



## Alabama Law Scholarly Commons

---

Articles

Faculty Scholarship

---

2021

### Abdication through Enforcement

Shalini Ray

Follow this and additional works at: [https://scholarship.law.ua.edu/fac\\_articles](https://scholarship.law.ua.edu/fac_articles)



Part of the [Law Commons](#)

---

# Abdication Through Enforcement

SHALINI BHARGAVA RAY\*

*Presidential abdication in immigration law has long been synonymous with the perceived nonenforcement of certain provisions of the Immigration and Nationality Act. President Obama's never-implemented policy of deferred action, known as DAPA, serves as the prime example in the literature. But can the President abdicate the duty of faithful execution in immigration law by enforcing the law, i.e., by deporting deportable noncitizens? This Article argues "yes." Every leading theory of the presidency recognizes the President's role as supervisor of the bureaucracy, an idea crystallized by several scholars. When the President fails to establish meaningful enforcement priorities, essentially making every deportable noncitizen a priority, and resources for enforcement are insufficient to achieve full enforcement, the President de facto delegates that discretion to the rank and file without requisite constraints. In so doing, the President abdicates this supervisory role, producing abdication through enforcement.*

---

\* Associate Professor, University of Alabama School of Law. For helpful comments on drafts of this paper, I thank Ava Ayers, Nicholas Bagley, Blake Emerson, Laila Hlass, Eisha Jain, Anil Kalhan, Jennifer Lee Koh, Sophia Lee, Ronald Krotoszynski, Nicholas Parrillo, Shruti Rana, Carrie Rosenbaum, Daiquiri Steele, Shoba Sivaprasad Wadhia, and the participants in the 2020 Administrative Law New Scholarship Roundtable. Chisolm Allenlundy, Miranda Ronnow, Josie Rykhus, and Anna Saggio provided excellent research assistance. I am also grateful to the editors of the *Indiana Law Journal* for their valuable editorial assistance.

|   |      |
|---|------|
| INTRODUCTION.....   | 1326 |
| I. THE PRESIDENT IN IMMIGRATION ENFORCEMENT .....   | 1329 |
| A. FAITHFUL EXECUTION AND THE PRESIDENT’S ROLE AS SUPERVISOR OF THE<br>BUREAUCRACY .....                    | 1331 |
| B. PRESIDENTIAL SUPERVISION IN IMMIGRATION LAW .....  | 1337 |
| II. DISCRETION AND ABDICATION IN IMMIGRATION LAW .....  | 1341 |
| A. HISTORY OF ENFORCEMENT DISCRETION .....  | 1342 |
| B. NONENFORCEMENT AS A VIOLATION OF FAITHFUL EXECUTION .....  | 1348 |
| 1. FALLACY OF FULL ENFORCEMENT .....  | 1348 |
| 2. RULE-LIKE, CENTRALIZED CONSTRAINTS ON ENFORCEMENT<br>DISCRETION: ABDICATION OR FAITHFUL EXECUTION? ..... | 1351 |
| C. ENFORCEMENT AS A VIOLATION OF FAITHFUL EXECUTION .....   | 1354 |
| 1. THE CONCEPT OF THE “QUALITY” OF A DEPORTATION UNDERGIRDS<br>ENFORCEMENT DISCRETION.....                  | 1356 |
| 2. THE COMPLETE DEVOLUTION OF DISCRETION .....  | 1358 |
| 3. ZERO TOLERANCE .....   | 1360 |
| A. PUNISHING COMPLIANT CONDUCT .....  | 1361 |
| B. FOLLOWING A HIDDEN DATA TRAIL .....  | 1363 |
| 4. OBJECTIONS.....  | 1367 |
| III. RE-IMAGINING FAITHFUL EXECUTION IN IMMIGRATION LAW .....   | 1371 |
| A. PROCEDURAL FAITHFULNESS.....   | 1371 |
| B. SUBSTANTIVE FAITHFULNESS .....   | 1372 |
| C. ENFORCEABILITY .....   | 1373 |
| CONCLUSION .....  | 1374 |

## INTRODUCTION

The President has a critical role in enforcing federal immigration law. As the nation’s chief executive, the President has the duty to “take Care that the Laws be faithfully executed.”<sup>1</sup> Pursuant to this duty, the President oversees the immigration bureaucracy, appointing the Secretary for the Department of Homeland Security. Under 6 U.S.C. § 202, the DHS Secretary is responsible for establishing enforcement priorities to guide rank and file officers’ inevitable exercise of prosecutorial discretion. Although scholars sharply debate the scope of presidential power and its textual foundations, on any leading theory of presidential power, the President plays an important supervisory role, especially in immigration enforcement.

In recent years, however, immigration enforcement has lacked any trace of the President’s supervision. The Trump Administration’s immigration enforcement priorities formally focused on “criminal aliens” but functionally included nearly all

---

1. U.S. CONST. art. II, § 3.

deportable noncitizens.<sup>2</sup> According to this approach, “Everyone [i]s a [p]riority.”<sup>3</sup> Buttreasing this regime of blanket enforcement, the Department of Homeland Security under Trump declined to identify exempt classes of deportable noncitizens or even specify what equities might warrant an exercise of discretion.<sup>4</sup> As a result, line officers apprehended deportable noncitizens wherever and whenever they encountered them. No one was exempt, and commentators almost uniformly described that style of enforcement as “indiscriminate.”<sup>5</sup> In failing to establish meaningful enforcement priorities and methods to promote compliance, President Trump functionally delegated an unconstrained discretion to the rank and file. This created an enforcement culture ripe for racial discrimination<sup>6</sup> and the pursuit of so-

2. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 30, 2017), <https://www.federalregister.gov/documents/2017/01/30/2017-02102/enhancing-public-safety-in-the-interior-of-the-united-states> [<https://perma.cc/XP64-TCV8>] (establishing enforcement priorities). For an argument that these priorities render everyone a priority, see Dara Lind, *Fear Itself: Donald Trump’s Real Immigration Policy*, VOX, <https://www.vox.com/policy-and-politics/2017/9/14/16293906/trump-immigration-deportation> [<https://perma.cc/PV4N-UE3L>] (Sept. 29, 2017, 10:27 AM) (noting that provision prioritizing aliens who “have committed acts that constitute a chargeable criminal offense” would include all unauthorized immigrants who have driven a car in states that do not provide them with driver’s licenses); *The End of Immigration Enforcement Priorities Under the Trump Administration*, AM. IMMIGR. COUNCIL (Mar. 7, 2018), <https://www.americanimmigrationcouncil.org/research/immigration-enforcement-priorities-under-trump-administration> [<https://perma.cc/JLR9-QBNV>] (arguing that ICE statistics combine noncitizens with criminal convictions along with those charged with crimes, including traffic offenses, thus rendering the focus on “criminal aliens” illusory).

3. SHOBA SIVAPRASAD WADHIA, BANNED: IMMIGRATION ENFORCEMENT IN THE TIME OF TRUMP 29 (2019) [hereinafter WADHIA, BANNED]; see also Hiroshi Motomura, *Arguing About Sanctuary*, 52 U.C. DAVIS L. REV. 435, 464 (2018) (noting that the Trump Administration encouraged “rogue enforcement” by “declar[ing] virtually all potentially removable noncitizens to be enforcement priorities in broad and ambiguous language,” including noncitizens “who [i]n the judgment of an immigration officer . . . pose a risk to public safety or national security”).

4. See Exec. Order No. 13768, 82 Fed. Reg. 8799, *supra* note 2; Memorandum from John Kelly, Sec’y, U.S. Dep’t of Homeland Sec., Enforcement of the Immigration Laws to Serve the National Interest (Feb. 20, 2017), [https://www.dhs.gov/sites/default/files/publications/17\\_0220\\_S1\\_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf](https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf) [<https://perma.cc/H44R-HC8M>] (“[T]he Department no longer will exempt classes or categories of removable aliens from potential enforcement.”).

5. See, e.g., Eisha Jain, *The Interior Structure of Immigration Enforcement*, 167 U. PA. L. REV. 1463, 1490 (2019) (describing effects of “indiscriminate interior enforcement[.]”); Jamelle Bouie, *ICE Unbound*, SLATE (Jan. 29, 2018), <https://slate.com/news-and-politics/2018/01/ice-is-out-of-control.html> [<https://perma.cc/Z46A-JW3C>]; see also Elliot Spagat, *AP Fact Check: Trump’s Aggressive Immigration Enforcement*, AP (Dec. 5, 2017), <https://apnews.com/c043b0acf454439aa648080fb1a3f2a9/AP-FACT-CHECK:-Trump’s-aggressive-immigration-enforcement> [<https://perma.cc/3LBL-NH4E>] (discussing then-deputy director of ICE Thomas Homan’s statement denying “indiscriminate” enforcement, but revealing that more immigrants without criminal histories were being swept up by immigration enforcement under Trump than under Obama).

6. Motomura, *supra* note 3, at 465 (labeling current enforcement culture as “rogue by

called low-hanging fruit.<sup>7</sup> In a world where full enforcement is a fantasy and an abhorrent idea to many, such an approach to enforcement—undertaken in the name of “faithful execution of the immigration laws”<sup>8</sup>—calls for careful scrutiny.

This Article analyzes blanket enforcement and related approaches in immigration law against the demands of faithful execution. Drawing on a burgeoning scholarship on “good faith constitutionalism”—which construes the Constitution’s Take Care Clause in light of the fiduciary duties of agents to principals in private law—as well as on recent scholarship on the President’s role in supervising the bureaucracy and overseeing enforcement, this Article contends that the President’s failure to adequately guide and constrain line officers’ discretion amounts to abdication in violation of this duty of faithful execution. Faithful execution requires robust guidance for those who carry out the actual work of enforcing the laws, including meaningful enforcement priorities and, in appropriate circumstances, the specification of temporarily exempt classes.

This Article further contends that extreme centralization of discretion in the form of literalism or “zero tolerance” also falls short of faithful execution. On its face, a zero-tolerance policy that requires rank and file officers to apprehend and deport every deportable noncitizen encountered, regardless of individual equities, looks like a highly centralized, supervised exercise of enforcement discretion—line officers lack discretion not to take enforcement action on a case-by-case basis.<sup>9</sup> They are tasked with enforcing the letter of the law. But this view conflates centralization with supervision and ignores enforcement realities. When resources for enforcement are limited, extreme literalism merely pushes discretion back to the realm of surveillance and investigation. Although line officers must apprehend every deportable noncitizen encountered, line officers will not encounter them all: which deportable noncitizens the line officers encounter will depend on where and how line officers look. Discretion does not disappear; rather, it migrates, further undermining transparency and accountability. Thus, an empty-shell view of “faithfulness” as centralization alone lacks merit.

The debate over faithful execution in immigration law has almost exclusively focused on the deliberate nonenforcement of statutes. President Obama’s perceived nonenforcement of certain provisions of the Immigration and Nationality Act (INA)

---

design” and explaining that it “risk[s] undetected or unremedied discrimination because enforcement decision-making is not transparent”). Motomura further notes that the “vast discretion exercised by low-level officers” in immigration law mirrors concerns about over-policing in communities of color more generally. *Id.*

7. Adolfo Flores, *The Trump Administration Is Going After “Lowest Hanging Fruit” to Boost Deportations, Ex-ICE Director Says*, BUZZFEED NEWS (July 28, 2017), <https://www.buzzfeednews.com/article/adolfoflores/trump-administration-deportations> [<https://perma.cc/5XKT-4WBY>] (noting that ICE has increased apprehensions of removable noncitizens at routine ICE check-ins).

8. Kelly, *supra* note 4, at 3.

9. See Memorandum from Matthew T. Albence, Exec. Assoc. Dir., U.S. Immigr. & Customs En’t, Implementing the President’s Border Security and Interior Immigration Enforcement Policies (Feb. 21, 2017), <https://www.cato.org/sites/cato.org/files/wp-content/uploads/icememofeb21.pdf> [<https://perma.cc/3ZE2-TK93>] (ordering ERO officers to “take enforcement action against all removable aliens encountered in the course of their duties”).

through Deferred Action for Parents of Americans (DAPA), a deferred action policy that the federal courts enjoined before it could be implemented, serves as the prime example.<sup>10</sup> But this analysis has gotten it backward. Supervised enforcement discretion is not only permissible but required under some circumstances. In drawing attention to an underappreciated aspect of faithful execution, this Article identifies a new form of presidential abdication: abdication through enforcement.

## I. THE PRESIDENT IN IMMIGRATION ENFORCEMENT

The President heads the immigration bureaucracy and serves as its face and as a focal point for public accountability.<sup>11</sup> This role follows from the President's responsibility to "take Care that the Laws be faithfully executed."<sup>12</sup> Other provisions of Article II of the Constitution endow the President with powers and responsibilities relevant to faithful execution, namely, the Vesting Clause,<sup>13</sup> the Oath Clause,<sup>14</sup> and the Opinions Clause.<sup>15</sup> Together, these provisions support a conception of the President as supervisor of the bureaucracy that implements and enforces the law, a view that several scholars to date have developed and advanced. For example, Kate Andrias has highlighted the President's underappreciated role in overseeing or directing administrative enforcement.<sup>16</sup> Similarly, Gillian Metzger has argued that the Take Care Clause, due process, and general separation of powers principles all support a constitutional duty to supervise, although that duty is not exclusively the President's.<sup>17</sup>

---

10. See, e.g., Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784 (2013) (arguing that the "Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases" (emphasis in original)).

11. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333–34 (2001) (quoting Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95 (1985)); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 640 (1984) ("There remains a single President as the politically responsible head of law-administration.").

12. U.S. CONST. art. II, § 3.

13. *Id.* § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

14. *Id.* § 1, cl. 8 ("Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: . . . 'I will faithfully execute the Office of the President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.'").

15. *Id.* § 2, cl. 1; see Tara Leigh Grove, *Presidential Laws and the Missing Interpretive Theory*, 168 U. PA. L. REV. 877 (2020) (discussing the Oath and Opinions Clauses).

16. Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013).

17. Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1925 (2015); see also Ming H. Chen, *Administrator-in-Chief: the President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 368 (2017) (noting that the justification for centralizing discretion within agencies is rooted in President's supervisory role).

Although the President enjoys discretion as the nation's chief executive, the obligation of faithful execution also imposes constraints.<sup>18</sup> On the constraints side, scholarship on faithful execution in immigration law has generally focused on the President's lack of a suspension power—in other words, the lack of authority to carve out, through nonenforcement, provisions of validly enacted statutes based on the President's policy objectives.<sup>19</sup> However, recent scholarship on “good faith constitutionalism” has broadened and deepened our understanding of the Take Care Clause's constraints on the President. Specifically, scholars have analyzed historical sources and concluded that the Take Care Clause, as originally conceived, imposes constraints on the President similar to fiduciary duties of agents to principals in private law.<sup>20</sup> Thus, faithful execution prohibits the President from self-dealing or from violating the duties of loyalty or care. But the implications of presidential supervision of the bureaucracy and the constraints of good faith constitutionalism for intra-agency delegations of enforcement discretion have remained largely unexplored.<sup>21</sup>

The immigration law context for this analysis of the intra-agency delegation of enforcement discretion matters for several reasons. Although plenary power over immigration belongs to Congress, the Supreme Court has consistently recognized the President's inherent authority to regulate immigration impinging on foreign affairs.<sup>22</sup> As a practical matter, the President exercises delegated enforcement discretion against a vast population of deportable noncitizens.<sup>23</sup> And unlike other areas of administrative law, where the law provides for a range of graduated sanctions like fines or injunctive relief, immigration law formally has just one sanction: deportation.<sup>24</sup> As a result, line officers possess limited formal tools on the back end to effectuate the “fine-grained” judgments that typically justify devolved discretion.<sup>25</sup> Accordingly, immigration law presents a unique context in which to analyze the constitutionality of specific forms of delegated enforcement discretion.

---

18. See Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016) (discussing discretion-granting and discretion-constraining function of the Take Care Clause).

19. See, e.g., Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 711 (2014) (describing “a presumption against executive suspending and dispensing powers” flowing from the Take Care Clause).

20. Evan D. Bernick, *Faithful Execution: Where Administrative Law Meets the Constitution*, 108 GEO. L.J. 1 (2019).

21. Cf. Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 441 (2015) (noting the need for intra-agency subdelegations of rulemaking authority).

22. See, e.g., *U.S. ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950).

23. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 475 (2009) [hereinafter Cox & Rodríguez, *The President and Immigration Law*].

24. See Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1684 (2009) (“One sanction—deportation—is the ubiquitous penalty for any immigration violation.”). Some scholars have argued for greater use of fines in immigration law. See, e.g., Peter L. Markowitz, *Abolish ICE . . . and Then What?*, 129 YALE L.J.F. 130, 143 (2019).

25. Cf. Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 181 (2015) [hereinafter Cox and Rodríguez, *Redux*] (noting that devolved discretion enables fine-grained judgments).

Ultimately, this Article concludes that supervised enforcement discretion in immigration law is not only permissible, but under some circumstances, constitutionally required.<sup>26</sup> The President breaches his supervisory role in immigration law in failing to adequately guide or constrain line officers' exercise of enforcement discretion.

This Part explains the constitutional foundations of the President's role in immigration enforcement and the relevance of "good faith constitutionalism," and it concludes that faithful execution requires that the President or high-level agency officials guide and constrain rank and file officers' inevitable exercise of enforcement discretion.

#### *A. Faithful Execution and the President's Role as Supervisor of the Bureaucracy*

The President's responsibility to execute immigration law follows from Article II, which vests "[t]he executive Power" in the President.<sup>27</sup> Scholars like Steven Calabresi and Saikrishna Prakash argue that the Vesting Clause serves as "a general grant of the 'executive Power.'"<sup>28</sup> On this view, the President possesses the power to "put federal law into effect."<sup>29</sup> Scholars have further argued that the Executive possesses inherent power "to carry into execution the powers conferred upon it."<sup>30</sup> In a range of contexts, they note, the Supreme Court has already embraced this notion that the Executive possesses the power to specify "incidental details necessary" to complete a legislative scheme.<sup>31</sup> Thus, the President can be understood to possess "completion power."

Others contend that the Vesting Clause merely assigns to the President whatever executive power the Constitution elsewhere enumerates.<sup>32</sup> Julian Mortenson has

---

26. See Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015) (rejecting argument that the Constitution requires complete decentralization of enforcement discretion).

27. U.S. CONST. art. II, § 1, cl. 1.

28. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 570 (1994) [hereinafter Calabresi & Prakash, *The President's Power*]; Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992).

29. Calabresi & Prakash, *The President's Power*, *supra* note 28, at 570, 580.

30. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282 (2006).

31. *Id.* at 2303.

32. See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1178 (2019) (describing this view as the "Cross-Reference" theory); see also Peter L. Strauss, *Foreword: Overseer or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 703 (2007) (discussing arguments that President has only a political oversight role); *id.* at 709 (distinguishing supervisory from decisional authority). But see Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 716 (2003) (arguing for the view that the Vesting and Faithful Execution Clauses designate the President as the head of law enforcement and rejecting Lessig & Sunstein's thesis that Congress may *elect* to give the President law



recently reinvigorated the debate with a historical study of the use and meaning of the term “executive” from the eighteenth century. He has argued for an “empty vessel” view that executive power confers power “to bring legislated intentions into effect, especially the laws and their intended consequences.”<sup>33</sup> This comports with the Supreme Court’s view of execution as the act of “interpreting a law enacted by Congress to implement the legislative mandate.”<sup>34</sup> On this view, the President functions largely as an agent of Congress, and the tripartite framework set forth in Justice Jackson’s concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer* expounds this view.<sup>35</sup> In that case, Justice Jackson opined that the President possesses greatest authority when acting with the express or implied authorization of Congress but that this authority recedes when the President “takes measures incompatible with the expressed or implied will of Congress.”<sup>36</sup> Even on this latter view of presidential subordination to Congress, however, Article II identifies the President as the exclusive officer possessing executive power.<sup>37</sup>

The President executes congressional enactments, taken to represent the “will of the people,” but the Constitution does not require the President personally (and impossibly) to execute all laws alone. To accomplish this task of law execution, the President may enlist others.<sup>38</sup> Even if the President does not control the entire bureaucracy or control it completely, the President sits at its head, and the Constitution expressly grants the President the power to remove inferior officers. The Supreme Court has recognized limits to that power, but it has not tolerated significant

---

enforcement powers, but it might choose to structure law enforcement in some other way as well).

33. Mortenson, *supra* note 32, at 1237.

34. *Id.* at 1180 (quoting *Bowsher v. Synar*, 478 U.S. 714, 732–33 (1986)).

35. 343 U.S. 579 (1952).

36. *Id.* at 637 (Jackson, J., concurring). *But see* Goldsmith & Manning, *supra* note 30, at 2304 (resuscitating Chief Justice Vinson’s dissenting opinion in *Youngstown*, which critiqued the majority’s “messenger-boy concept of the Office”); Andrias, *supra* note 16, at 1113 (same).

37. Mortenson, *supra* note 32, at 1179 (describing “muscular[]” centralization of the executive power in the President). Notably, even scholars who reject the notion that the Framers intended a unitary executive support presidential control of agency discretion. Compare Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (arguing that “the framers imagined not a clear executive hierarchy with the President at the summit, but a large degree of congressional power to structure the administration as it thought proper”), with *id.* at 119 (“[I]t would not be faithful to the original design to permit officers in the executive branch, making discretionary judgments about important domestic issues, to be immunized from presidential control.”).

38. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) (“In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’”). See also *Seila L., LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2192 (2020) (invalidating structure of independent federal agency that permitted the President to remove the sole agency head only after meeting certain statutory criteria). *But see id.* at 2228 (Kagan, J., dissenting) (noting that the Take Care Clause “speaks of duty not power”).

diffusion of it, instead ruling that such diffusion violates the Vesting Clause.<sup>39</sup> In *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court invalidated the structure of the Public Company Accounting Oversight Board because board members enjoyed multilevel for-cause protection from removal by the President.<sup>40</sup> Specifically, the President lacked the power to remove board members directly or to remove at will an officer who could. Instead, the Commissioners of the SEC could remove board members only for cause, and the President could, in turn, remove the SEC Commissioners themselves only for cause. These two levels of for-cause protection, the Court determined, improperly diffused the executive power vested in the President and precluded the President from faithfully executing the laws.<sup>41</sup>

Unsurprisingly, scholars articulate a spectrum of views on presidential control of administration. On one end, Prakash has argued that the Framers sought to “establish an executive who alone is accountable for executing federal law and who has the authority to control its administration” as a chief administrator of sorts.<sup>42</sup> This view recognizes that a President “must have the aid of others” to be effective<sup>43</sup> but maintains that the President possesses control over subordinate executive officers<sup>44</sup> and has the authority to control agency discretion.<sup>45</sup> Commentators have further argued that presidential control plays a crucial role in checking agency excesses, as agency policymakers often have incentives and tendencies to “pursue a maximalist agenda within [their] own field of authority.”<sup>46</sup> Under a strong unitary executive model, the President exercises full and complete control over the work of executive agencies.

On the other end, scholars argue that the President lacks complete control of the bureaucracy and occupies an oversight role rather than a directive one. Cass Sunstein and Lawrence Lessig contend that the Framers distinguished executive power from administrative power.<sup>47</sup> On their view, when the Framers vested the executive power in the President, they did not necessarily vest the President with full control over all law administration. Instead, Sunstein and Lessig conclude that the Framers preserved “a large degree of congressional power to structure the administration as it thought proper.”<sup>48</sup> Similarly, Peter L. Strauss has described the President’s oversight as less than “rigorous” on account of the very limited arena in which the President exerts direct control over personnel.<sup>49</sup> Strauss instead characterizes the President as the

---

39. *Free Enter. Fund*, 561 U.S. at 484 (holding that multilevel protection from removal for agency board members violated the Vesting Clause).

40. *Id.*

41. *Id.*

42. Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–92 (1993).

43. Prakash, *supra* note 32, at 719.

44. *Id.* at 706–07.

45. Prakash, *supra* note 42, at 992.

46. Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 265 (2010).

47. Lessig & Sunstein, *supra* note 37, at 39.

48. *Id.* at 2.

49. Strauss, *supra* note 11, at 590.

figurehead for an “enormous bureaucracy” staffed principally by civil servants with job tenure, deep knowledge of the statutory constraints within which they operate, and “strong views of the public good in the field in which they work.”<sup>50</sup> Structured in this way, “the bureaucracy constitutes an independent force.”<sup>51</sup>

Even on this latter theory, however, the President still serves as the leader and public face of the bureaucracy. Strauss regards the Framers’ choice of a single executive, rather than an executive committee, as a “fundamental structural judgment,” one that supports the President’s role as “the politically accountable head of government.”<sup>52</sup> Then-Professor Elena Kagan has argued that presidential administration has deep roots regardless of one’s underlying theory of the presidency. She observes, “[T]he President has natural and growing advantages over any institution in competition with him to control the bureaucracy. The Presidency’s unitary power structure, its visibility, and its ‘personality’ all render the office peculiarly apt to exercise power in ways that the public can identify and evaluate.”<sup>53</sup> Kagan further echoes Jerry Mashaw’s argument that bureaucracy has “a democratic pedigree purer than even Congress’s” due to the President’s role as head of administration.<sup>54</sup> Thus, on most leading theories of the presidency, the President has, at a minimum, a duty to oversee the bureaucracy.<sup>55</sup>

As head of the bureaucracy, the President has the duty to “take Care that the Laws be faithfully executed.”<sup>56</sup> Scholars and jurists interpret the Take Care Clause as a source of the President’s prosecutorial discretion, among other powers and responsibilities.<sup>57</sup> In *Heckler v. Chaney*, the Supreme Court ruled that “an agency’s

---

50. *Id.* at 586.

51. *Id.*

52. *Id.* at 599–600. Blake Emerson argues that departments constitute distinct units within the Executive Branch that do more than the bidding of Congress or the President. Blake Emerson, *The Departmental Structure of Executive Power: Subordinate Checks from Madison to Mueller*, 38 YALE J. REGUL. 90, 97 (2021). They impose constraints on the political leadership through norms developed over time, transcending “any particular officeholder.” *Id.* at 119. A robust departmental structure, however, does not necessarily undermine the supervisory role of the President. Instead, it conceives of supervision as “managerial” rather than directive. *Id.* at 98 n.50.

53. Kagan, *supra* note 11, at 2332. Even if one rejects the unitary executive thesis, she argues, Congress has “left more power in presidential hands than generally is recognized.” *Id.* at 2251.

54. *Id.* at 2334; *see also* Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1972 (2015).

55. Sunstein and Lessig tout the normative appeal of a hierarchically organized bureaucracy under presidential control, even if such a structure is unsupported by history. *See* Lessig & Sunstein, *supra* note 37, at 3, 4 (describing benefits of a strong unitary executive model).

56. U.S. CONST., art. II, § 3.

57. Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1837 (2016); Price, *supra* note 19, at 697–98; Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 517 (2017) (noting that scholars and jurists cite the Take Care Clause as a source of the President’s prosecutorial discretion, even though “the language of the Take Care Clause reads more naturally as a command than a grant of power”).

refusal to institute proceedings” constitutes an exercise of the Executive’s prosecutorial discretion, “inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’”<sup>58</sup> Similarly, in *United States v. Armstrong*, the Supreme Court characterized the Executive’s prosecutorial discretion as the “‘special province’ of the Executive.”<sup>59</sup>

Recent scholarship has delved deeper into historical sources for insight on the meaning of faithful execution. Evan Bernick has interpreted the Take Care Clause to embody the fiduciary duties that agents owe principals in fiduciary law, with “the people” being the principals, and the President their agent.<sup>60</sup> As with every scenario in which agents’ interests may diverge from those of the principal, and the principal lacks the ability to perfectly monitor the agents’ discretion, “[h]igh agency costs loom . . . .”<sup>61</sup> As in fiduciary law, duties of good faith in constitutional law seek to cabin these agency costs by constraining public officials.<sup>62</sup> Andrew Kent, Ethan Leib, and Jed Shugerman have similarly advanced an originalist interpretation of the Clause as embodying fiduciary duties, such as the duty of loyalty, the prohibition on self-dealing, and the duty of care.<sup>63</sup> On this view, “faithfulness” depends on the coherence of executive action with legislative will, and the “faithful execution” clauses impose substantive constraints on executive power. Others have argued that “faithfulness” demands that an exercise of discretion “be tethered to a good-faith interpretation of the underlying statute.”<sup>64</sup> Finally, scholars have emphasized that the Executive’s task of “realiz[ing] a legislative command” would be “inconsistent with an inherent power to dispense with or suspend law.”<sup>65</sup> Thus, declining to enforce a statute or particular provisions in order to functionally amend the statute violates the duty of faithful execution.<sup>66</sup> Nonetheless, this prohibition on suspension does not fully describe the President’s duties, for there will often be more than one way to “fulfill congressional preferences.”<sup>67</sup> As a result, the President must make political and value judgments about how to enforce the law, but the President must not act *ultra vires* or act as a lawmaker by suspending validly enacted laws. Accordingly, an executive action undertaken opportunistically, or perhaps to express animus, would run afoul of the fiduciary duties implicit in the Take Care Clause.<sup>68</sup>

---

58. 470 U.S. 821, 832 (1985) (quoting U.S. CONST. art. II, § 3).

59. 517 U.S. 456, 464 (1996) (quoting *Heckler*, 470 U.S. at 832).

60. Bernick, *supra* note 20, at 23.

61. *Id.* at 24.

62. *Id.*

63. Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2188–89 (2019). *But see* David E. Pozen, *Constitutional Bad Faith*, 129 HARV. L. REV. 885, 908 (2016) (noting Court’s failure to recognize duty of good faith under the Take Care Clause).

64. Bellia, *supra* note 18, at 1788–89.

65. Andrias, *supra* note 16, at 1039.

66. Kent et al., *supra* note 63, at 2185.

67. Andrias, *supra* note 16, at 1039.

68. Bernick, *supra* note 20, at 66; *see also* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 92 (2017) (“The Take Care Clause’s obligation of faithfulness offers a textual basis upon which to anchor the obligations of interpretive good faith and honesty.”).

The Constitution further requires the President to take an “Oath or Affirmation . . . [to] faithfully execute the Office of the President of the United States” and swear or affirm to “preserve, protect and defend the Constitution” to the best of his ability.<sup>69</sup> These clauses have generally been read to mean that the President must apply skill and judgment to “faithfully” undertake these executive duties rather than function merely as an enforcement automaton.<sup>70</sup> Thus, for example, the Constitution grants the President a right to seek information from executive officers and to suggest to Congress measures for its consideration.<sup>71</sup> Combined with the Opinions Clause,<sup>72</sup> which permits the President to require executive officials to offer their opinions, Article II paints a picture of a well-informed President at the helm of an organized, capable bureaucracy.<sup>73</sup>

A robust concept of faithful execution includes or even centers this notion of supervision of the bureaucracy.<sup>74</sup> In executing congressional enactments, the President exercises some power as a policymaker and as an overseer and organizer of agency efforts. As a supervisor, the President has a duty to prevent others—such as low-level bureaucrats—from undermining faithful execution through “maladministration of the law.”<sup>75</sup> The Take Care Clause’s articulation of “presidential oversight” and its obligatory quality further suggests “hierarchical oversight” by the President of subordinates.<sup>76</sup> In *Free Enterprise Fund*, the Supreme Court emphasized the removal power as a core method for supervising the bureaucracy. Chief Justice John Roberts noted that diffusing removal authority

---

69. U.S. CONST. art. II, § 1, cl. 8.

70. See Sohoni, *supra* note 68, at 82 (arguing that “enforcing the letter of the law to an overly literal degree” can undermine “custom, . . . legislative expectations, and . . . constitutional values”); Price, *supra* note 19, at 696–97 (“[T]he very separation of legislative and executive functions implies that enforcing the laws may be a matter of judgment, a task of applying general laws appropriately—‘faithfully’—in particular factual circumstances [, rather than robotically].”); Bernick, *supra* note 20, at 42 (noting that predecessor provision to the Take Care Clause was revised to remove requirement that President be “a kind of law enforcement automaton”).

71. Article II, Section 3 requires the President to update Congress on the State of the Union “and recommend to their Consideration such Measures as he shall judge necessary and expedient.” U.S. CONST. art. II, § 3.

72. Article II, Section 2 permits the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” *Id.* § 2, cl. 1. It further authorizes the President to “fill up all Vacancies that may happen during the Recess of the Senate” under certain circumstances. *Id.* cl. 3.

73. See Strauss, *supra* note 11; see also Metzger, *supra* note 17, at 1856 (“The President today plays a central lawmaking role, spurred by multiple causes, including the birth of the modern national administrative state; new economic, social, and global realities; divided government and changed political practices.”). Anne Joseph O’Connell notes that the President has a “mandatory duty” to fill vacancies in Senate-confirmed positions, even if no court has ever required the President to “staff vacant offices.” Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 984 (2009).

74. See Metzger, *supra* note 17.

75. *Id.* at 1877.

76. *Id.* at 1879.

through multilevel for-cause protections means that the President “is not the one who decides whether Board members are abusing their offices or neglecting their duties. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”<sup>77</sup> Moreover, a scheme that entrusts another officer to evaluate Board members’ performance amounts to an impermissible delegation of this supervisory role: “This violates the basic principle that the President ‘cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,’ because Article II ‘makes a single President responsible for the actions of the Executive Branch.’”<sup>78</sup> In describing presidential supervision as an “active obligation,” the Court hinted at possible constraints on intra-agency delegations. Without endorsing a strong unitary executive model of executive power, a statutory delegation to an executive agency head, such as the Department of Homeland Security, nonetheless “usually should be read as allowing the President to assert directive authority . . . over the exercise of the delegated discretion.”<sup>79</sup> Andrias argues that a weaker concept of execution creates, in Chief Justice Fred Vinson’s words, a “messenger-boy concept of the [President’s] Office.”<sup>80</sup> As a result, the grant of executive power “must include the authority to supervise enforcement.”<sup>81</sup> In this way, the power to supervise underlies most conceptions of presidential administration, and on a range of conceptions, presidential supervision constitutes not only a power but also a duty.

### *B. Presidential Supervision in Immigration Law*

The larger debates over the scope of executive power notwithstanding, the President plays an important role in policymaking, enforcement, and supervision in immigration law specifically. Congress has broad authority to regulate immigration, particularly to establish the grounds of inadmissibility and removability.<sup>82</sup> But

---

77. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496 (2010).

78. *Id.* at 496–97 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)).

79. Kagan, *supra* note 11, at 2250–51.

80. Andrias, *supra* note 16, at 1113; *see also* Goldsmith & Manning, *supra* note 30, at 2304.

81. Andrias, *supra* note 16, at 1046.

82. This authority is often attributed to the so-called plenary power doctrine, which the Supreme Court established in the nineteenth century. *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889). Scholars and jurists have debated the bounds of Congress’s plenary power, and courts generally recognize an exception for procedural due process claims. *See* Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 259 (1984). A separate debate focuses on the question of what exactly constitutes *immigration* law, thereby triggering plenary power, versus laws that simply affect immigrants. *See* Emma Kaufman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379, 1436 (2019) (arguing for treating “rules on entry, exit, and naturalization” as migration control, and thus more easily cast within Congress’s plenary power over immigration). *But cf.* Adam B. Cox, *Immigration Law’s Organizing Principles*, 157 U. PA. L. REV. 341, 343 (2008) (arguing that laws that concern entry (selection) and post-entry conduct (regulation) both work to shape incentives to enter or depart the United States).

Congress does not regulate immigration on its own. In their groundbreaking work, Adam Cox and Cristina Rodríguez reject the narrative that casts Congress as the “principal” in immigration law and the President as its “faithful agent.”<sup>83</sup> Instead, they reveal the President’s essential policymaking role in immigration law, both as a matter of actual practice and of constitutional design.<sup>84</sup>

The President’s delegated discretion has slowly accreted, creating “a world of pervasive delegation” and creating a substantial screening authority for the President.<sup>85</sup> Over the course of the twentieth century, Congress defined a staggering array of strict grounds of admission and deportation, but it has never allocated resources sufficient to deport all persons rendered deportable on these grounds.<sup>86</sup> Cox and Rodríguez argue that the INA has essentially delegated authority to the President to establish immigrant screening policy “by making a huge fraction of noncitizens deportable at the option of the Executive.”<sup>87</sup> Moreover, Congress has acquiesced for years, sometimes expressly and in writing, to the use of executive discretion in immigration law.<sup>88</sup> As Cox and Rodríguez argue, this state of affairs has created a vast “de facto delegation” of discretion to the President, who chooses whom to pursue, effectively shaping the immigrant labor force or tolerating the presence of immigrants with minor criminal convictions.<sup>89</sup> This has created a new norm in which immigrants, if they ever acquire secure status, occupy a lengthy “probationary” period before doing so.<sup>90</sup> Thus, given the particular makeup of the INA and his constitutional role, the President functions as far more than Congress’s mere agent in immigration law. These unique conditions complicate the basic notion that executing laws means carrying out “the will of others—of the legislature, and ultimately of the people.”<sup>91</sup> In immigration law, carrying out the “legislative will” as it currently stands necessarily requires the President to make policy judgments.<sup>92</sup>

---

83. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 42; *see also* Ginsburg & Menashi, *supra* note 46, at 265; Metzger, *supra* note 17, at 1898 (describing Congress and the President as two political principals).

84. Cox & Rodríguez, *Redux*, *supra* note 25, at 160 (locating the President’s policymaking power in the Take Care Clause); *see also* Andrias, *supra* note 16, at 1114 (“From the founding, the prevailing view was that the executive power ‘necessarily included some measure of executive discretion ‘to fill in the details’ in implementing legislation.’”).

85. Cox & Rodríguez, *Redux*, *supra* note 25, at 511.

86. By “deportable,” I mean both noncitizens who are inadmissible under INA § 212 and those who are removable under INA § 237. Throughout, I use the term “deportable” to cover both grounds.

87. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 463.

88. *See* Marjorie S. Zatz & Nancy Rodríguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666, 671 (2014) (describing letter that twenty-eight members of Congress sent to Attorney General Janet Reno and INS Commissioner Doris Meissner “affirming their sense that the 1996 laws did not erase all elements of discretion”).

89. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 464.

90. ADAM B. COX & CRISTINA M. RODRÍGUEZ, *THE PRESIDENT AND IMMIGRATION LAW* 90 (2020).

91. Andrias, *supra* note 16, at 1113 (quoting HARVEY C. MANSFIELD, JR., *TAMING THE PRINCE: THE AMBIVALENCE OF MODERN EXECUTIVE POWER* 2 (1989)).

92. *See* Cox & Rodríguez, *Redux*, *supra* note 25, at 196 (noting the difficulty of discerning

Congress and the Supreme Court both recognize the inevitability of enforcement discretion.<sup>93</sup> Under 6 U.S.C. § 202, Congress recognizes this reality and vests the DHS Secretary with responsibility for articulating enforcement priorities.<sup>94</sup> The Supreme Court has similarly acknowledged the permissibility of nonenforcement decisions by the federal government. In *Arizona v. United States*, the Court noted that “[a] principal feature of the removal system is the broad discretion exercised by immigration officials. Federal officials, as an initial matter, must decide whether it makes sense to pursue removal at all.”<sup>95</sup> Here, Justice Kennedy alluded to considerations apart from cost that might justify nonenforcement, i.e., the notion that removal simply might not “make[] sense.”<sup>96</sup> For example, humanitarian considerations might justify a showing of lenience.

Relevant authority suggests expansive but not unlimited latitude. In *Heckler v. Chaney*, discussed *supra*, the Court held that a decision to decline to enforce a statute against a specific defendant is generally ineligible for judicial review.<sup>97</sup> Such a decision springs from an agency’s prosecutorial discretion. *Heckler*, however, reserved the question of whether APA review would be available where an agency “has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities.”<sup>98</sup>

The latitude not to enforce implies discretion to select which enforcement actions to bring. Along these lines, Congress has precluded judicial review of a range of

---

coherent enforcement priorities from the INA).

93. See Zatz & Rodriguez, *supra* note 88, at 679 (“Realistically, discretion is inevitable—ICE officers could not detain and deport 11 million unauthorized immigrants.”). Today, nearly 11 million undocumented immigrants live in the United States, a figure that does not even represent the full deportable population because it excludes legal permanent residents who have committed deportable offenses. See JEFFREY S. PASSEL & D’VERA COHN, PEW RSCH. CTR., U.S. UNAUTHORIZED IMMIGRANT TOTAL DIPS TO LOWEST LEVEL IN A DECADE (2018), <https://www.pewresearch.org/hispanic/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade/> [<https://perma.cc/9DF8-43C3>]. About two-thirds of undocumented immigrants have resided here for more than ten years. Jens Manuel Krogstad, Jeffrey S. Passel & D’Vera Cohn, 5 *Facts About Illegal Immigration in the U.S.*, PEW RSCH. CTR. (June 12, 2019), <https://www.pewresearch.org/fact-tank/2019/06/12/5-facts-about-illegal-immigration-in-the-u-s/> [<https://perma.cc/YD9Y-E8F6>]. However, the government has resources to deport “only” a few hundred thousand immigrants per year. See, e.g., U.S. DEP’T HOMELAND SEC., FY 2019 BUDGET IN BRIEF 33 (2019), <https://www.dhs.gov/sites/default/files/publications/DHS%20BIB%202019.pdf> [<https://perma.cc/7CW5-CYZJ>] (“In FY 2017, ICE removed 226,119 illegal aliens.”).

94. 6 U.S.C. § 202.

95. 567 U.S. 387, 396 (2012) (citation omitted).

96. *Id.*; see also Jason A. Cade, *Judging Immigration Equity: Deportation and Proportionality in the Supreme Court*, 50 U.C. DAVIS L. REV. 1029, 1043 (2017) (“Justice Kennedy’s language acknowledges that not all noncitizens made deportable by Congress are similarly situated and that executive enforcement officials should weigh individual equities in determining the appropriateness of removal in particular cases.”).

97. 470 U.S. 821, 838 (1985).

98. *Id.* at 833 n.4 (citing *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973)). Commentators have noted that agency underenforcement rarely amounts to total nonenforcement in satisfaction of the abdication exception. See Jentry Lanza, Note, *Agency Underenforcement as Reviewable Abdication*, 112 Nw. U. L. REV. 1171, 1182 (2018).



decisions in immigration enforcement. Under 8 U.S.C. § 1252(g), except for claims relating to habeas corpus provisions, “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien . . . .”<sup>99</sup> In *Reno v. American-Arab Anti-Discrimination Committee*, the Supreme Court held that this provision barred review of a selective prosecution claim.<sup>100</sup> The Court expounded on the special strength in the immigration context of standard justifications for prosecutorial discretion. In addition to the routine concerns for giving the Executive the leeway to balance a range of factors and the potential for a chilling effect on law enforcement, the possibility of delay and of “an ongoing violation” of U.S. immigration law loomed large in the Court’s reasoning.<sup>101</sup> But the insulation of some discrete enforcement decisions from review does not mean an enforcement policy necessarily would be so insulated.<sup>102</sup>

Finally, the President has a heightened responsibility to guide and discipline line officers in immigration enforcement because of immigration law’s crude penalty scheme and a widespread culture of agency defiance of the President. Unlike other areas of administration, immigration law formally imposes only one severe penalty for most offenses—deportation.<sup>103</sup> In practice, agency officials use a variety of discretionary tools to limit the imposition of deportation,<sup>104</sup> but they typically make judgments of lenience absent regulatory guidance.<sup>105</sup> Other agencies not only possess a variety of tools to sanction offenders<sup>106</sup> but also robust interpretive guidance on using those tools.<sup>107</sup> In addition, recent years have exposed a disconnect between the mission of immigration enforcement as conceived by agency officials and the

---

99. 8 U.S.C. § 1252(g).

100. 525 U.S. 471, 489 (1999).

101. *Id.* at 490, 491 (emphasis omitted).

102. Some courts have suggested that general enforcement policies are reviewable under the APA even though an agency’s decision to bring or not bring an individual enforcement action is not. *See, e.g., Crowley Caribbean Transp., Inc. v. Peña*, 37 F.3d 671, 676–77 (D.C. Cir. 1994). In contrast to the debate about whether an agency’s enforcement priorities constitute a general policy reviewable under the APA, this Article considers the nature of a challenge to enforcement priorities under the Take Care Clause, were the federal courts to deem such a claim justiciable.

103. *See Stumpf, supra* note 24, at 1684.

104. *See* BEN HARRINGTON, CONG. RSCH. SERV., R45158, AN OVERVIEW OF DISCRETIONARY REPRIEVES FROM REMOVAL: DEFERRED ACTION, DACA, TPS, AND OTHERS (Apr. 10, 2018), <https://fas.org/sgp/crs/homesecc/R45158.pdf> [<https://perma.cc/8BQ9-BR6U>].

105. *Cf. Shoba Sivaprasad Wadhia, Demystifying Employment Authorization and Prosecutorial Discretion in Immigration Cases*, 6 COLUM. J. RACE & L. 1, 5 (2016) (noting the lack of “form, fee, or public information about how to apply” for non-DACA deferred action).

106. *See, e.g., Basic Information on Enforcement*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/enforcement/basic-information-enforcement> [<https://perma.cc/JW4J-D2ZZ>] (describing types of enforcement actions and associated penalties).

107. *See, e.g., Water Quality Standards Variances*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/wqs-tech/water-quality-standards-variances> [<https://perma.cc/D4X6-P6YG>].

President on the one hand and line officers on the other.<sup>108</sup> Due to these structural features of immigration law, rational, good-faith administration requires supervision, guidance, and constraint at the front end.

## II. DISCRETION AND ABDICATION IN IMMIGRATION LAW

The President's supervisory role in immigration law has been challenged in recent years on faithful execution grounds in litigation relating to President Obama's deferred action policies, Deferred Action for Childhood Arrivals (DACA) and the never-implemented DAPA.<sup>109</sup> The literature on faithful execution in immigration law emphasizes a common theme of the perceived lack of enforcement rather than a particular manifestation of enforcement. Given that an agency's commencement of proceedings against a specific deportable noncitizen is generally within the agency's prosecutorial discretion<sup>110</sup> and therefore subject only to limited judicial review,<sup>111</sup> such a focus is understandable.

This Part, however, demonstrates that the fixation on nonenforcement has precluded proper analysis of the potential for enforcement policies to amount to presidential abdication. Rather than challenging individual enforcement decisions, my argument challenges the constitutionality of enforcement policies. I argue that enforcement policies lacking meaningful constraints on line officers' enforcement discretion may run afoul of the President's Take Care duty.<sup>112</sup> I first offer a brief

---

108. For a discussion of the challenges President Obama faced with respect to line officers' defiance, see Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 685 (2016).

109. DAPA was proposed to provide deferred action to undocumented parents of U.S. citizen or lawful permanent resident children. By an equally divided court, the Supreme Court let stand the Fifth Circuit's affirmance of a district court order enjoining DAPA nationwide. *United States v. Texas*, No. 15–674 (U.S. June 23, 2016) (per curiam).

110. See *United States v. Armstrong*, 517 U.S. 456 (1996).

111. See 8 U.S.C. § 1252(g) (stating that, except for limited exceptions, such as a habeas action, “no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases or execute removal orders against any alien under this chapter”). Nonetheless, scholars have identified a range of discretionary enforcement decisions outside the scope of § 1252(g). See SHOBA SIVAPRASAD WADHIA, *BEYOND DEPORTATION: THE ROLE OF PROSECUTORIAL DISCRETION IN IMMIGRATION CASES* 125 (2015) [hereinafter WADHIA, *BEYOND DEPORTATION*].

112. Several leading scholars have made related claims. Cox and Rodríguez reject the notion that the Take Care Clause *requires* decentralized, blanket enforcement but decline to argue that the Constitution *requires* its opposite, centralized, rule-like constraints on enforcement discretion. Cox & Rodríguez, *Redux*, *supra* note 25, at 175. They write, “Insulating low-level bureaucrats from the President . . . will not facilitate their compliance with congressional priorities. It will simply enable them to freely pursue their own agendas.” *Id.* at 196. But they reject the notion that the particular “choices embodied in DACA and DAPA are legally required, or even that they would in all contexts be legally permissible.” *Id.* at 175. Gillian Metzger articulates a fuller defense of centralized, rule-like supervision of enforcement discretion, arguing that the full delegation of discretion to low-level officials is “as much at odds with constitutional structure as a presidential dispensation power.” Metzger,

history of enforcement discretion in immigration law. I then analyze claims of presidential abdication lodged against rule-like instantiations of prosecutorial discretion. Finally, I argue that specific styles of enforcement—which have recurred throughout the history of immigration enforcement and transcend the Trump Administration—amount to abdication when they involve opaque or unconstrained delegations of discretion to the rank and file.

### *A. History of Enforcement Discretion*

Since the creation of the Border Patrol in 1924, enforcement officials have strived to structure enforcement discretion using “internal administrative law,”<sup>113</sup> such as agency guidance memoranda that establish enforcement priorities or create deferred-action policies. Congress initially housed the Border Patrol within the Immigration Bureau in the U.S. Department of Labor.<sup>114</sup> Low morale characterized the Border Patrol’s early years,<sup>115</sup> and several interests converged to limit the agency’s efficacy. Kelly Lytle Hernández has argued that southern anxiety about “federal intervention in southern race relations” hampered the development of federal law enforcement across the board, including immigration enforcement.<sup>116</sup> The development of border patrol was thus “tempered by efforts to protect white supremacy in the southern states.”<sup>117</sup> In addition, powerful agribusiness interests in the southwest blocked efforts to convince Congress to appropriate sufficient funds to border patrol.<sup>118</sup>

Against this backdrop of a weak, half-hearted investment, the Border Patrol began its project of racial policing at the border, as Mexican identity quickly became synonymous with illegal presence.<sup>119</sup> The use of racial profiling, thus, has been at the heart of immigration enforcement from the beginning—due not only to the overwhelming numbers of deportable immigrants and limited capacity to apprehend but also to the particular context within which border enforcement developed the American Southwest. The Border Patrol for years struggled to forge a professional identity, but decentralization, a lack of equipment, and an enduring lack of funding hobbled these efforts.<sup>120</sup>

---

*supra* note 17, at 1929.

113. Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1241 (2017) (describing immigration enforcement policies as examples of internal administrative law).

114. KELLY LYTLE HERNÁNDEZ, *MIGRA! A HISTORY OF THE U.S. BORDER PATROL* 36–37 (Earl Lewis, George Lipsitz, Peggy Pascoe, George Sánchez & Dana Takagi, eds., 1st ed. 2010).

115. JUAN RAMON GARCÍA, *OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954* 116 (Leonard Doob ed., 1980).

116. HERNÁNDEZ, *supra* note 114, at 42.

117. *Id.*

118. GARCÍA, *supra* note 115, at 116.

119. HERNÁNDEZ, *supra* note 114, at 52; *see also* Carrie L. Rosenbaum, *The Natural Persistence of Racial Disparities in Crime-Based Removals*, 13 U. ST. THOMAS L.J. 532 (2017).

120. HERNÁNDEZ, *supra* note 114, at 42–44 (describing disorganization and lack of clarity regarding the Border Patrol’s authority).

The President has played a key role in bridging the gap between congressional mandates and enforcement reality. The President has principally relied upon prosecutorial discretion, and the discretion to establish priorities among deportable immigrants is almost as old as immigration law. Shobha Sivaprasad Wadhia notes that the Immigration and Naturalization Service's use of prosecutorial discretion dates to 1909.<sup>121</sup> In the 1917 Immigration Act, Congress provided a statutory basis for discretion through the Seventh Proviso of Section 3.<sup>122</sup> This proviso authorized the Attorney General, in his discretion, to admit "aliens returning after a temporary absence to an unrelinquished United States domicile of seven consecutive years . . . ."<sup>123</sup> It embodied equitable notions of a statute of limitations and honoring an alien's stakes and ties here in the United States.<sup>124</sup>

Advocates lobbied Congress to codify administrative relief from deportation in the early 1930s, but to no avail. Under President Franklin D. Roosevelt's administration, the Secretary of Labor, Frances Perkins, and Commissioner of the INS, Daniel MacCormack, advocated for a statutory basis for relief from deportation—essentially, an extension of the Seventh Proviso from exclusion to deportation—for immigrants with U.S. citizen family members and other equities.<sup>125</sup> MacCormack defended this proposal by appealing to the integrity of the public fisc, which would suffer from the deportation of breadwinners. According to Mae M. Ngai, MacCormack thus denied that equitable relief had a basis in "sentimentality." Although Congress declined for many years to codify discretionary relief, these administrative agencies granted relief to many immigrants through executive discretion.<sup>126</sup>

The 1917 Immigration Act also featured a provision that authorized the Commissioner General for Immigration to waive the immigration laws for certain migrants.<sup>127</sup> The Secretary most frequently invoked this provision, the Ninth Proviso to Section 3, to permit entry of temporary agricultural workers. Scholars have suggested that the Ninth Proviso on its own did not authorize the President to "craft immigration policy to address wartime labor shortages,"<sup>128</sup> but that perhaps it incidentally supported an exercise of inherent authority.<sup>129</sup> Congress moved the INS

---

121. WADHIA, *BEYOND DEPORTATION*, *supra* note 111, at 18.

122. Act of Feb. 5, 1917, ch. 29, Pub. L. No. 64-301, § 3, 39 Stat. 874 (1917) (repealed 1952).

123. MAE M. NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* 84 (William Chafe, Gary Gerstle, Linda Gordon & Julian Zelizer eds., 2004).

124. Mae M. Ngai, *The Strange Career of the Illegal Alien: Immigration Restriction and Deportation Policy in the United States, 1921-1965*, 21 L. & HIST. REV. 69, 100 (2003); see also Kerne H.O. Matsubara, *Domicile Under Immigration and Nationality Act Section 212(c): Escaping the Chevron "Trap" of Agency Deference*, 82 CALIF. L. REV. 1595, 1605 (1994) (describing substantive basis of Seventh Proviso as making immigration law "humane").

125. NGAI, *supra* note 123, at 83–84.

126. *Id.*

127. S. DEBORAH KANG, *THE INS ON THE LINE: MAKING IMMIGRATION LAW ON THE U.S.-MEXICO BORDER, 1917-1954* 20 (2017); Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 487.

128. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 488.

129. *Id.*

to the Department of Justice in 1940 and continued to expand the administrative practice of hardship-based waivers for European immigrants.<sup>130</sup>

Discretionary admission and relief from removal eventually found a statutory foundation in the INA of 1952, or the McCarran-Walter Act,<sup>131</sup> but shortly after that Act's passage, the Border Patrol initiated a massive campaign against undocumented Mexican laborers called "Operation Wetback."<sup>132</sup> The federal government initiated a "military-style" campaign of mass deportation against Mexican immigrants, regardless of possible American citizenship or legal entry.<sup>133</sup> According to Kelly Lytle Hernández, the Border Patrol puffed up its statistics and crafted a narrative of a massive uptick in removals when removals for the relevant fiscal year in fact decreased.<sup>134</sup>

The legacy of Operation Wetback was two-fold: first, it represented a surge in border enforcement to "solve" the problem of unauthorized Mexican immigration once and for all. The effort resulted in apprehension and removal of hundreds of thousands of people of Mexican descent, including some U.S. citizens.<sup>135</sup> Second, it signaled the start of an era of reduced emphasis on border enforcement and greater integration of the Border Patrol with other federal law enforcement agencies.<sup>136</sup> This approach to border enforcement led the undocumented population to grow as the agency consistently made fewer apprehensions in the years after the surge.<sup>137</sup>

The tacit acceptance of a large number of undocumented immigrants gradually made discretion a structural necessity rather than purely an equitable tool. The conventional history of prosecutorial discretion starts in the late twentieth century. In 1976, Sam Bernsen, the General Counsel of the INS Commissioner, wrote a memorandum that defined prosecutorial discretion as "the power of a law enforcement official to decide whether or not to commence or proceed with action against a possible law violator," for reasons both "practical and humanitarian."<sup>138</sup> Shoba Sivaprasad Wadhia has noted that, for many years, the agency's Operations Instructions identified factors to guide its use of "nonpriority status" for some cases, or what is now known as "deferred action."<sup>139</sup> Agency officials canceled those guidelines only after the 1996 amendments to the INA.<sup>140</sup> At the conclusion of several years of study of the agency's use of prosecutorial discretion, and with

---

130. Ngai, *supra* note 124, at 102.

131. Ngai, *supra* note 124, at 88.

132. See generally GARCÍA, *supra* note 115.

133. HERNÁNDEZ, *supra* note 114, at 184–90.

134. *Id.* at 159.

135. *Id.* at 172, 173 (noting inaccuracy of routinely quoted 1.5 million number of removals due to "statistical sleight of hand").

136. *Id.* at 190, 197.

137. *Id.* at 174 ("After the summer of 1954, apprehensions of Mexican nationals dropped to a fraction of what they had been.").

138. Zatz & Rodríguez, *supra* note 88, at 670 (quoting Memorandum from Sam Bernsen, Gen. Couns., Immigr. & Naturalization Serv., Opinion Regarding Service Exercise of Prosecutorial Discretion (July 15, 1976), <https://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf> [<https://perma.cc/J6BJ-YNSW>]).

139. WADHIA, BEYOND DEPORTATION, *supra* note 111, at 18.

140. *Id.* at 21.

guidance from the INS General Counsel, Bo Cooper, INS Commissioner Doris Meissner issued a memorandum that identified “a range of possible actions (one of which is deferred action) to which prosecutorial discretion may apply” for reasons of efficiency, or cost-containment, as well as humanitarian considerations.<sup>141</sup> Her memorandum also identified numerous factors for line officers to consider, including the immigrant’s status, length of residence in the United States, criminal history, and humanitarian considerations.<sup>142</sup> She wrote, “Managers should plan and design operations to maximize the likelihood that serious offenders will be identified.”<sup>143</sup> Thus, the Meissner memorandum conceded that immigration law “offenders” differ qualitatively.

Meissner’s memorandum continued to shape how the agency exercised prosecutorial discretion,<sup>144</sup> and both Republican and Democratic administrations since have formalized prosecutorial discretion to varying degrees, even amid a transformation of the immigration bureaucracy. After the attacks of September 11, 2001, Congress dissolved the INS and created the Department of Homeland Security. Several subagencies constitute DHS, two of which principally engage in enforcement activity. Customs and Border Protection (CBP) focuses on enforcement at the border,<sup>145</sup> while Immigration and Customs Enforcement (ICE) conducts interior enforcement.<sup>146</sup> Several subunits comprise ICE. Homeland Security Investigations (HSI) is “the principal investigative arm of [DHS]” and “is a vital U.S. asset in combating criminal organizations illegally exploiting America’s travel, trade, financial and immigration systems.”<sup>147</sup> In contrast, Enforcement and Removal Operations (ERO) focuses on ordinary immigration law violations, such as individuals who overstay visas or enter without inspection.<sup>148</sup> Also within ICE is the Office of the Principal Legal Advisor (OPLA), which consists of attorneys who represent the government in removal hearings.<sup>149</sup>

Congress vested the DHS Secretary with authority to set enforcement priorities for the agency.<sup>150</sup> Although the very structure of the immigration bureaucracy

---

141. *Id.* at 24.

142. *Id.* at 25.

143. *Id.* at 24 (quoting Memorandum from Doris Meissner, Comm’r, Immigr. & Naturalization Serv., Exercising Prosecutorial Discretion (Nov. 17, 2000), <https://www.aila.org/infonet/ins-memo-on-prosecutorial-discretion> [<https://perma.cc/GWV3-4LK4>]).

144. SHOBA SIVAPRASAD WADHIA, READING THE MORTON MEMO: FEDERAL PRIORITIES AND PROSECUTORIAL DISCRETION 9 (2010) [hereinafter WADHIA, READING THE MORTON MEMO].

145. *About CBP*, U.S. CUSTOMS & BORDER PROT., (Dec. 18, 2020), <https://www.cbp.gov/about> [<https://perma.cc/7YWE-DUQ7>].

146. *Overview*, IMMIGR. & CUSTOMS ENF’T (Feb. 11, 2021), <https://www.ice.gov/about-ice> [<https://perma.cc/UC9V-3XQP>].

147. *Homeland Security Investigations*, IMMIGR. & CUSTOMS ENF’T, (Mar. 8, 2021), <https://www.ice.gov/about-ice/homeland-security-investigations> [<https://perma.cc/9MUG-P9B4>].

148. *Enforcement and Removal Operations*, IMMIGR. & CUSTOMS ENF’T, (Jan. 26, 2021), <https://www.ice.gov/about-ice/ero> [<https://perma.cc/VJR6-ZN24>].

149. *Office of the Principal Legal Advisor*, IMMIGR. & CUSTOMS ENF’T, <https://www.ice.gov/about-ice/opla> [<https://perma.cc/53DZ-BHU9>].

150. 6 U.S.C. § 202(5).

transformed, the practice of guiding the exercise of enforcement discretion continued. For example, in 2005, ICE's Principal Legal Advisor, William Howard, directed Chief Counsels to consider the criteria he identified in his guidance memorandum on dismissing proceedings when a deportable immigrant had an adjustment of status application pending before CIS that "would be appropriate for approval" by CIS.<sup>151</sup> This guidance suggested that pursuing removal proceedings against immigrants with meritorious applications for immigration benefits would constitute a poor use of enforcement resources. He further underscored prosecutorial discretion as a tool to enable the bureaucracy to "deal with the difficult, complex and contradictory provisions of the immigration laws and cases involving human suffering and hardship."<sup>152</sup> Julie Myers, the DHS Assistant Secretary and Director of ICE, similarly issued a memorandum in 2007 reminding the rank and file of their power to exercise discretion and the expectation that they do so "in a judicious manner at all stages of the enforcement process."<sup>153</sup> She highlighted the importance of discretion when arresting and determining whether to detain noncitizens "who are nursing mothers."<sup>154</sup>

Similarly, in 2010, the head of ICE, John Morton, acknowledged the practical need to prioritize targets, noting the federal government's capacity to deport immigrants to be 400,000 per year, or 4% of the deportable population.<sup>155</sup> To direct enforcement resources most productively, he issued a series of memoranda outlining criteria for line officers to use in determining whether to make an arrest. Specifically, these so-called Morton Memos identified immigrants with serious criminal convictions as priorities for removal.<sup>156</sup> Further, the memoranda made immigrants low priorities when they had no criminal convictions, had U.S. citizen relatives, and had other equities.<sup>157</sup> Additional memoranda closed certain immigration case files, thus shielding the immigrants in question from removal but not conferring legal status or benefits such as work authorization.<sup>158</sup> The effect of Morton's guidance

---

151. Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enf't, Exercising Prosecutorial Discretion to Dismiss Adjustment Cases (Oct. 6, 2005), <https://www.aila.org/infonet/ice-prosecutorial-discretion-to-dismiss-adjustment> [<https://perma.cc/T2KT-WJ9Y>].

152. Zatz & Rodriguez, *supra* note 88, at 673 (quoting Memorandum from William J. Howard, Principal Legal Advisor, U.S. Immigr. & Customs Enf't (Oct. 24, 2005), <http://www.scribd.com/doc/22092975/ICE-Guidance-Memo-Prosecutorial-Discretion-William-J-Howard-10-24-05> [<https://perma.cc/FQ9R-64ZY>]).

153. *Id.* at 673 (quoting Memorandum from Julie Myers, Assistant Sec'y, U.S. Immigr. & Customs Enf't (Nov. 7, 2007), <https://www.aila.org/infonet/ice-prosecutorial-custody-discretion-nursing-mom> [<https://perma.cc/56B6-AQQZ>]).

154. *Id.*; see also Kalhan, *supra* note 26, at 88; Joseph Landau, *Bureaucratic Administration: Experimentation and Immigration Law*, 65 DUKE L.J. 1173, 1194–95 (2016) (describing the Myers memorandum).

155. HIROSHI MOTOMURA, *IMMIGRATION OUTSIDE THE LAW* 28 (2014).

156. Memorandum from John Morton, Dir., U.S. IMMIGR. & CUSTOMS ENF'T, Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011), <https://www.ice.gov/doclib/news/releases/2011/110302washingtondc.pdf> [<https://perma.cc/9FXB-LDWN>].

157. WADHIA, *READING THE MORTON MEMO*, *supra* note 144, at 9.

158. MOTOMURA, *supra* note 155, at 28–29.

remained questionable as line officers followed the guidance unevenly, and data revealed that 45% of deported immigrants in 2012 had no criminal records.<sup>159</sup>

Line officers at best ignored the Morton Memos' enforcement priorities and at worst denigrated them.<sup>160</sup> Given the uneven implementation of the ICE Director's guidance, and the ease with which line officers disregarded them, DHS ultimately took a more centralized approach to supervising enforcement discretion.<sup>161</sup> This approach culminated in DACA, President Obama's signature immigration policy. President Obama's Secretary of DHS at the time, Janet Napolitano, issued a memorandum announcing DACA, formalizing prosecutorial discretion to a high level<sup>162</sup> and essentially instructing line officers, in their individual discretion and on a case-by-case basis, to refrain from pursuing individuals who met the eligibility criteria for DACA.<sup>163</sup> Eligibility criteria included having entered the country under the age of sixteen, having continuously resided in the United States for at least five years prior to the date of the memorandum, being present in the United States on the date of the memorandum, being enrolled in high school or achieving certain other educational milestones, and lacking any conviction for a serious crime.<sup>164</sup>

ICE agents resented their superiors telling them to hold back. Several agents filed a lawsuit against DHS Secretary Janet Napolitano and ICE Director, John Morton, alleging violations of the APA, the INA, and the Take Care Clause.<sup>165</sup> Although a federal district court dismissed the suit for lack of standing,<sup>166</sup> the suit remains a symbol of the challenges that agency officials face in supervising the ICE rank and file officers and inducing compliance with agency priorities. Fundamentally, many line officers view their role as apprehending and removing every deportable person

---

159. Josh Hicks, *ICE Director John Morton Stepping Down*, WASH. POST (June 18, 2013), [https://www.washingtonpost.com/politics/federal\\_government/ice-director-john-morton-stepping-down/2013/06/17/f22f6bb8-d78a-11e2-a9f2-42ee3912ae0e\\_story.html](https://www.washingtonpost.com/politics/federal_government/ice-director-john-morton-stepping-down/2013/06/17/f22f6bb8-d78a-11e2-a9f2-42ee3912ae0e_story.html) [<https://perma.cc/7JFY-SUQ7>].

160. Zatz & Rodriguez, *supra* note 88, at 680 (quoting an immigration attorney's recollection of conversations with ICE officers to the effect that the memoranda had no effect, and in one instance, that they were akin to "toilet paper").

161. See Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 192; Kalhan, *supra* note 26.

162. Memorandum from Janet Napolitano, Sec'y, U.S. Dep't Homeland Sec., Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/24ZZ-VC8B>]; Kalhan, *supra* note 26, at 61.

163. See Cox & Rodríguez, *Redux*, *supra* note 25, at 177–78. "As a practical matter, the structure of DACA and DAPA significantly constrains, if not functionally eliminates, the discretion of those adjudicating relief applications." *Id.* at 180.

164. Memorandum from Janet Napolitano, *supra* note 162.

165. *Crane v. Napolitano*, 920 F. Supp. 2d 724, 730–31 (N.D. Tex. 2013).

166. *Id.* at 743, 746.



encountered,<sup>167</sup> which, ironically, transforms enforcement into a robotic or ministerial function rather than one associated with expertise, judgment, or esteem.<sup>168</sup>

### *B. Nonenforcement as a Violation of Faithful Execution*

Discretion has a long history, but that does not insulate it from constitutional scrutiny. Critics of immigration discretion contend that deliberate nonenforcement of the law in any circumstance amounts to abdication of the duty of faithful execution.<sup>169</sup> Others take the view that only categorical, prospective rules of nonenforcement amount to abdication, but that case-by-case exercises of prosecutorial discretion are consistent with the president's duties.<sup>170</sup> This sub-Part evaluates these arguments in turn.

#### 1. Fallacy of Full Enforcement

Resistance to enforcement discretion often follows from the view that DHS should deport each and every person unlawfully present or "amenable to removal."<sup>171</sup> Some scholars and jurists doubt claims that resource constraints justify large-scale nonenforcement. For example, John Yoo and Robert Delahunty question the Obama Administration's assertion that it lacked sufficient resources to effectuate full enforcement of the immigration laws. They note that the Administration "provided no evidence to substantiate its claim of inadequate resources,"<sup>172</sup> nor did it explain the savings to ICE or consider the administrative expenses to conduct background checks and other operational requirements of a deferred action policy.<sup>173</sup> However, Yoo and Delahunty do not question the possibility that resource constraints might justify nonenforcement in individual cases,<sup>174</sup> but rather they question the veracity of the Obama Administration's specific claim that a lack of resources justified the precise deferred action policy it created, one that "dovetailed so neatly with" the

167. See Chen, *supra* note 17, at 395 ("More than one ICE official relayed in interviews the anecdote that ICE officers presented with a choice between deporting the proverbial undocumented grandmother and the undocumented murderer would go after both.").

168. Cf. Richard M. Re, *Imagining Perfect Surveillance*, 64 UCLA L. REV. DISCOURSE 264, 287 (2016) (describing imagined shift of discretion from the executive to the legislature in a world of perfect surveillance because the legislature would no longer rely on the executive to "make difficult resource allocation decisions when investigating crime").

169. Delahunty & Yoo, *supra* note 10; Dara Lind, *Jeff Sessions Gave Trump the Immigration Crackdown He Wanted*, VOX (Nov. 7, 2018, 3:49 PM), <https://www.vox.com/2018/5/23/17229464/jeff-sessions-resign-trump-immigration> [https://perma.cc/G6ZE-SMLA] (describing former Attorney General Jeff Sessions's view "that the federal government has an obligation to 'end illegality' in the immigration system, full stop").

170. Price, *supra* note 19, at 760.

171. ENF'T & REMOVAL OPERATIONS, U.S. IMMIGR. & CUSTOMS ENF'T, U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT FISCAL YEAR 2019 ENFORCEMENT AND REMOVAL OPERATIONS REPORT 12 (2019), <https://www.ice.gov/sites/default/files/documents/Document/2019/eroReportFY2019.pdf> [https://perma.cc/H3SY-EGCG].

172. Delahunty & Yoo, *supra* note 10, at 847.

173. *Id.* at 848.

174. *Id.* at 847.

failed DREAM Act.<sup>175</sup> Under these circumstances, some scholars accused President Obama of evading his duty of faithful execution by substituting his policy preferences for congressional will through the pretense of coping in good faith with resource constraints.<sup>176</sup>

But even if one doubts a particular invocation of limited resources to justify nonenforcement, full enforcement remains a fantasy and a fallacy when Congress allocates resources insufficient to achieve full enforcement. As a result, discretion inevitably permeates enforcement work, and the question arises whether enforcement officials should openly acknowledge this reality. In his foundational work *Police Discretion*, Kenneth Culp Davis argues that the police should abandon the “pretense of full enforcement” and instead openly embrace selective nonenforcement for the sake of transparency, due process, and accountability.<sup>177</sup> Following interviews with some 300 police officers in the Chicago Police Department, Davis determined that police officers almost uniformly assume that state law requires full enforcement.<sup>178</sup> Stemming from this belief that the law requires full enforcement, officers denied that they make or have any kind of enforcement policy. Any such policy, even if only de facto, must necessarily develop without community input because no official policymaking process exists.

The reality of law enforcement, however, means that the police cannot and do not enforce all the laws all the time. Davis lauds police, in their acts of underenforcement, for their use of common sense and “wisdom” in the face of the full enforcement pretense, noting that some offenders do warrant lenience.<sup>179</sup> In the face of systemic pressures, the legislature must either scale back the criminal code to criminalize fewer acts, or police officers must enforce less than all the laws all the time.<sup>180</sup> Davis ultimately also noted a third option—that legislatures could delegate rulemaking to the police, essentially turning the police into an administrative agency, to develop a set of rules that would be amenable to full enforcement.<sup>181</sup>

In the absence of such delegated rulemaking authority, police enjoy only an unofficial delegation of discretion to develop nonenforcement policy, a delegation that they deny and over which they refuse to engage the public. Davis critiques the lack of transparency and accountability that characterizes the police units’ development of unofficial nonenforcement policy. Moreover, this approach to enforcement policy devolves discretion to line officers, preventing “the top officials from making enforcement policy.”<sup>182</sup> As a result, the public lacks truthful

---

175. *Id.* at 848.

176. Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213, 231 (2015).

177. Kenneth Culp Davis argues that the pretense of full enforcement follows from laws requiring full enforcement, insufficient resources for such enforcement, and “the commonsense of some nonenforcement.” KENNETH CULP DAVIS, *POLICE DISCRETION* 54 (1975).

178. *Id.* at 52–53.

179. *Id.* at 62, 66.

180. *Id.* at 67.

181. *Id.* Shoba Sivaprasad Wadhia applies Davis’s analysis to exercises of immigration enforcement discretion as well. *See* WADHIA, *BEYOND DEPORTATION*, *supra* note 111, at 85.

182. DAVIS, *supra* note 177, at 70.

information about operative policies, those affected lack notice, and the public continues to be told that the laws are being fully enforced.<sup>183</sup>

Davis notes that the criminal law manifests both formally in the code, which might, say, criminalize drinking alcohol in the park, and also informally in enforcement patterns. Thus, “quietly drinking at a family picnic without disturbing others is not a crime according to the reality of the law, because officers uniformly refuse to enforce the ordinance in such circumstances.” In such instances, the police’s enforcement policy “supersedes” the law’s formal requirements.<sup>184</sup> Instead of this quiet charade, Davis argues, the police should engage in rulemaking to structure their enforcement discretion. The principal reason not to have an open, selective nonenforcement policy is that it contradicts the pretense of full enforcement.<sup>185</sup> Thus, Davis argues for an open system of enforcement priorities.<sup>186</sup> Arguing that no reasonable legislature “could have intended that resources should be indiscriminately used up,”<sup>187</sup> Davis ultimately proposed open, participatory, public police rulemaking, subject to judicial review.<sup>188</sup> Such a proposal would not eliminate police discretion, but it would refine it and properly control it.<sup>189</sup> Rules would help confine, structure, and check officer discretion.<sup>190</sup>

Multiple insights from Davis’s work apply to immigration law. First, like the criminal law, immigration law renders many more people deportable than could ever realistically be deported.<sup>191</sup> Congress has created few avenues for legal entry, made entry without inspection a deportable offense, and imposed exacting conditions on post-entry conduct.<sup>192</sup> As with the criminal law, these provisions are unlikely to be scaled back anytime soon. Accordingly, the legislature has de facto delegated vast discretion to immigration law enforcement.<sup>193</sup> Second, in the absence of centralized,

---

183. Unless safety requires confidentiality, Davis contends, every policy should be subject to public scrutiny. *Id.* at 77.

184. *Id.* at 73.

185. *Id.* at 78.

186. *Id.* at 86.

187. *Id.*

188. *Id.* at 126, 128 (regarding police rulemaking as judicially required).

189. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 141 (1976).

190. *Id.* at 145. Confining discretion means articulating a boundary between discretionary and nondiscretionary judgments. Structuring discretion means that, within the realm of discretionary judgments, those judgments should be guided by particular goals, policies, and principles, and made pursuant to particular procedures to limit arbitrariness. Checking discretion refers to review by a supervisor, prosecutor, judge, the press, the public, or some other person or entity other than the officer themselves. On Davis’s view, rules do not replace discretion, but rather, coexist to confine, structure, or check discretion. For a critique of using rulemaking to constrain law enforcement discretion, see Maria Ponomarenko, *Rethinking Police Rulemaking*, 114 NW. U. L. REV. 1, 6 (2019).

191. See Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129, 1146 (2016) (comparing this aspect of immigration law with criminal law).

192. See, e.g., 8 U.S.C. § 1227(a)(1)(B) (describing classes of deportable aliens to include those present in violation of the law).

193. Cox & Rodríguez, *The President and Immigration Law*, *supra* note 23, at 463 (describing “de facto delegation” of immigration enforcement discretion resulting from the

supervised discretion, line officers are left to make judgment calls about how to direct enforcement efforts without guidance, thus assigning them the task of making de facto enforcement policy without any official policymaking process. Such an approach suffers from deficits in transparency, accountability, and consistency—core “rule-of-law” values.<sup>194</sup>

Davis’s analysis also has important limitations when applied to immigration law. First, it seems unlikely that Congress would (or should) require DHS to formalize enforcement priorities through notice-and-comment rulemaking when, instead, the centralization of discretion through enforcement priorities developed in a less formal process might achieve some of the same rule-of-law benefits.<sup>195</sup> Second, the pretense of full enforcement arguably does less work in debates over faithful execution in immigration. Although a range of actors in the executive branch, the judiciary,<sup>196</sup> and the public have used the rhetoric of full enforcement, Congress has explicitly acknowledged the reality of priority-setting,<sup>197</sup> thus dampening expectations of full enforcement in immigration law. Upon recognition of the supervisory character of the President’s duties, however, many of the same rationales for police nonenforcement policies apply to the President: the value of centralized discretion by high-level officials; supervision and constraint of low-level discretionary judgments; and a public, and therefore more transparent, process of developing priorities for enforcement.<sup>198</sup>

## 2. Rule-Like, Centralized Constraints on Enforcement Discretion: Abdication or Faithful Execution?

Scholars, advocates, and jurists have traditionally conceived of presidential abdication in immigration law as nonenforcement of certain provisions of the INA. The legal challenge to DACA, also alleging abdication through nonenforcement, failed on standing grounds, but a similar challenge to a related policy, DAPA, and an expansion of DACA, overcame the standing hurdle.<sup>199</sup> A federal district court

---

existence of a “detailed, rule-bound immigration code,” rendering a vast number of noncitizens “deportable at the option of the Executive”).

194. Cox & Rodríguez, *Redux*, *supra* note 25, at 192 (discussing “rule-of-law” value of centralizing discretion in the form of rule-like deferred action policies). *Cf.* Carrie L. Rosenbaum, *Anti-Democratic Immigration Law*, 97 DENV. L. REV. 797 (2020); David S. Rubenstein, *Taking Care of the Rule of Law*, 86 GEO. WASH. L. REV. 168, 224 (2018).

195. *See* Metzger & Stack, *supra* note 113, at 1245–46 (discussing benefits to agencies and the public of using internal administrative law not subject to judicial review); Cox & Rodríguez, *Redux*, *supra* note 25, at 218 (characterizing notice-and-comment rulemaking as a “protracted multi-year” process, rendering it “unworkable” with respect to DAPA and DACA). *But see* WADHIA, *BEYOND DEPORTATION*, *supra* note 111, at 152 (arguing that DHS should use rulemaking to regulate deferred action).

196. *See, e.g.,* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 59 (2012) (describing Justice Scalia’s expectation of full enforcement in his dissenting opinion in *Arizona v. United States*).

197. *See* 6 U.S.C. § 202(5) (assigning task of priority-setting to the DHS Secretary).

198. *See* Cox & Rodríguez, *Redux*, *supra* note 25, at 224 (describing benefits of centralization of discretionary decision making within DHS).

199. *Texas v. United States*, 86 F. Supp. 3d 591, 621–22 (S.D. Tex. 2015) (finding states

preliminarily enjoined DAPA nationwide, a divided panel of the Fifth Circuit affirmed the nationwide preliminary injunction,<sup>200</sup> and an equally divided Supreme Court left the Fifth Circuit's decision undisturbed.<sup>201</sup> The Trump Administration subsequently rescinded DAPA, and thus neither DAPA nor the expanded DACA policy were ever implemented.<sup>202</sup>

Critics of the policy challenged DAPA on numerous constitutional and statutory grounds. They asserted that DAPA violated the Take Care Clause, the APA's requirement of notice-and-comment rulemaking for legislative rules, and the APA's prohibition on arbitrary and capricious agency action.<sup>203</sup> Plaintiffs argued that the President violated the Take Care Clause by admitting that he was "changing the law" with DAPA.<sup>204</sup> Conceding the impossibility of full enforcement, plaintiffs strived to distinguish DAPA from an ordinary expression of enforcement priorities.<sup>205</sup> Rather, plaintiffs argued, DAPA conferred benefits, such as work authorization and driver's licenses, upon unlawfully present noncitizens.<sup>206</sup> Apart from changing the law, on this view, the policies also essentially suspended a valid congressional enactment.<sup>207</sup> Thus, the nonenforcement policy, coupled with the categorical extension of benefits to a large class of unauthorized immigrants, amounted to abdication.<sup>208</sup>

The federal government's analysis of the legality of DAPA originates in a memorandum from the Office of Legal Counsel to the President (OLC).<sup>209</sup> The OLC memorandum determined that the Take Care Clause served as a source of bounded enforcement discretion rather than an imposition of an obligation of perfect enforcement. It then proceeded to evaluate DAPA's consistency with congressional

had standing due to costs of granting drivers licenses to recipients of deferred action), *aff'd*, 809 F.3d 134, 150 (5th Cir. 2015) (finding states' standing "plain, based on the driver's-license rationale"), *aff'd by an equally divided Court*, 136 S. Ct. 2271, 2272 (2016).

200. *Texas v. United States*, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015), *aff'd*, 809 F.3d 134, 188 (5th Cir. 2015).

201. *United States v. Texas*, 136 S. Ct. 2272 (2016).

202. Memorandum from John Kelly, Sec'y of U.S. Dep't of Homeland Sec., Rescission of November 20, 2014 Memorandum Providing for Deferred Action for Parents of Americans & Lawful Permanent Residents ("DAPA") (June 15, 2017), <https://www.dhs.gov/sites/default/files/publications/DAPA%20Cancellation%20Memo.pdf> [<https://perma.cc/3MQY-UGYU>].

203. Complaint for Declaratory and Injunctive Relief ¶¶ 70–86, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254), <https://web.archive.org/web/20150402104146/https://www.texasattorneygeneral.gov/files/epress/files/20141203Multi-stateImmigrationOrderLawsuit%281%29.pdf> [<https://perma.cc/HYD6-NCHP>].

204. *Id.* ¶ 49.

205. *Id.* ¶ 58.

206. *Id.* ¶ 61.

207. Analyzing DACA rather than DAPA, Zachary Price concludes that the program of deferred action constituted an impermissible "categorical, prospective suspension of both the statutes requiring removal of unlawful immigrants and the statutory penalties for employers who hire immigrants without proper work authorization." Price, *supra* note 19, at 760.

208. The Fifth Circuit, however, declined to address plaintiffs' claim under the Take Care Clause. *Texas*, 809 F. 3d at 146 n.3.

209. U.S. DEP'T JUST., Memorandum Opinion for the Secretary of Homeland Security and the Counsel to the President, (Nov. 19, 2014), <https://www.justice.gov/file/179206/download> [<https://perma.cc/U9UF-F4TT>].

priorities. It discerned a congressional intent to preserve U.S. citizens' and lawful permanent residents' family unity, and it concluded that DAPA promoted that objective.<sup>210</sup> In addition, the memorandum noted that a more expansive policy, such as deferred action for parents of DACA recipients, would strain fidelity to congressional priorities and likely lack a limiting principle.<sup>211</sup>

Scholars persuasively defended the federal government's effort to centralize and supervise enforcement discretion. Anil Kalhan critiqued as inconsistent Judge Hanen's decision to enjoin DAPA out of a belief that the Constitution precludes supervised enforcement discretion while simultaneously purporting to accept the Executive's power to set enforcement priorities.<sup>212</sup> Similarly, Adam Cox and Cristina Rodríguez endorsed "permitting politically accountable leadership to exert supervisory authority over line-level agents."<sup>213</sup> They further argued that any particular enforcement policy would have to undergo an analysis of specific trade-offs to assess the charge of "abdication."<sup>214</sup> In their view, an administration must choose between rules and standards, centralized versus decentralized discretion, and secrecy versus transparency in the exercise of enforcement discretion.<sup>215</sup> Thus, the Constitution does not per se prohibit centralizing enforcement discretion in rule-like form.

Apart from defending the mere permissibility of centralized enforcement discretion, scholars such as Gillian Metzger argue that the Constitution requires some level of centralized enforcement discretion.<sup>216</sup> With respect to DAPA specifically, she argues, "[B]y openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, the President and DHS Secretaries . . . were actually fulfilling their constitutional duties to supervise."<sup>217</sup> Although she does not argue that the Constitution requires the particular policy embodied in DAPA, she does suggest that the failure to create such a policy raises questions about adequate supervision. After all, the alternative to this scheme of supervised enforcement discretion consists of "case-by-case discretionary decisions by low-level officials over which meaningful supervision is very hard to exercise."<sup>218</sup> Metzger's defense of DAPA captures the concerns that Kenneth Culp Davis expressed regarding police discretion. If law enforcement officials are going to exercise vast discretion over a large population, selective enforcement is inevitable,

---

210. *Id.* at 26.

211. *Id.* at 32–33. But as Cox and Rodríguez have noted, the task of discerning congressional priorities from hundreds of pages of statutory text is a "doomed" inquiry. Cox & Rodríguez, *Redux*, *supra* note 25, at 224. They argue that the inquiry should instead focus on whether enforcement policies "make reasonable rule-of-law tradeoffs and thereby advance the general purposes of the constitutional separation of powers—constraining and rendering accountable government power." *Id.*

212. Kalhan, *supra* note 26, at 88.

213. Cox & Rodríguez, *Redux*, *supra* note 25, at 196.

214. *Id.* at 213.

215. *Id.* at 174.

216. Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 92 (2017).

217. Metzger, *supra* note 17, at 1929.

218. *Id.*

and the due process values of predictability, consistency, and accountability all support the wisdom of centralizing enforcement discretion in rule-like form under some circumstances.<sup>219</sup> The next section considers in greater depth the relationship of centralized enforcement discretion to faithful execution.

### *C. Enforcement as a Violation of Faithful Execution*

The President's supervisory role in the immigration bureaucracy, combined with the longstanding practice of structuring enforcement discretion through enforcement priorities, parole, deferred action, and other reprieves from removal,<sup>220</sup> suggests presumptive space for use of discretion as a tool of equity; but it does not authorize a President to effectively revise or invalidate a statute through complete nonenforcement.<sup>221</sup> Some forms of centralized enforcement discretion, however, are permissible. The question remains whether the President can claim to faithfully execute the immigration laws by declining to constrain enforcement discretion and letting the rank and file loose on any and every deportable noncitizen officers encounter.<sup>222</sup> This Article argues that recent policies of blanket enforcement and zero tolerance violate the President's duty of faithful execution. Specifically, a stated policy that exempts no one and makes everyone a priority simply devolves discretion to the rank and file, a regime that Hiroshi Motomura calls "rogue by design."<sup>223</sup> Such a scheme does nothing to guard against race discrimination, producing a shadow, unsupervised shield from enforcement for those whose race or appearance does not reveal their deportability. Relatedly, a stated policy of zero tolerance in the face of insufficient resources to attain full enforcement will simply reproduce a shadow, unsupervised shield from enforcement for deportable noncitizens who are hard to locate or costly to apprehend. Such policies abrogate "the active obligation to supervise" that accompanies the President's "ultimate responsibility . . . for the actions of the Executive branch."<sup>224</sup>

Other developments also support more squarely considering the faithfulness of blanket enforcement and zero tolerance. The fixation on suspension of or dispensation with the law has generally followed from the historical concerns of the Framers, but recent scholarship has broadened and deepened analysis of the historical record. Recent work on good faith constitutionalism, discussed in Part I, also suggests that certain duties constrain enforcement policy.<sup>225</sup> Ultimately, every

---

219. See DAVIS, *supra* note 177, at 124–25.

220. See HARRINGTON, *supra* note 104.

221. See Price, *supra* note 19, at 689; see also Heckler v. Chaney, 470 U.S. 821 (1985); Cass R. Sunstein, *Reviewing Agency Inaction After Heckler v. Chaney*, 52 U. CHI. L. REV. 653, 675–83 (1985).

222. Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil-Criminal Line*, 58 UCLA L. REV. 1819, 1842 (2011); Juliet P. Stumpf, *D(e)volving Discretion: Lessons from the Life and Times of Secure Communities*, 64 AM. U. L. REV. 1259 (2015).

223. See Motomura, *supra* note 3, at 451.

224. Free Enter. Fund. v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 496–97 (2015) (quoting Clinton v. Jones, 520 U.S. 681, 712–713 (1997) (Breyer, J., concurring)).

225. See *supra* Part I.

enforcement policy implies nonenforcement as to others, and every nonenforcement policy implies enforcement as to others.<sup>226</sup> This insight, too, might diminish the significance of the nonenforcement-enforcement distinction in abdication analysis and lend itself to scrutiny of policies based on the fallacy of full enforcement.

The supervisory vacuum in which immigration enforcement occurred under the Trump Administration produced chaos and resentment. Recent reporting suggests that ICE agents hungered for appropriate guidance, and the lack of intra-agency coordination damaged morale and mission.<sup>227</sup> Although Trump superficially appeared to direct agency efforts in many instances, he did so without adequate information and input from subordinates. His attempts to direct enforcement sowed chaos. For example, Trump's announcement on Twitter of an upcoming mass immigration raid caught unaware the acting Secretary of DHS, Kevin McAleenan.<sup>228</sup> The White House had ignored McAleenan's cautioning about the potential waste of human and financial resources in such a campaign, as well as the concerns expressed by McAleenan's predecessor, Kirstjen Nielsen, former DHS Secretary, and the former head of ICE, Ron Vitiello.<sup>229</sup> Not only had Trump ignored the advice of the relevant agency heads, but he cut McAleenan out entirely, coordinating directly with the acting head of ICE, Mark Morgan. The administration then proceeded to accuse McAleenan of leaking information about the raids, although "it was Trump who first publicized the information about the operation."<sup>230</sup> Instead of serving as evidence of a subagency director defying his boss, the episode fueled a narrative of the acting DHS secretary "resisting what ICE is trying to do."<sup>231</sup> Insufficient intra-agency guidance, supervision, and control undermined the planned raid and gave no assurance to the public of the legitimacy or coherence of the policy.

Although ICE agents resented President Obama's robust enforcement priorities which they viewed as "micromanagement," the anecdotal evidence described above suggests that some ICE agents also resented the "chaotic" approach to enforcement in their absence.<sup>232</sup> In this way, line officers appear to yearn for a very different mix of centralization and freedom. Both complete devolution and zero tolerance eliminate necessary presidential supervision at the critical points. Notably, rather than facilitating presidential oversight, these approaches permit the President to look the other way.

---

226. Cf. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 472 (1923) (arguing that the government's protection of a property right coerces non-owners).

227. Jonathan Blitzer, *ICE Agents Are Losing Patience with Trump's Chaotic Immigration Policy*, NEW YORKER (June 24, 2019), <https://www.newyorker.com/news/news-desk/ice-agents-are-losing-patience-with-trumps-chaotic-immigration-policy> [<https://perma.cc/ZHL3-5SWY>].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* (quoting former acting head of ICE, Thomas Homan, appearing on Fox News).

232. *Id.*



### 1. The Concept of the “Quality” of a Deportation Undergirds Enforcement Discretion

To understand how particular enforcement policies can violate faithful execution, one first must have a sense of the normative assumptions underlying prosecutorial discretion in immigration law. The concept of the “quality” of a deportation lies at the core of equitable discretion, but not everyone subscribes to it. Some take the view that all deportations are or should be regarded as qualitatively equal. Thus, a deportable immigrant with no criminal convictions, deep family and community ties, and a flourishing business merits enforcement action as much as a recently arrived deportable immigrant who has already gotten into trouble with the police. Each is present in the United States in violation of the law. To show leniency toward the former (or latter) would amount to something less than faithful execution of the law.<sup>233</sup>

Others contend that the government can and should distinguish among deportable immigrants based on the nature of their immigration offense as well as their other, non-immigration-related conduct or their personal characteristics. Deportable immigrants who entered as lawful permanent residents or those who entered on a visa but subsequently overstayed may differ in important ways from those who entered without inspection or through the use of fraudulent documents.<sup>234</sup> Some deportable immigrants will show all marks of a successful individual in a community. They usually pay taxes,<sup>235</sup> and they might marry a U.S. citizen or have children who are U.S. citizens.<sup>236</sup> They often know their neighbors,<sup>237</sup> and they might serve as the primary caregiver to a U.S. citizen relative.<sup>238</sup> They might own a business or make a living on wages without requiring government subsidy—all without any arrests, convictions, or other interaction with the criminal legal system.<sup>239</sup> The

233. See Delahunty & Yoo, *supra* note 10, at 784.

234. See Stumpf, *supra* note 24, at 1737–38 (distinguishing those who commit crimes from those who “transgress[] pure immigration law”).

235. Alexia Fernández Campbell, *Undocumented Immigrants Pay Millions of Dollars in State Taxes—Even in the Reddest States*, VOX (Mar. 1, 2019, 8:00 AM), <https://www.vox.com/2019/3/1/18241692/undocumented-immigrants-pay-state-local-taxes> [<https://perma.cc/3H6B-CB3X>].

236. Vivian Yee, *A Marriage Used To Prevent Deportation. Not Anymore.*, N.Y. TIMES (Apr. 19, 2018), <https://www.nytimes.com/2018/04/19/us/immigration-marriage-green-card.html> [<https://perma.cc/4NMU-GUJD>].

237. Julia Jacobo, *Tennessee Neighbors Form Human Chain to Prevent ICE from Arresting Father in Driveway*, ABC NEWS (July 23, 2019, 7:28 PM), <https://abcnews.go.com/US/tennessee-neighbors-form-human-chain-prevent-ice-arresting/story?id=64508277> [<https://perma.cc/K2SC-NUCH>].

238. Cristina Ritchie Cooper & Elizabeth Christy, *Promising Practices When Working with Immigrant Kinship Caregivers*, AM. B. ASS’N (July 1, 2017), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-36/july-aug-2017/promising-practices-when-working-with-immigrant-kinship-caregiver/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-36/july-aug-2017/promising-practices-when-working-with-immigrant-kinship-caregiver/) [<https://perma.cc/88EK-JYYR>].

239. Maya Salam, *Mayor Says Indiana Man’s Deportation ‘Feels Like a Defeat for Our Community’*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/undocumented-indiana-man-deported-trump.html> [<https://perma.cc/RPC9-JZ2K>] (describing

government has routinely regarded these individuals as worthy of discretion or equitable consideration.<sup>240</sup>

Invoking this normative view of a successful or morally “good immigrant” divides deportable immigrants into those more and less worthy of enforcement action.<sup>241</sup> This prompts the question: who does merit enforcement, if not deportable immigrants with the above-described equities? Government officials commonly rely on criminal convictions to identify those worthy of enforcement action. President Obama described his enforcement philosophy as “felons, not families.”<sup>242</sup> Moreover, his administration’s enforcement priorities focused almost exclusively on immigrants with criminal convictions for “serious felonies.”<sup>243</sup> Although those “serious felonies” were often nonviolent and minor, arrests and convictions frequently serve as markers for those worthy of removal.<sup>244</sup> In so doing, however, proponents of this view risk making the worst thing someone has done the only thing that matters to the immigration system.<sup>245</sup>

This practice of legitimating immigration enforcement by vilifying one subset of deportable immigrants and valorizing another has deep historical roots. Kelly Lytle Hernandez argues that this shift began in the mid-1950s, as Border Patrol began performing more crime control work, principally enforcement of the drug laws.<sup>246</sup> This in effect “recast the problem of unsanctioned Mexican immigration as a matter of quality not quantity,” which served to justify the Border Patrol’s “continued concentration upon the U.S.-Mexico border and persons of Mexican origin despite the reduction of apprehensions that continued into the early 1970s.”<sup>247</sup> During this era, immigration enforcement shifted from the awkward and unsympathetic task of

---

community reaction to deportation of long-term resident and restaurateur, who had entered the United States without inspection twenty years before).

240. See WADHIA, BANNED, *supra* note 3, at 41 (noting Trump administration’s shift from prioritizing for deportation individuals without regard to equities “such as long-term residence, employment, and service in the military”).

241. Elizabeth Keyes, *Beyond Saints and Sinners: Discretion and the Need for New Narratives in the U.S. Immigration System*, 26 GEO. IMMIGR. L.J. 207, 228 (2012).

242. President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), <https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration> [<https://perma.cc/7B7U-QY82>].

243. Memorandum from John Morton, Dir., U.S. IMMIGR. AND CUSTOMS ENF’T, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011), <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/4873-4PGZ>].

244. See Christie Thompson & Anna Flagg, *Who Is ICE Deporting? Obama’s Promise to Focus on “Felons Not Families” Has Fallen Short*, THE MARSHALL PROJECT (Sept. 26, 2016, 3:30 PM), <https://www.themarshallproject.org/2016/09/26/who-is-ice-deporting> [<https://perma.cc/9VLS-HK52>] (noting that forty percent of noncitizens deported after announcement of priorities had no criminal conviction at all, let alone for a serious felony).

245. Cf. BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 17–18 (2014) (“Each of us is more than the worst thing we’ve ever done.”).

246. HERNÁNDEZ, *supra* note 114, at 195.

247. *Id.* at 179.

expelling workers with families to defending against immigrant criminality, revealed by the immigrant's violation of the border.<sup>248</sup>

These distinctions among deportable immigrants and the search for "equities" normalize deportation and legitimate the current system of highly limited pathways to legal entry combined with tacit acceptance of huge populations of undocumented residents. But short of a complete halting of immigration enforcement, immigration enforcement will happen, and policy will influence to whom it happens.<sup>249</sup> Although equity-based discretion masks structural injustices, the alternative to a rationalized system based on priorities is indiscriminate enforcement.<sup>250</sup>

## 2. The Complete Devolution of Discretion

Echoing the critics of DAPA, enforcement policy under the Trump Administration rejected formal presidential supervision of enforcement discretion. Specifically, enforcement policy established weak enforcement priorities that swept in much of the deportable population and underscored that no one was exempt from enforcement. President Trump's Executive Order establishing enforcement priorities for DHS formally focused on "criminal aliens," but functionally rendered everyone a priority.<sup>251</sup> When nearly everyone is a priority, rank and file officers enjoy the freedom to apprehend and deport any deportable noncitizen based on nothing other than their own preferences or judgments.

To a large extent, the Trump Administration's approach to immigration enforcement devolved discretion down to the rank and file. Pursuant to the January 25, 2017, Executive Order, Border Security and Immigration Enforcement Improvements, the President instructed DHS to redouble its commitment to faithfully executing the immigration laws.<sup>252</sup> In a February 2017 guidance memorandum from then-DHS Secretary John Kelly, the Secretary instructed subagency heads to "faithfully execute the immigration laws of the United States against all removable aliens."<sup>253</sup> Notably, the guidance memorandum established that "the Department no longer will exempt classes or categories of removable aliens from potential enforcement."<sup>254</sup> The Secretary then articulated seven priorities, including deportable aliens convicted of any criminal offense, those who have been charged with any criminal offense, and those who have "committed acts which constitute a chargeable criminal offense," thereby sweeping in every single immigrant who entered without inspection, as well as any unauthorized immigrant who has ever driven without a drivers' license in a jurisdiction that does not give them to unauthorized immigrants.<sup>255</sup> Rejecting Obama-era enforcement discretion priorities and

---

248. *Id.* at 207.

249. *See* Markowitz, *supra* note 24, at 130–33.

250. One other alternative is to abolish deportation altogether. *See* Angélica Cházaro, *The End of Deportation*, 67 UCLA L. REV. (2021) (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3415707](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415707) [<https://perma.cc/5GH4-D9AU>].

251. WADHIA, BANNED, *supra* note 3, at 41.

252. Exec. Order No. 13767, 82 Fed. Reg. 8,793 (Jan. 25, 2017).

253. Memorandum from John Kelly, *supra* note 4, at 2.

254. *Id.*

255. *Id.*; *see also* WADHIA, BANNED, *supra* note 3, at 32 (noting that "a noncitizen who

establishment of exempt classes, the memorandum essentially made every deportable noncitizen a “priority.”<sup>256</sup> It expressly licensed the pursuit of low-level violators.<sup>257</sup>

A lack of meaningful enforcement priorities results in indiscriminate enforcement, for any and all violators risk arrest.<sup>258</sup> Scholars have noted that when high-level agency officials refuse to establish meaningful enforcement priorities or to draw lines of seriousness or culpability among violators, this discretion frequently devolves to line officers.<sup>259</sup> Vesting low-level officers with discretion to make federal immigration policy infuses immigration enforcement with randomness and the potential for bias. The long history of enforcement officials conflating race and illegal presence further cautions against complete devolution.<sup>260</sup> Such a policy trades transparency and “bounded discretion” for decentralization.<sup>261</sup>

For these reasons, such a style of enforcement falls short of faithful execution. Not all intra-agency delegations of discretion should prompt concern, but here the President effectively denied any qualitative distinctions among deportable immigrants, defying well-established norms of immigration enforcement.<sup>262</sup> Moreover, evidence suggests that the share of noncitizens without criminal convictions among those apprehended for removal rose under the Trump Administration, undermining claims that the agency focused on public safety and perceived security threats.<sup>263</sup> Given these facts and particular characteristics of immigration law, complete decentralization reveals either a lack of reasonable care or a lack of good faith—or both. It fails the test of good faith constitutionalism and constitutes presidential abdication.

Drawing a line between ordinary devolution and abdication presents a challenge. But a bright-line rule is articulable: the government can demonstrate that it engaged in good-faith line drawing by specifying a temporarily exempt class of “low-priority”

---

jaywalks in a city where jaywalking is a crime but who is never charged may be classified as a person who ‘commits an act that constitutes a chargeable offense’”).

256. See WADHIA, BANNED, *supra* note 3, at 30; see also AM. IMMIGR. COUNCIL, *supra* note 2.

257. See Shoba Sivaprasad Wadhia, *Immigration Enforcement and the Future of Discretion*, 23 ROGER WILLIAMS U. L. REV. 353, 358 (2018).

258. Bouie, *supra* note 5 (describing ICE’s style as “indiscriminate”).

259. Cf. Motomura, *supra* note 222, at 1838 (identifying a police officer’s decision to arrest a noncitizen for a criminal offense as the critical site of discretion).

260. Hiroshi Motomura has characterized this devolution of discretion as “rogue by design.” See Motomura, *supra* note 3, at 451. Kelly Lytle Hernández has also argued that immigration police have long conflated Mexican ethnicity with illegal presence. HERNÁNDEZ, *supra* note 107, at 42.

261. Bernick, *supra* note 20, at 42.

262. See *Judulang v. Holder*, 565 U.S. 42, 46 (2011).

263. Philip Bump, *Migrants Targeted Under Trump Are Less Likely To Have Criminal Records*, WASH. POST (July 19, 2019, 5:01 PM), <https://www.washingtonpost.com/politics/2019/07/19/migrants-targeted-by-ice-under-trump-are-much-less-likely-have-criminal-records/> [https://perma.cc/78XY-4MGF]; see also Spagat, *supra* note 5 (discussing then-deputy director of ICE Thomas Homan’s statement denying “indiscriminate” enforcement but revealing that more immigrants without criminal histories were being apprehended by immigration enforcement under Trump than under Obama).

noncitizens. In this way, the agency would publicly commit to focusing on other noncitizens.

### 3. Zero Tolerance

A similar, but distinct, style of enforcement in recent years transcends “enforcement without priorities.”<sup>264</sup> Unpublished guidance during the Trump administration appears to have required line officers to take enforcement action against all deportable noncitizens encountered. As a result, line officers appeared to lack the discretion to weigh equities or prioritize arrests. Stripping the rank and file of the choice to show lenience, such a policy aims to satisfy those seeking “full enforcement” of the immigration laws; but such a policy does not amount to faithful execution.

In 2017, ERO’s director established zero tolerance for unauthorized immigrants by memorandum. The memorandum starts with the proposition that no classes of deportable aliens are exempt, but it then proceeds to tie line officers’ hands once they encounter such an individual. Specifically, the memorandum prohibits line officers from exercising discretion to show lenience on a case-by-case basis. Instead, the memorandum states:

Effective immediately, ERO officers will take enforcement action against all removable aliens encountered in the course of their duties. As always, ERO officers must make an individualized custody determination in every case, prioritizing detention resources on aliens subject to expedited removal and aliens removable on any criminal ground, security or related ground, or for grounds related to fraud or material misrepresentation. Under the terms of the E.O., DHS will no longer exempt classes or categories of removable aliens from potential enforcement.<sup>265</sup>

According to these terms, line officers “will” arrest all deportable immigrants “encountered.” Unlike a regime that devolves discretion to line officers to consult priorities and weigh equities, it imposes a “shall” instead of a “may.” Although officers’ individualized judgments apply to custody determinations, they have no bearing on arrests.<sup>266</sup> Thus, ERO started from the President’s and Secretary’s view that no one is exempt, but it then imposed a form of zero tolerance, ignoring whatever guidance the rudderless priorities provided in the first place.<sup>267</sup> Unlike blanket enforcement, which devolves discretion completely to line officers, zero tolerance

---

264. AM. IMMIGR. COUNCIL, *supra* note 2.

265. Memorandum from Matthew T. Albence, *supra* note 9, at 1.

266. David J. Bier, *Unpublished ICE Memo Allows Arrests of Non-Criminal Immigrants Who Trump Did Not Prioritize*, CATO INST.: CATO AT LIBERTY (July 7, 2017, 10:02 AM), <https://www.cato.org/blog/unpublished-memo-allows-arrests-non-criminal-immigrants-who-trump-did-not-prioritize> [https://perma.cc/7VJY-LVWX].

267. Marcelo Rochabrun, *ICE Officers Told to Take Action Against All Undocumented Immigrants Encountered While on Duty*, PROPUBLICA (July 7, 2017, 8:00 AM), <https://www.propublica.org/article/ice-officers-told-to-take-action-against-all-undocumented-immigrants-encountered-while-on-duty> [https://perma.cc/VB6Y-H4BN].

superficially centralizes discretion at the top. Functionally, however, as explained below, zero tolerance simply pushes discretion back to the stage of surveillance and investigation.

Lest one dismiss this approach as a single errant memorandum, OPLA similarly discouraged entertaining requests for prosecutorial discretion under the Trump administration. Specifically, it encouraged ICE attorneys to ignore requests for relief.<sup>268</sup> It further instructed ICE attorneys to reopen administratively closed cases.<sup>269</sup> Thus, internal guidance from ERO and OPLA leadership instructed line officers to arrest all deportable noncitizens they encounter and discouraged the use of discretion to weigh equities in an individual case.<sup>270</sup> Because the Trump administration prized increasing the numbers of removals over all else, enforcement officials increasingly focused on obtaining removals in whatever way possible. Under the ERO zero-tolerance policy, immigration officers enforce according to whom they can locate with the greatest ease. These immigrants are the “lowest hanging fruit” that walk into a DHS subagency’s office<sup>271</sup> but also include immigrants locatable through pervasive surveillance and dataveillance technologies about which the public knows very little. The lack of transparency, consistency, and accountability that characterizes this displaced discretion raises serious questions for faithful execution.

#### a. Punishing Compliant Conduct

Zero tolerance violates faithful execution by enabling irrational policy and allowing the President and high-level agency officials to ignore hard choices about how to allocate resources. Instead, they seek to fulfill their duties by apprehending so-called low-hanging fruit. Consider deportable immigrants who walk into an ICE office for what they believe is a routine check-in, only to be arrested and detained pending removal.<sup>272</sup> Consider also ICE’s coordination with U.S. Citizenship and Immigration Services (USCIS) to determine when and where a deportable immigrant will arrive for an interview at a USCIS office for a potential immigration benefit,

---

268. Hamed Aleaziz, *An ICE Memo Lays Out the Differences Between Trump and Obama on Immigration Enforcement*, BUZZFEED NEWS (Oct. 8, 2018, 3:09 PM), <https://www.buzzfeednews.com/article/hamedaleaziz/trump-ice-attorneys-foia-memo-discretion> [<https://perma.cc/6JC5-4ZWC>] (describing how OPLA memorandum instructed ICE attorneys that they had no obligation to check the inbox where immigrants’ attorneys ask for relief).

269. Memorandum from Tracy Short, Principal Legal Advisor, U.S. Immigrs. and Customs Enf’t, Guidance to OPLA Attorneys Regarding the Implementation of the President’s Executive Orders and the Secretary’s Directives on Immigration Enforcement (Aug. 15, 2017), <https://assets.documentcloud.org/documents/4996339/18100807.pdf> [<https://perma.cc/6MP8-Q5XQ>]; Aleaziz, *supra* note 268.

270. Memorandum from Tracy Short, *supra* note 269, at 4 (“No individual classes or categories of removable aliens are excluded from enforcement.”).

271. Flores, *supra* note 7 (noting that ICE has increased apprehensions of removable noncitizens at routine ICE check-ins).

272. Michael Paluska, *Dad Described as ‘Perfect’ Green Card Candidate Detained by ICE During Routine Immigration Check-In*, ABC ACTION NEWS (Oct. 1, 2019, 8:35 PM), <https://www.abcactionnews.com/news/region-hillsborough/ice-officials-detain-tampa-dad-of-six-american-children-during-routine-immigration-check-in> [<https://perma.cc/X5PY-G6AC>].

only to ensure that an ICE agent is also present to apprehend the immigrant.<sup>273</sup> This approach seeks to maximize the number of deportations without regard to the circumstances of individual noncitizens and, in many cases, their citizen family members. These tactics further smack of “bait and switch,” where the government agency arranges an appointment to meet a deportable immigrant for a non-removal purpose, only to take custody of the immigrant for removal proceedings. Such tactics could also constitute entrapment, triggering due process concerns, depending on the circumstances.<sup>274</sup>

Fundamentally, zero tolerance runs afoul of the most basic requirement of law: rationality. In *Judulang v. Holder*, the Supreme Court held that the Board of Immigration Appeals (BIA) had violated the Administrative Procedure Act by adopting an irrational approach to granting relief from removal under INA § 212(c).<sup>275</sup> Congress had repealed § 212(c) in 1996, but the Supreme Court subsequently held that it remained available for noncitizens who may have entered guilty pleas (prior to § 212(c)’s repeal) in reliance on its availability.<sup>276</sup> The BIA subsequently developed a policy that made § 212(c) relief available to individuals facing deportation only if their offense had a “comparable ground” in the INA’s exclusion provisions.<sup>277</sup> Because the availability of relief hinged on “the meaningless matching of statutory grounds,” the Court held that the BIA’s policy limited § 212(c)’s scope in an irrational way.<sup>278</sup> The Court chided the BIA for choosing a method for disbursing relief without regard to the noncitizen’s “fitness to remain in the country.”<sup>279</sup> All of this suggests that rationality functions as a substantive constraint on enforcement decisions.<sup>280</sup>

If, like the Supreme Court, one recognizes qualitative differences among deportable immigrants despite their common transgression of immigration law, these deportations almost necessarily sacrifice quality for cost. The government pursues those whom it can apprehend most cheaply, including immigrants who walk in. And yet, immigrants who comply with the government’s terms for avoiding deportation and those who have significant family ties to U.S. citizens that enable them to apply for immigration benefits possess the very characteristics and equities that would normally lead ICE to forbear. Instead, ICE justifies the removals by noting that no one is exempt.<sup>281</sup> Easily apprehended individuals are the prime targets of zero

---

273. Brenda Medina, *Man Goes to Immigration Interview, Gets Detained by ICE*, AP (Oct. 13, 2018), <https://www.apnews.com/4bb97fdb9194f1981e1523872fb60a9> [<https://perma.cc/QYU3-SHQ6>].

274. Zachary S. Price, *Reliance on Nonenforcement*, 68 WM. & MARY L. REV. 937, 1002 (2017) (discussing due process considerations for people who revealed information in reliance on nonenforcement under DACA).

275. 565 U.S. 42, 46 (2011).

276. *Id.* at 48.

277. *Id.* at 49.

278. *Id.* at 57.

279. *Id.* at 55.

280. *Id.* at 58 (critiquing regime in which a noncitizen’s right to remain in the country “hangs on the fortuity of an individual official’s decision”).

281. Medina, *supra* note 273.

tolerance.<sup>282</sup> For administrations fixated on perceived immigrant criminality, it behooves agency leaders to justify tactics that ensnare so many noncitizens without any criminal history.

#### b. Following a Hidden Data Trail

A similar sacrifice of quality for cost occurs when enforcement agents use data analytics to guide investigations. The government collects, or contracts with private companies to collect, unprecedented amounts of information about every person in the country.<sup>283</sup> Coupled with widespread information-sharing agreements with other federal and subfederal government actors, ICE possesses staggering surveillance capabilities.<sup>284</sup> Finding success in leveraging “big data” to locate deportable noncitizens, ICE seeks new data with a tenacity comparable to a “hunt.”<sup>285</sup> This approach to enforcement implicates faithful execution because it occurs in the dark corners of law enforcement. When enforcement officials deny qualitative differences among deportable noncitizens but not all can be deported, these unmonitored technologies set de facto priorities outside the ambit of presidential supervision.

Technology increasingly sweeps up information about every person in the United States, and deportable immigrants engage in a range of activities that potentially leave a data trail revealing their immigration status.<sup>286</sup> They pay taxes and buy homes, but they also pursue higher education, seek medical treatment for communicable diseases, and call 911 to report crime. Using revelations of identity

282. Nick Miroff & Maria Sacchetti, *Trump Takes Shackles off ICE, Which is Slapping Them on Immigrants Who Thought They Were Safe*, WASH. POST (Feb. 11, 2018, 7:10 PM), [https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5\\_story.html?noredirect=on&utm\\_term=.4d0a7424578e](https://www.washingtonpost.com/world/national-security/trump-takes-shackles-off-ice-which-is-slapping-them-on-immigrants-who-thought-they-were-safe/2018/02/11/4bd5c164-083a-11e8-b48c-b07fea957bd5_story.html?noredirect=on&utm_term=.4d0a7424578e) [<https://perma.cc/TB6D-EJAR>].

283. Spencer Woodman, *Palantir Provides the Engine for Donald Trump’s Deportation Machine*, INTERCEPT (March 2, 2017, 1:18 PM), <https://theintercept.com/2017/03/02/palantir-provides-the-engine-for-donald-trumps-deportation-machine/> [<https://perma.cc/Z77A-MCGE>] (describing ICE’s deployment of Investigative Case Management (ICM), a platform developed by the data-mining company Palantir). Cf. Joel Rose, *Can Big Data Really Help Screen Immigrants?* NPR: ALL THINGS CONSIDERED (Dec. 15, 2017, 4:23 PM), <https://www.npr.org/2017/12/15/571199955/dhs-wants-to-build-a-computer-system-to-help-determine-who-gets-to-visit-the-u-s> [<https://perma.cc/FEV7-YUNA>].

284. See Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014); Kathleen J. Frydl, *The Incidental State: Coercion in the Age of Big Data*, DISSENT MAG. (May 2, 2014), <https://www.dissentmagazine.org/blog/the-incidental-state-coercion-in-the-age-of-big-data> [<https://perma.cc/3FSH-E6ZM>] (arguing that “[e]nhanced data collection,” itself innocuous, can lead law enforcement to automate what was previously a “sequence of discretionary decisions,” thereby “lower[ing] the bar for the application of force”).

285. See WTVF Staff, *Nashville Elementary School Refuses to Provide ICE with Student Records*, ABC 15 (Oct. 11, 2019, 5:50 AM), <https://www.abc15.com/news/national/nashville-elementary-school-refuses-to-provide-ice-with-student-records> [<https://perma.cc/DS46-AJ85>].

286. See Anil Kalhan, *The Fourth Amendment and Privacy Implications of Interior Immigration Enforcement*, 41 U.C. DAVIS L. REV. 1137, 1143 (2008).



from these activities to locate deportable noncitizens seriously impacts both noncitizens and citizens, and yet without statutory, regulatory, or internal guidance on the use and aggregation of such data, agents remain unconstrained in their use of them. A few vignettes illustrate the point. In February 2018, Rodriguez Maccareno called 911 to report a burglary of his home, and the local police responded. Because local police store ICE warrants in the same database as criminal complaints, ICE also responded, arresting Maccareno and placing him in removal proceedings.<sup>287</sup> Around the same time, Blanca Morales, a DACA recipient, was admitted to Harvard Medical School, but she feared that her federal student loan application would “out” her parents as undocumented, leading to their removal and destroying her family.<sup>288</sup> Some advocates also fear that, despite statutory protection of tax information, DHS will at some point access sensitive information from the Internal Revenue Service and Social Security Administration to target immigrant workers who pay taxes under someone else’s Social Security number.<sup>289</sup> Leading immigrants’ rights organizations have counseled hospitals to be cognizant of the sensitive information contained in records they share with ICE and the potential immigration consequences of such revelations.<sup>290</sup>

As these vignettes illustrate, ICE can acquire immigrant identity information from innocuous, socially responsible, or even at times “prosocial”<sup>291</sup> behaviors, and this undermines public policy. By using identity information collected and transmitted from socially useful behaviors, such as criminal complaints, applications for adjustment of status, or medical treatment, ICE deters noncitizens from engaging in

287. Rex Santus, *Cops Turned an Immigrant Over to ICE After He Called 911*, VICE (Feb. 14, 2018, 11:00 AM), [https://news.vice.com/en\\_us/article/kzp73y/cops-turned-an-immigrant-over-to-ice-after-he-called-911](https://news.vice.com/en_us/article/kzp73y/cops-turned-an-immigrant-over-to-ice-after-he-called-911) [<https://perma.cc/48ZJ-27MN>].

288. Rosa Flores & Kevin Conlon, *Success for Harvard Medical Students in DACA Could Mean Their Parents Are Deported*, CNN (Feb. 13, 2018, 12:56 PM), <https://www.cnn.com/2018/02/13/politics/daca-harvard-medical-students/index.html> [<https://perma.cc/QBW6-4KWB>]. This would occur when a student with undocumented parents fills in all zeroes for her parents’ Social Security numbers on loan application documents or even the FAFSA (Free Application for Federal Student Aid).

289. Jennifer Chang Newell, *Is the IRS Sharing Tax Information to Deport Immigrants?*, NEWSWEEK (Apr. 24, 2018, 4:00 PM), <http://www.newsweek.com/immigrants-tax-taxes-deport-immigration-899721> [<https://perma.cc/84H2-2ZD2>].

290. *Healthcare Providers and Immigration Enforcement: Know Your Rights, Know Your Patients’ Rights*, NAT’L IMMIGR. L. CTR. (Apr. 2017), <https://www.nilc.org/issues/immigration-enforcement/healthcare-provider-and-patients-rights-imm-enf/> [<https://perma.cc/C9R6-W4A8>].

291. An example of governments rewarding prosocial behavior is the case of Mamoudou Gassama, a French migrant from Mali, who was granted French citizenship after scaling four balconies to save a dangling toddler. See Aurelien Breeden & Alan Cowell, *Paris ‘Spider-Man’ Saves Young Boy. Cue Debate on Migrants.*, N.Y. TIMES (May 28, 2018), <https://www.nytimes.com/2018/05/28/world/europe/paris-migrant-hero-spiderman.html> [<https://perma.cc/9SZ9-SB4K>]; see also Adry Torres, *Deported Father Begs U.S. for Humanitarian Visa to Attend Miami Funeral of Teenage Son Who Died Rescuing a Mother and Child From Drowning*, DAILYMAIL (Oct. 4, 2019), <https://www.dailymail.co.uk/news/article-7538219/Deported-dad-hopes-U-S-allow-enter-country-attend-funeral-Miami-hero-teen-son.html> [<https://perma.cc/5L6J-Z4PK>].

them.<sup>292</sup> This, in turn, eliminates positive spillovers and sometimes produces negative spillovers. In the former case, society stands to lose over the long run when young people decline professional training, and in the latter, sick persons avoiding treatment directly undermines public health and community well-being. Reliance on hidden data trails or data-driven investigative methods further impedes efforts on the part of state and local governments to integrate immigrants. For example, many “sanctuary” jurisdictions have involuntarily (and for a long time, unknowingly) populated ICE’s databases because of compulsory participation in a national criminal law database that ICE routinely accesses.<sup>293</sup> Localities’ forced disclosure of data for immigration enforcement undermines their efforts to integrate and include residents regardless of immigration status.

De facto prioritizing immigrants for deportation when they reveal their immigration status in these ways frustrates reliance interests<sup>294</sup> and ultimately fails to take seriously the distinctions among deportable immigrants.<sup>295</sup> As Eisha Jain has argued, the hidden costs of harsh, unpredictable exercises of immigration enforcement discretion abounds.<sup>296</sup> Fear of employers calling ICE drives immigrant workers not to report safety violations, wage theft, and other harmful workplace practices.<sup>297</sup> Those who do are swiftly deported.<sup>298</sup> Moreover, the full costs also include those associated with immigrant “passing.”<sup>299</sup> Angela S. García has argued that harsh enforcement climates do not always lead undocumented immigrants to retreat to the shadows of the community. Sometimes, they will instead strive to “pass” as a U.S.-born or other legally present person. Passing means investing in a persona, “a strategic presentation of self to the outside world that takes on characteristics associated with mainstream, U.S.-born groups to mask unauthorized immigration status.”<sup>300</sup> These efforts constitute potential costs in addition to the many that DHS currently ignores without justification.

---

292. For example, economists have argued that Hispanic citizens under-use public benefits out of fear of deportation of their noncitizen contacts. Marcella Alsan & Crystal Yang, *Fear and the Safety Net: Evidence from Secure Communities* (Nat’l Bureau of Econ. Rsch., Working Paper No. 24,731, July 2018), <https://www.nber.org/papers/w24731> [<https://perma.cc/949H-WTE4>].

293. Ali Winston, *How Sanctuary Cities Can Protect Undocumented Immigrants from ICE Data Mining*, INTERCEPT (June 16, 2017), <https://theintercept.com/2017/06/16/how-sanctuary-cities-can-protect-undocumented-immigrants-from-ice-data-mining/> [<https://perma.cc/9V2A-TYKU>].

294. See Hiroshi Motomura, *Who Belongs?: Immigration Outside the Law and the Idea of Americans in Waiting*, 2 U.C. IRVINE L. REV. 359 (2012) (discussing contract view of immigration and the notion that immigrants who invest in building lives in the U.S. develop reliance interests in remaining here undisturbed).

295. Cf. JOHN RAWLS, A THEORY OF JUSTICE 24 (rev. ed. 1999) (noting that utilitarianism fails to “take seriously the distinction between persons”).

296. See Jain, *supra* note 5, at 1490.

297. See Lauren Zanolli, *Worker Who Raised Alarm Before Deadly New Orleans Hotel Collapse to Be Deported*, GUARDIAN (Nov. 22, 2019), <https://www.theguardian.com/us-news/2019/nov/22/new-orleans-hotel-collapse-deported-honduras> [<https://perma.cc/QD64-7K5H>].

298. See *id.*

299. See ANGELA S. GARCÍA, LEGAL PASSING 134 (2019).

300. *Id.* Stella Burch Elias has similarly analyzed passing and related phenomena. See

The use of big data technologies in immigration enforcement erodes social utility and has implications for discretion when a government adopts a zero-tolerance policy. As previously discussed, under zero tolerance, enforcement depends entirely on whom officers find, which in turn depends on where and how they look. Big data brings many more immigrants and citizens onto ICE's radar. As Elizabeth E. Joh has argued in the criminal legal setting, "surveillance discretion" has expanded through the use of big data.<sup>301</sup> Surveillance discretion refers to "the decisions that [enforcement officials] make about individuals *before* any search, detention, or arrest takes place."<sup>302</sup> Just like police officers seeking crime suspects, immigration line officers possess discretion regarding whom to identify and investigate for suspected immigration violations.

Big data transforms investigations; rather than starting with a suspect and then investigating that person, big data can reveal suspects who "emerge from the data."<sup>303</sup> The technology driving immigration enforcement hails from Silicon Valley, and newer tools complement existing capabilities to leverage national databases, along with the potential to match them against local information. This includes DMV rolls, which many jurisdictions collect without realizing they ultimately merge into a database accessible by federal immigration officials.<sup>304</sup> Under zero tolerance, every target encountered will be deported, and enforcement officials using big data let the data suggest potential targets. In this way, the data itself sets the priorities, and discretion migrates to a point prior to the line officer's encounter—to programmatic choices regarding investigative methods, surveillance, and dataveillance, through which a line officer locates a deportable noncitizen in the first place.<sup>305</sup>

The migration of discretion to hidden corners undermines important rule of law values. First, such a regime allows agency officials to pretend they are engaged in full enforcement, resource constraints notwithstanding. They simply repeat the refrain that no one is exempt from enforcement and decline to draw lines among deportable noncitizens. They do not explain that the noncitizens who are deported will essentially be selected according to the ease of finding them. Second, the lack of transparency about surveillance and dataveillance practices impedes political accountability for choices to collect and use certain data about immigrants.<sup>306</sup> Third,

---

Stella Burch Elias, *Immigrant Covering*, 58 WM. & MARY L. REV. 765 (2017). She argues that immigration law has not only stimulated passing, but it has facilitated "covering" as well. "Covering" refers to integrative efforts to reduce disparities in access to benefits and services on account of undocumented status. The harm of passing and covering rests largely with the ultimately unresolved state of an undocumented immigrant's legal status; passing and covering are necessarily stop-gap or ameliorative rather than curative. They embody precarity.

301. See Elizabeth E. Joh, *The New Surveillance Discretion: Automated Suspicion, Big Data, and Policing*, 10 HARV. L. & POL'Y REV. 15, 19 (2016).

302. *Id.* at 18.

303. *Id.* at 21.

304. See April Glaser, *Sanctuary Cities are Handing ICE a Map*, SLATE (Mar. 13, 2018), <https://slate.com/technology/2018/03/how-ice-may-be-able-to-access-license-plate-data-from-sanctuary-cities-and-use-it-for-arrests.html> [<https://perma.cc/T74F-AYPV>].

305. Joh argues for locating discretion in criminal policing "at an earlier stage: when the police focus on persons suspected of ongoing or future criminal activity but before any intervention takes place." Joh, *supra* note 301, at 18.

306. See McKenzie Funk, *How ICE Picks Its Targets in the Surveillance Age*, N.Y. TIMES

the migration of discretion creates an environment ripe for acting on the bias baked into investigative tools.<sup>307</sup> When an immigration enforcement policy depends entirely on systems of big-data surveillance that scholars have for years described as inadequately regulated and poorly understood, the executive cannot be said to be adequately guiding line officers' exercise of enforcement discretion.

Ultimately, increased surveillance discretion imposes a quality-cost trade-off, also characterized as a quality-quantity trade-off. When government officials irrationally deem all removals qualitatively equal (and equally bad), they have the incentive to pursue cheap removals, i.e., the ones that take the least time, effort, or resources. Necessarily, these will ensnare people who bring themselves to the attention of the government, often, although not exclusively, through innocuous conduct, or through the data trail they leave behind. These decisions occur hidden from higher-level agency officials, thus shielding this vast discretion completely from executive supervision. All of this suggests that zero tolerance makes for bad policy. But this Article argues further that it violates the duty of faithful execution because it flows from an irrational premise, one that the Supreme Court has disavowed in a related setting.<sup>308</sup>

#### 4. Objections

Numerous likely objections arise. With respect to complete devolution, some might contend that empowering line officers allows agencies to capture the expertise and creativity that low-level bureaucrats principally possess.<sup>309</sup> Low-level bureaucrats have a fuller factual picture based on their work on the front lines of enforcement. They see countless individual cases and can make better-informed decisions than high-level agency personnel. But some degree of line officer discretion is inherent in all enforcement, and the question is whether an extreme or total devolution comports with the constitutional requirement of constrained delegation and presidential supervision. Even defenders of empowering line officers

---

(Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/magazine/ice-surveillance-deportation.html> [https://perma.cc/SEZ8-FAZ8]; cf. Emily Berman, *Regulating Domestic Intelligence Collection*, 71 WASH. & LEE L. REV. 3 (2014); Daphna Renan, *The Fourth Amendment as Administrative Governance*, 68 STAN. L. REV. 1039, 1054 (2016).

307. A large literature on algorithmic bias establishes that automated, mechanized processes remain susceptible to racial bias. See generally Anupam Chander, *The Racist Algorithm?*, 115 MICH. L. REV. 1023 (2017) (reviewing Frank Pasquale's book, *The Black Box Society: The Secret Algorithms that Control Money and Information*). In recognition of this problem, lawmakers have introduced legislation to require companies to monitor bias and inaccuracies in their algorithms. See Jack Corrigan, *Lawmakers Introduce Bill to Curb Algorithmic Bias*, NEXTGOV (Apr. 11, 2019), <https://www.nextgov.com/emerging-tech/2019/04/lawmakers-introduce-bill-curb-algorithmic-bias/156237/> [https://perma.cc/7KMQ-9GDH] (describing the Algorithmic Accountability Act). This bill did not progress out of committee, but it could be reintroduced. See Grace Dille, *Sen. Wyden to Reintroduce AI Bias Bill in Coming Months*, MERITALK (Feb. 19, 2021), <https://www.meritalk.com/articles/sen-wyden-to-reintroduce-ai-bias-bill-in-coming-months/> [https://perma.cc/W3GY-D5KK].

308. See *Judulang v. Holder*, 565 U.S. 42, 55 (2011).

309. See Landau, *supra* note 154, at 1185 (discussing expertise of low-level bureaucrats who have been exercising executive discretion "for decades").

acknowledge the need for “supervision by policy officials who have the bigger picture in mind.”<sup>310</sup>

Although lower-level bureaucrats often possess valuable expertise and knowledge of local conditions that would favor devolution in many settings, those reasons do not apply with equal force in immigration law. First, the culture of immigration enforcement agencies has taken a draconian turn, with ICE and CBP resisting lenience and pressing for full enforcement. Many agencies have a clear constituency and base their policy decisions on scientific, economic, or other technical expertise. In the VA Hospitals, for example, one might argue that physicians (the equivalent of “low-level bureaucrats” in the agency) are best situated to diagnose and treat patients. Presidential supervision in the form of, say, requiring use of a specific medicine, could prove disastrous.

But the enforcement units of DHS do not serve a clear constituency, and when all deportable noncitizens are considered qualitatively equal, their work does not require special credentialing or technical knowledge.<sup>311</sup> ICE perhaps serves all U.S. citizens or all lawfully present individuals, and its mission appeals to the vague concepts of public safety and economic welfare. In such a setting, without institutional safeguards, the agency’s culture assumes central importance in shaping line officers’ behavior, and the prevailing culture in immigration enforcement has been characterized at best as “rogue,” and at worst, as channeling immigration enforcement’s abusive foundations.<sup>312</sup> There is a second reason to doubt the wisdom of complete devolution in immigration enforcement. Unlike in other agencies, where line officers have a variety of tools for sanctioning offenders, such as administrative, civil, or criminal penalties, the INA contemplates one principal penalty for nearly all immigration offenses: deportation.<sup>313</sup> Because not every deportable noncitizen can or will be deported, this creates a system of informal sanctions in which immigration officers distribute discretionary reprieves.<sup>314</sup> With a lack of statutory or other guidance applicable to these sanctions in many instances, bureaucrats perform their most important work shielded from public scrutiny. The lack of transparency and formal opportunities for calibration on the backend underscore the need for robust enforcement priorities at the frontend.

With respect to zero tolerance, the government has suggested that anything less gives some rule violators a pass.<sup>315</sup> Defenders of zero tolerance, like former Attorney

---

310. *Id.* at 1197.

311. Some aspects of DHS’s work, such as consular processing, do require expertise. See James A.R. Nafziger, *Review of Visa Denials by Consular Officers*, 66 WASH. L. REV. 1, 53–54 (1991) (discussing expertise of consular officers adjudicating visa applications). Weighing equities is a nuanced endeavor, but a policy that disavows any qualitative distinctions among deportable immigrants does not call upon line officers to make these nuanced judgments.

312. Adam Isacson, Commentary, *Fixing a Culture that Protects and Rewards Abuses at U.S. Border Agencies*, WASH. OFF. ON LATIN AM. (Oct. 14, 2020), <https://www.wola.org/analysis/fixing-a-culture-protects-rewards-abuse-us-border-agencies/> [https://perma.cc/K44D-SU4M].

313. Juliet Stumpf, *Fitting Punishment*, 66 WASH. & LEE L. REV. 1683, 1691 (2009).

314. See HARRINGTON, *supra* note 104.

315. See Anil Kalhan, *DAPA, ‘Lawful Presence,’ and the Illusion of a Problem*, YALE J. ON REGUL.: NOTICE & COMMENT (Feb. 12, 2016), <https://www.yalejreg.com/nc/dapa-lawful->

General Jeff Sessions, suggest that showing lenience or drawing lines imbues virtue and merit in lawbreaking.<sup>316</sup> Moreover, the argument goes, by insulating some unauthorized entrants from enforcement, the government fails to send a clear message about the unacceptability of illegal immigration.<sup>317</sup> On this view, every illegal entry violates sovereignty.

National sovereignty in a constitutional democracy, or the right to collective self-determination, means that members of the nation choose the rules by which the nation operates.<sup>318</sup> Members also adopt rules of membership. Unauthorized migrants, by entering without inspection, essentially disregard the rules of membership that a nation has adopted.<sup>319</sup> Circumstances such as a long history of U.S. intervention in a region might justify such disregard,<sup>320</sup> but for strict defenders of sovereignty, all border transgressions and violations of the rules for remaining in the country should necessarily trigger banishment.

This argument suffers from several flaws.<sup>321</sup> First, it conflates all immigration violations as “sovereignty” violations. Some migrants are unauthorized because they entered lawfully but have overstayed their visas, some are lawful permanent residents who have committed deportable offenses, and some are migrants that entered without authorization, either with fraudulent documents or without inspection.<sup>322</sup> The “sovereignty” violation appears strongest with the migrants who entered without

presence-and-the-illusion-of-a-problem-by-anil-kalhan/ [https://perma.cc/K44D-SU4M] (discussing Judge Hanen’s view to this effect).

316. See Attorney General Jeff Sessions, Remarks Discussing the Immigration Enforcement Actions of the Trump Administration (May 7, 2018), <https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-discussing-immigration-enforcement-actions> [https://perma.cc/4HFP-3RNP] (“Citizens of other countries don’t get to violate our laws or rewrite them for us. People around the world have no right to demand entry in violation of our sovereignty.”).

317. See Brief for the Petitioner at 31, *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891 (2020) (Nos. 18-587, 18-588, 18-589), [https://www.supremecourt.gov/DocketPDF/18/18-587/112855/20190819213105900\\_18-587tsUnitedStates.pdf](https://www.supremecourt.gov/DocketPDF/18/18-587/112855/20190819213105900_18-587tsUnitedStates.pdf) [https://perma.cc/GA32-C6BQ].

318. See generally SARAH SONG, *IMMIGRATION AND DEMOCRACY* 54 (2019) (describing the internal dimension of collective self-determination as “the idea of popular sovereignty—that the people are the ultimate source of political authority”).

319. Cf. Christopher Heath Wellman, *Immigration and the Freedom of Association*, 119 ETHICS 109, 114 (2008) (discussing the importance of rules of membership).

320. See Sarah Sherman-Stokes, *Reparations for Central American Refugees*, 96 DENV. L. REV. 585, 592–93 (2019) (presenting a historical overview of violence in Central America in the 1980s and 1990s); *id.* at 598–99 (discussing the role of the United States in creating peril); E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1521 (2019) (identifying “Third World migration to the First World as an entitlement of neocolonial imperial membership on grounds of political equality”).

321. For a fundamental critique of “sovereignty discourse,” see Achiume, *supra* note 320, at 1521.

322. Robert Warren, *US Undocumented Population Continued to Fall from 2016 to 2017, and Visa Overstays Significantly Exceeded Illegal Crossings for the Seventh Consecutive Year*, CTR. FOR MIGRATION STUDS. (Jan. 16, 2019), <https://cmsny.org/publications/essay-2017-undocumented-and-overstays/> [https://perma.cc/U6YH-985C].

inspection or by fraud;<sup>323</sup> the others followed the rules of entry. Unsurprisingly, scholars have discerned qualitative differences among these violations.<sup>324</sup> Second, even with respect to these “sovereignty” violations, immigrants themselves differ qualitatively in important ways, and some may assert competing rights. For example, consistent with the United States Convention Relating to the Status of Refugees, Congress preserves unauthorized entrants’ right to seek asylum,<sup>325</sup> perhaps because U.S. law provides few avenues for asylum seekers’ lawful entry in the first place.<sup>326</sup> Under prior administrations, the government recognized that asylum seekers frequently possess some form of irregular status.<sup>327</sup> Thus, a migrant’s “illegal entry” might be justified if she subsequently lodges a nonfrivolous asylum claim. An individual noncitizen’s particular circumstances shape the quality (and forgivability) of the transgression, or whether it is properly deemed a transgression at all. A zero-tolerance policy, however, ignores these meaningful distinctions, defying rationality. It transforms law execution into a robotic enterprise based on opaque investigatory processes. It might qualify as execution, but not as faithful execution.<sup>328</sup>

323. Even here, however, the INA provides for waivers that would ultimately shield some unlawful entrants from deportation under INA § 237(a)(1). *See, e.g.*, INA §§ 212(d), (i) (describing waivers). Accordingly, not every unlawful entry ultimately leads to banishment.

324. *See* Stumpf, *supra* note 24, at 1685.

325. *See* 8 U.S.C. § 1158 (providing for right to seek asylum for unauthorized entrants). In 2018, the Trump Administration adopted a new rule barring asylum claims from individuals who cross between ports of entry. *Aliens Subject to a Bar on Entry Under Certain Presidential Proclamations; Procedures for Protection Claims*, 83 Fed. Reg. 55,934 (Nov. 9, 2018) (to be codified at 8 C.F.R. pt. 1003, 1208). Plaintiffs challenged the rule, and a preliminary injunction prevented it from going into effect. However, the Trump Administration then instituted a transit ban, barring anyone from applying for asylum if they transited through a third country before reaching the United States. *Asylum Eligibility and Procedural Modifications*, 84 Fed. Reg. 33,829 (July 16, 2019) (to be codified at 8 C.F.R. pt. 1003, 1208). Although the trial court issued a preliminary injunction and the Ninth Circuit affirmed, the Supreme Court allowed this ban to take effect. *See* Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019). President Biden subsequently directed DHS to review the transit ban, among other policies relating to asylum. *See* Exec. Order 14010, 86 Fed. Reg. 8267, Creating a Comprehensive Regional Framework to Address the Causes of Migration, to Manage Migration Throughout North and Central America, and to Provide Safe and Orderly Processing of Asylum Seekers at the United States Border, (Feb. 2, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/> [https://perma.cc/V2HG-LQ7J].

326. Shalini Bhargava Ray, *Optimal Asylum*, 46 VAND. J. TRANSNAT’L L. 1215, 1230 (2013) (observing that U.S. immigration law does not offer a visa to asylum seekers to travel to the United States to lodge their applications, and accordingly, the asylum system relies heavily on irregular migration).

327. *See* Deborah E. Anker, *Discretionary Asylum: A Protection Remedy for Refugees Under the Refugee Act of 1980*, 28 VA. J. INT’L L. 1, 28 (1987) (noting that a UNHCR report emphasized that “being an asylum seeker and entering ‘irregularly’ are inextricably linked”).

328. Criticisms of “zero tolerance” in criminal policing make similar points, namely that police officers arrest those whom they encounter, and whom they encounter follows from discretionary judgments about where to focus policing attention. *See, e.g.*, K. Babe Howell,

\*\*\*

The shadow, unsupervised, and de facto enforcement policies discussed above not only violate basic assumptions about qualitative differences among deportable noncitizens but also defy structural constraints on executive power. Specifically, blanket enforcement inappropriately delegates unconstrained discretion to the rank and file, and zero tolerance merely shifts enforcement discretion to the hidden realm of surveillance. Such a shift renders enforcement decisions even more opaque and less accountable. As measured against the demands of faithful execution and as argued above, these approaches fail.

### III. RE-IMAGINING FAITHFUL EXECUTION IN IMMIGRATION LAW

This Article has thus far argued that “faithful execution” of the immigration laws precludes the President from devolving unconstrained discretion to line officers to set de facto priorities and decide how to shape and implement federal enforcement efforts. It has further argued that faithful execution precludes adoption of zero tolerance, which shunts discretion to the opaque realm of surveillance. But what does it require? This Part begins sketching a future for faithful execution in immigration law, tending both to procedural and substantive faithfulness. It concludes that, short of congressional specification of enforcement priorities, faithful execution requires the President or high-level agency officials to set robust enforcement priorities, as well as measures to induce compliance by the rank and file. This conclusion follows from a concept of faithful execution rooted in rule of law values, rationality, and good faith constitutionalism, discussed above.

#### A. Procedural Faithfulness

Faithful execution in immigration law at a minimum requires setting robust enforcement priorities to guide subordinates in ICE, CBP, and USCIS. Robust enforcement priorities centralize discretion rather than eliminate it.<sup>329</sup> Enforcement priorities have had at best a mixed record in shaping line officers’ actual exercise of enforcement discretion, but regardless of their success in inducing compliance, the President or the DHS Secretary has a duty to articulate priorities and values transparently.<sup>330</sup> Under the Take Care Clause, the President has room to make policy judgments and to organize enforcement efforts accordingly.<sup>331</sup> He satisfies his Take Care duty when he “uses enforcement discretion and prioritization—including

---

*The Costs of “Broken Windows” Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059, 1068 (2016).

329. See Cox & Rodríguez, *Redux*, *supra* note 25, at 182 (“[C]onstraining low-level decision makers with rules simply relocates discretion to a point higher up in the bureaucracy.”).

330. Although Congress has not articulated a duty to set enforcement priorities, under 6 U.S.C. § 202, it has assigned the responsibility of articulating them to the DHS Secretary, appointed by the President.

331. Andrias, *supra* note 16, at 1039.



nonenforcement—to advance policy goals, but only if he can articulate a reasonable statutory basis to the public and to Congress for his decisions.”<sup>332</sup> Under a concept of faithful execution rooted in rationality, rule of law values, and good faith constitutionalism rather than robotic law execution, categorical, prospective nonenforcement policies do not necessarily abrogate his Take Care duty.<sup>333</sup> Rather, they force the President’s judgment into the public sphere, placing accountability for his priorities on his shoulders.

Supreme Court precedent supports a focus on procedural faithfulness. The removal power cases support the President’s ability to hold low-level bureaucrats responsible for faithfully executing the laws.<sup>334</sup> Although blanket enforcement and zero tolerance do not implicate the President’s removal power directly, they do implicate the very purpose for which the current Supreme Court has so passionately protected the President’s removal power: to avoid delegating ultimate responsibility for the actions of the executive branch. Guidance that structures enforcement discretion to invite line officer bias or operate according to a hidden logic lacks procedural faithfulness.

Even if the Supreme Court ultimately rejects more rule-like instantiations of supervised enforcement discretion,<sup>335</sup> the President’s obligation to supervise will nonetheless remain. It might manifest instead in initiatives such as training the rank and file, improving culture and morale by reducing chaos, and training officers on constitutional issues that arise in enforcement.<sup>336</sup>

### *B. Substantive Faithfulness*

Substantively, good faith requires that the President’s enforcement priorities reflect some defensible view of the qualitative differences among deportable immigrants. For example, as other scholars have noted, priorities based on race or other protected characteristics would likely violate rights-based constraints on enforcement discretion.<sup>337</sup> The Supreme Court has ruled that prosecutions based on

---

332. *Id.* Andrias has argued further that the President merits some form of *Chevron* deference “or space in enforcing the law.” *Id.*

333. See Bernick, *supra* note 20, at 60–61 (determining that DAPA was justified under the faithful execution framework put forth based on its promotion of “accountability, bounded discretion, the rule of law, or non-opportunism” or the “spirit of the Take Care Clause”).

334. See, e.g., *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *Myers v. United States*, 272 U.S. 52, 176 (1926) (invalidating as unconstitutional part of a law that restricted the President’s power to remove first-class postmasters); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (noting that congressional authority to create quasi-legislative or quasi-judicial agencies independent of executive control implies limits on the President’s removal power).

335. The Supreme Court declined to address the legality of DACA recently. See *DHS v. Regents of the Univ. of Calif.*, 140 S. Ct. 1891, 1910 (2020).

336. Cf. Yuri R. Linetsky, *What the Police Don’t Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 3, 41–42 (2018) (arguing for enhanced legal training for police officers, especially with regard to constitutional safeguards).

337. Cox & Rodríguez, *Redux*, *supra* note 25, at 212 n.303 (discussing the Constitution’s prohibition on using some criteria in enforcement, such as race).

arbitrary classifications exceed the scope of prosecutorial discretion,<sup>338</sup> even when it comes to enforcement against immigrants.<sup>339</sup>

Rationality also serves as a substantive constraint. If the government decided to deport only lawful permanent residents who had committed nonviolent deportable offenses but not unlawful entrants with serious criminal histories, the public would, at a minimum, deserve an explanation.<sup>340</sup> What's more, the Supreme Court has rejected deportation "as a sport of chance"<sup>341</sup> for its violation of "reasoned decision-making" and its disconnection from the "rational operation of the immigration laws."<sup>342</sup> The Court has instead endorsed a robust conception of rationality in evaluating deportable immigrants, one that is "tied, even if loosely, to the purposes of the immigration laws or the appropriate operation of the immigration system."<sup>343</sup> In particular, the choice to deport immigrants must be informed by some conception of the immigrant's "fitness to remain in the country."<sup>344</sup> In this way, the Supreme Court has already articulated a basic standard for assessing the substantive rationality of immigration policies.

The concept of faithful execution advanced here, one rooted in good faith, rule of law values, and rationality, does not require the President to adopt a particular set of priorities, but it does not permit random, indiscriminate, or opaque enforcement. It further requires the President to articulate and take responsibility for the way he or she intends to manage enforcement realities.

### *C. Enforceability*

This Article, at a minimum, seeks to elaborate on an underenforced constitutional norm under the Take Care Clause, but to the extent that a court has authority to review enforcement priorities, the judiciary can apply and implement the analysis offered above. When an administration puts forward enforcement priorities that effect a complete devolution or embody an irrational approach, a court can determine that the administration has violated the Take Care Clause. One clear indication of abdication would be enforcement priorities lacking a temporarily exempt class. The Trump Administration balked at the notion that a deportable noncitizen should enjoy a modicum of security. It instead emphasized that no one is exempt. But enforcement priorities lacking a temporarily exempt class may insufficiently guide enforcement officials about how to direct their efforts. Specifying an exempt class allows an

---

338. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1977) (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); see TODD GARVEY, CONG. RSCH. SERV., R43708, THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF LAW 26 (2014), <https://fas.org/sgp/crs/misc/R43708.pdf> [<https://perma.cc/8GMU-NHFX>].

339. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See GARVEY, *supra* note 338, at 13.

340. See Andrias, *supra* note 16, at 1117 (arguing for "disclosure of enforcement policy decisions, accompanied by explanations rooted in law . . .").

341. *Judulang v. Holder*, 565 U.S. 42, 59 (2011) (quoting *Di Pasquale v. Karnuth*, 158 F.2d 878, 879 (2d Cir. 1947)).

342. *Id.* at 53, 58.

343. *Id.* at 55.

344. See *id.* at 53.

administration to easily demonstrate its adherence to faithful execution to show that it has engaged in meaningful line drawing.

Discussion of the precise remedies that might be available for violation of the Take Care Clause is beyond the scope of this Article, but a challenge to an enforcement policy would likely fare better than an attempt to quash removal proceedings against a specific noncitizen.<sup>345</sup> As others have suggested, with respect to a nonenforcement policy, a court could “simply invalidate the policy, or direct the agency to reconsider its policy, without necessarily taking additional steps or directing the agency to take any specific action.”<sup>346</sup> An individual noncitizen might not have an enforceable right to stop their own deportation. But they could potentially challenge a policy, and a court could potentially invalidate the policy and direct the agency to set priorities demonstrating good-faith line drawing.

#### CONCLUSION

In litigation and scholarship alike, the President’s role in overseeing the exercise of immigration enforcement discretion has become more salient in recent years. Due to the policies of the Obama Administration, the discourse has focused almost exclusively on the constitutionality of presidential nonenforcement policies, based on interpretations of the Take Care Clause. It has thus far avoided squarely evaluating how enforcement against deportable noncitizens, if improperly or opaquely undertaken, might also amount to abdication, despite its superficial fidelity to the law. Building on recent scholarship in constitutional and administrative law, this Article analyzes enforcement policy based on the structure of delegated discretion and its fidelity to the core values of administrative law, including transparency and accountability. It determines that two leading approaches to immigration enforcement in recent years—total devolution and zero tolerance—fall short of faithful execution.

---

345. Cf. WADHIA, *BEYOND DEPORTATION*, *supra* note 111, at 124–25 (discussing range of discretionary actions subject to judicial review apart from the three actions specifically mentioned in 8 U.S.C. § 1252(g), commencing proceedings, adjudicating cases, or executing removal orders).

346. GARVEY, *supra* note 338, at 26.