything on immigration beyond building more fences.").

140. Stine, *supra* note 49, at 233.

141. WATERMAN, *supra* note 34, at 134-35.

it was ever feasible, became impossible.<sup>142</sup> One commentator summed up the lessons: “There is a price to pay for inattention to legislative change . . . subsequent administrations can more easily reverse policies pursued through administrative action alone.”<sup>143</sup>

Current debates over immigration and marijuana may differ from these Reagan-era controversies insofar as President Obama’s actions, unlike Reagan’s, align with majority public preferences. It is also possible that Congress will respond to recent initiatives, as it did to deregulatory initiatives of the Reagan era, by enacting more specific enforcement mandates or relying more heavily on private enforcement to achieve policy objectives.<sup>144</sup> Yet President Reagan’s experience at least illustrates how the short-run benefits of executive action for a President’s constituents may sometimes come at the long-run cost of impeding more significant legislative changes. To the extent that is true, maintaining a strong sense of executive obligation to enforce laws, whether or not the President agrees with them, may not only be most consistent with the formal constitutional structure but might also stand the best chance of giving us a sensible, responsive set of laws in the long run.

## CONCLUSION

The politics of nonenforcement have shifted in recent decades along with partisan shifts in control of the White House. This reality should encourage a search for enforcement norms with some basis beyond the politics of the moment. Building on previous work analyzing constitutional principles of executive enforcement discretion, this brief symposium article has reflected on possible criteria for evaluating faithful execution and potential practical benefits of maintaining strong norms of executive enforcement obligation. Our polarized, gridlocked political system will no doubt continue to place pressure on presidents to address constituent demands through executive action, including exercises of nonenforcement. But now that nonenforcement’s potential for both parties is plain, we may hope that each side considers carefully the precedents it sets.

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142. *Id.* at 134–37.

143. Stine, *supra* note 49, at 233–34 (quoting *Introduction, in* NATURAL RESOURCES AND THE ENVIRONMENT: THE REAGAN APPROACH 10 (Paul R. Portney ed., 1984)).

144. *See supra* text accompanying notes 52–55 (describing examples); FARHANG, *supra* note 17, at 192–98, 219–20 (arguing that separation-of-powers conflicts led to enactment in 1990 and 1991 of measures to authorize and incentivize private environmental and civil rights enforcement).