

Faithful Execution in the Federal Government and the Fifty States

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DRAFT—COMMENTS WELCOME

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GOVERNMENT AND THE FIFTY STATES

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ABSTRACT

Amid increasing political conflict over criminal-justice policy, norms surrounding prosecutorial discretion have shifted rapidly. Under the prior mainstream approach, prosecutors exercised broad charging discretion, but generally did so tacitly and in case-by-case fashion out of deference to the primacy of statutory law. Under a rapidly emerging new approach, prosecutors instead categorically and transparently suspend enforcement of laws they consider unjust or unwise. The Obama Administration employed this theory in several high-profile policies relating to marijuana, immigration, and the Affordable Care Act. More recently, a number of self-described “progressive prosecutors” have employed the same theory at the local level to nullify various state laws on social-justice grounds.

This article explores this shift with a view to answering questions of both legality and causation. As of fall 2021, much of the debate over this new approach to prosecutorial discretion has been both partisan and nationalized. Yet categorical nonenforcement, though associated for the moment with progressive political aims, could just as easily be employed to achieve conservative goals, including nullification of environmental restrictions, firearms controls, voting requirements, police regulations, or public-health mandates. Likewise, though associated for the moment with a

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generalized understanding of the prosecutor’s role, federal and state laws in fact vary widely with respect to the degree of autonomy they confer on prosecutors who might choose to adopt categorical nonenforcement policies.

This article aims to correct these distortions in current debates by providing a snapshot of the law and practice of federal nonenforcement as of the article’s writing, as well as a brief survey of all fifty states’ laws regarding local prosecutors’ authority. Ultimately, it urges a debate over prosecutorial authority that focuses more on governing positive laws and less on political abstractions and policy aims. It also suggests that categorical nonenforcement’s rapid diffusion across jurisdictions illustrates two worrisome features of current constitutional politics: first, the weak enforcement of state-specific constitutional requirements; and second, the overriding power of contested policy aims, as opposed to dispassionate legal analysis, in shaping contemporary institutional understandings.

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INTRODUCTION

Prosecutorial discretion has become a political battleground. For decades, if not longer, an uneasy equilibrium prevailed: though exercising enormous discretion in practice and even recognizing an obligation to forego charges in some cases “in the interests of justice,”¹ prosecutors nonetheless presented themselves as humble servants of the law and the public will. Within the space of roughly ten years, this model has rapidly degraded at both the federal and local levels, giving way to a new model, associated for the moment with progressive politics, in which prosecutors actively reshape the operative law in their jurisdictions by categorically suspending enforcement of disfavored statutes. At the federal level, the Obama Administration employed this theory to alter the operative law in three high-profile areas: marijuana regulation, immigration, and Affordable Care Act implementation.² In the years since, close on the heels of these federal policies, a number of self-described “progressive” prosecutors have won office based on pledges to take similarly bold action at the local level.³

The rise of this new approach to prosecutorial authority, which I here call “categorical nonenforcement,” has sparked a heated, nationwide controversy, with some celebrating the shift and others decrying it as an invitation to lawlessness.⁴ This article takes stock of this debate, aiming not only to assess

¹ AM. BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 77 (3d ed. 1993) (§ 3-3.9(b) & cmt.).

² See *infra* Parts I.B. and II.B.

³ See *infra* Parts I.B. and III.A.

⁴ See, e.g., EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 296 (2019) (“The movement to elect a new kind of prosecutor is the most promising means of reform I see on the political landscape.”); Charles D. Stimson & Zack Smith, “*Progressive*” Prosecutors Sabotage the Rule of Law, Raise Crime Rates, and Ignore Victims, HERITAGE FOUNDATION LEGAL MEMORANDUM NO. 275 at 2 (Oct. 29, 2020) (“The so-called progressive prosecutor

categorical nonenforcement’s lawfulness, but also to explore what its rapid spread reveals about constitutional politics in the divided and polarized America of 2021.

With respect to its legality, most analysis has associated categorical nonenforcement with progressive policy aims while also presuming that this prosecutorial approach is equally valid (or not) for all prosecutors nationwide.⁵ Yet both these associations are wrong. Nonenforcement is progressive only insofar as the laws being stripped of force are somehow conservative. Insofar as the general severity and intrusiveness of criminal law in the United States, as well as the resulting social costs and inequities, have become major political concerns among progressives (and some others as well), prosecutorial leniency may be an important means of achieving progressive goals, and it is understandable that progressives have seized on prosecutorial power as a valuable policy tool. In practice, however, categorical nonenforcement could just as easily be put to reactionary ends in particular jurisdictions; it might be employed, for example, to undermine laws guaranteeing civil rights, environmental protection, gun control, electoral procedures, tax requirements, or public health, among other things. Indeed, on some level, it is odd that an essentially deregulatory authority—a power to strip laws of force—has been so fervently embraced by the political faction that is, by definition, more strongly committed to employing law and government power to alter the status quo.

As for the presumed standardization of prosecutorial power, although it is true that a common understanding of prosecutors’ role and authority has generally obtained nationwide, there is no reason to think that the laws and

movement—or, as we refer to it, the ‘rogue prosecutor’ movement—upends the traditional and customary role of the prosecutor in American society with short-term and potentially long-term disastrous consequences on a number of levels.”).

⁵ See, e.g., W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (defending categorical nonenforcement by elected prosecutors who disclosed their plans); Thomas Hogan, *Prosecutorial Indiscretion*, CITY JOURNAL (June 22, 2021) (arguing that prosecutors are generally obligated to exercise discretion case by case and not “negate the legislative process by simply declaring that an entire class of crimes will go unpunished”); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) (seeking to “craft” a generalized “normative vision of the prosecutor’s role”); Logan Sawyer, *Reform Prosecutors and Separation of Powers*, 72 OKLA. L. REV. 603 (2020) (critiquing general separation-of-powers objections to reform prosecutors); Stimson & Smith, *supra* note 4 (faulting progressive prosecutors for categorical nonenforcement); BAZELON, *supra* note 4 (offering positive account of progressive prosecution movement); William H. Simon, *The Organization of Prosecutorial Discretion*, in PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY 175 (MAXIMO LANGER & DAVID ALAN SKLANSKY, EDS., 2017) (advocating a new understanding of prosecutorial discretion based on “post-bureaucratic or experimentalist” models of “judgment and organization”). For further discussion of perspectives on categorical nonenforcement, see *infra* Part I.

constitutional arrangements governing enforcement discretion in the federal government, the fifty states, and the over 2,300 local prosecutor’s offices in the United States⁶ should all be equally amenable to the new categorical approach. The proper scope of federal prosecutorial discretion (a question I have addressed on the merits elsewhere and revisit here⁷) is a function of the federal separation of powers. By the same token, the extent of discretion among state and local prosecutors is a matter of state and local law. And states in fact vary widely in both the degree of enforcement discretion they presume and the degree of autonomy they afford locally elected prosecutors. For example, Massachusetts’s constitution forbids “suspending . . . the execution of the laws,”⁸ and California’s obligates the state Attorney General to “to see that the laws of the State are uniformly and adequately enforced”⁹—provisions that seem at odds with presuming any categorical nonenforcement power at all, let alone one vested in locally elected officials. By contrast, both heavily-Republican Texas¹⁰ and heavily-Democratic Illinois¹¹ limit centralized oversight of local prosecutors in ways that could effectively guarantee broad local nonenforcement power. Texas, in particular, generally gives its state Attorney General “no authority to initiate criminal prosecutions” or displace local prosecutorial choices.¹²

This article’s most concrete contribution is thus to urge a debate over prosecutorial authority that focuses more on governing positive laws and less on political abstractions and policy aims. Though the fifty states and the federal government share a common commitment to constitutionalism and separation of powers, their specific institutional arrangements vary considerably. On this question among others, allowing these varied arrangements to shape official behavior could not only help governance match local conditions but also provide valuable experiments in the

⁶ BUREAU OF JUST. STAT., U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS, 2003, at 5 (2005) (counting 2,344 separate state prosecutor’s offices as of 2003).

⁷ Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

⁸ MASS. CONST. pt. I, art. XX.

⁹ CAL. CONST. art. V, § 13.

¹⁰ TEX. CODE CRIM. PROC. ANN. art. 2.01 (“Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely.”).

¹¹ 55 ILL. COMP. STAT. ANN. 5/3-9005(1) (“The duty of each State’s Attorney shall be . . . [t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for the county, in which the people of the State or county may be concerned. . . .”); *Cty. of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 831 N.E.2d 563, 570 (Ill. 2005) (rejecting arguments that the legislature could “reduce a State’s Attorney’s constitutionally derived power to direct the legal affairs of the county”).

¹² *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. Ct. App. 1996).

“laboratories of democracy” afforded by federalism.¹³

Beyond this normative contribution, the article suggests two unsettling observations about contemporary constitutional politics based on the rapid diffusion of categorical nonenforcement across jurisdictions. First, this story of swift institutional change suggests that state and local positive laws may only weakly restrain significant institutional innovation in our time. Absent some strengthening at the state level of what Miriam Seifter has called “extra-judicial constitutional capacity”—an infrastructure of lawyers and commentators to give force to state-level constitutional and legal restraints—prosecutorial discretion is unlikely to be the last question of institutional authority on which we see rapid change based on national patterns.¹⁴ Second, the story here also suggests that partisanship may often trump dispassionate legal analysis in shaping constitutional understandings in the current polarized polity—and further that this dynamic, paradoxically, may both accelerate and restrain change across U.S. jurisdictions. Despite its artificiality, categorical nonenforcement’s association with progressive politics has probably aided its rapid diffusion across jurisdictions with progressive electorates,¹⁵ while at the same time conservative opposition may have restrained some other officials from embracing the new approach. This pattern, too, may well repeat itself in other areas, so long as American politics remain intensely conflicted and polarized.

To be clear at the outset about this article’s scope, the progressive-prosecutor movement has had varied features in different jurisdictions, including among other things increased attention to police abuses, retrospective review of potentially faulty convictions, and efforts to reduce racial biases and inequities in criminal justice. I focus here only on one technique employed by some (but by no means all) self-described progressive prosecutors, namely, the overt and deliberate nonenforcement of particular laws with respect to entire categories of offenders. I call this type of policy “categorical nonenforcement,” though other scholars have described roughly the same phenomenon as “prosecutorial nullification” or “prosecutorial decriminalization,” among other things.¹⁶ In addition, I focus here solely on

¹³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

¹⁴ Miriam Seifter, *Extra-Judicial Capacity*, 2020 WISC. L. REV. 385 (2020).

¹⁵ See *infra* ____.

¹⁶ See, e.g., W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021); Erik Luna, *Prosecutorial Decriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 785 (2012); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243 (2011); see also Ronald F. Wright, *Prosecutors and Their State and Local Politics*, 110 J. CRIM. L. & CRIMINOLOGY 823, 830-31 (2020) (discussing “categorical declination policies”).

the use of this claimed authority to eliminate conduct prohibitions altogether, rather than simply to mitigate applicable penalties. Prosecutors often have authority not only to decline charges in particular cases, but also to seek more or less severe penalties, either by adjusting their charges or through sentencing recommendations.¹⁷ I do not mean to suggest that prosecutors hold any particular obligation to seek maximal penalties; my focus here is only on their authority to strip force from conduct regulations altogether. Finally, I do not mean to take any position here on the policy merits of various reform efforts. American criminal justice has many problems, including excessive scope and severity, but questions about prosecutorial discretion arise across different policy domains with differing political valence and understandings of prosecutorial power have shaped conceptions of executive authority even outside of criminal law.¹⁸ I explore questions of prosecutorial authority here with an interest principally in those broader dynamics.

My argument proceeds as follows. Part I addresses the question presented by categorical nonenforcement in an abstract and general way. It explains that even if substantial under-enforcement of laws is inevitable given the scope and severity of criminal laws in most U.S. jurisdictions, the choice to move from case-by-case nonenforcement or internal prioritization entails increased conflict between executive enforcement policy and the substantive laws being enforced. Part I also provides brief background on how broader conceptions of prosecutorial nonenforcement power have rapidly gained currency at both the federal and state and local levels. Part II then provides a snapshot of the law and practice of federal nonenforcement as of this article's writing. It explains that although federal categorical nonenforcement is unconstitutional unless Congress authorizes it by statute, the Obama Administration adopted policies in conflict with this norm, and court decisions and practice in the Trump and Biden Administrations place the understanding of federal nonenforcement authority at a crossroads.

Part III turns to the law and practice of state and local prosecutorial discretion. It first explains how public opinion appears to have shifted in many jurisdictions from the “tough-on-crime” attitudes of an earlier era to stronger support for criminal-justice reform. It then documents how shifts in prosecutorial behavior have provided one important outlet for this shift in public opinion, producing examples of categorical nonenforcement by self-described “progressive” prosecutors in jurisdictions spread across the United States. Finally, Part III canvasses ways in which state laws and constitutions

¹⁷ See, e.g., ABA STANDARDS 1993, *supra* note ____.

¹⁸ See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (deeming administrative nonenforcement decisions unreviewable based in part on an analogy to “the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch”).

differ both from the federal government and from each other with respect to the scope of local prosecutorial nonenforcement power.

Part IV turns to general observations, arguing for a more grounded analysis of particular laws governing prosecutorial authority but also reflecting on how the trajectory of change in understandings of prosecutors' power reflects the primacy of nationwide perspectives and negative partisanship over state-specific laws and long-term institutional perspective. The article closes with a summary of key points and a call to take positive constitutional law more seriously as a means of restraining and diffusing partisan conflicts over policy.

I. MOUNTING CONTROVERSY OVER CATEGORICAL NONENFORCEMENT

A. *Competing Understandings of Prosecutorial Discretion and Their Practical and Legal Stakes*

Prosecutorial discretion is central to the operation of criminal justice at every level in the United States today. Although the federal criminal code may be particularly harsh, severe, and overbroad, state criminal codes are often not far behind.¹⁹ Accordingly, as scholars have long lamented, criminal codes in the United States tend to cover more conduct, and punish it more harshly, than true democratic preferences would support.²⁰ This overbreadth makes at least some degree of prosecutorial discretion inevitable: given resource limitations and practical obstacles, enforcement officials could not possibly prosecute every offense to the full extent of the law.²¹

Even worse, criminal law's overbreadth may well be self-reinforcing: because legislatures anticipate that prosecutors will exercise discretion, they may enact overbroad laws, counting on prosecutors to limit enforcement to truly culpable cases.²² Legislatures may even set penalties at deliberately elevated levels to facilitate the pervasive (though much criticized) practice of

¹⁹ See, e.g., DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 4-5, 9-10 (2008).

²⁰ See, e.g., *id.* at 10-11; Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 748 (2005); Paul H. Robinson & Michael Cahill, *Can a Model Penal Code Second Save the States from Themselves?*, 1 OHIO ST. J. CRIM. L. 169, 170 (2003).

²¹ See, e.g., Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1423 (2008) ("Resource constraints as well as prudence dictate the conclusion that the federal criminal law cannot be applied in its full rigor.").

²² See William J. Stuntz, *the Pathological Politics of Criminal Law* 100 MICH. L. REV. 505, 546-49 (2001); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 6-7 (2011). For my own prior discussion of these dynamics, see Zachary S. Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 911 (2004).

plea bargaining. In other words, to give prosecutors leverage to obtain plea bargains, legislatures may deliberately set punishments high and enact multiple overlapping offenses.²³ To the extent laws impose a “trial penalty” in this fashion, the “sticker price” for proscribed conduct reflected in the letter of the law may diverge systematically from the “market price” desired by legislators and (hopefully) imposed in actual practice.²⁴ In short, in Kate Stith’s apt phrase, “both prosecutorial and sentencing discretion are inevitable because of the broad reach of [criminal] proscriptions and the severity of authorized punishments.”²⁵

This legal structure is unattractive in important respects. Not only does it render more conduct illegal than true public preferences would support; it may also enable biased or arbitrary enforcement, as different prosecutors or enforcement officials inevitably end up treating comparable cases differently. Nevertheless, the legal structure’s implications for prosecutors’ self-understanding are not obvious. As we shall see, different jurisdictions’ laws may define prosecutors’ responsibility differently. Yet prosecutors are in principle executive officials: their job is to apply the law, not make it, which generally means they should subordinate their own discretion to affirmative enactments dictating the conduct rules that govern society. Balancing these competing imperatives—the inevitability and desirability of discretionary enforcement under modern conditions, on the one hand, and the formal limitations on prosecutors’ institutional role as executive officials, on the other—is the core normative challenge in evaluating the scope of prosecutorial discretion today.

From that point of view, we might imagine a spectrum of possible approaches to prosecutorial discretion—different ways of negotiating the tension just described—that involve increasing conflict between underlying substantive conduct rules and a given prosecutor’s enforcement choices:

1. Automatic enforcement: Prosecutors might seek to fully enforce every substantive law by punishing every known

²³ For discussion and criticism of plea bargaining and its effects, see, e.g., Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CAL. L. REV. 1117, 1125-27 (2011) (discussing distortions in plea-bargaining market); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467 (2004) (“there are many structural impediments that distort bargaining in various cases”); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1911 (1992) (discussing how the plea bargaining system “leads predictably to innocent defendants being offered (and taking) the same deals as guilty ones”).

²⁴ Cf. Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 100-103 (2017) (discussing potential judicial responses to mitigate punitive effects of an executive “crackdown” on conduct that executive officials treated more leniently in the past).

²⁵ Stith, *supra* note __, at 1423.

violation to the maximum extent. Although in most jurisdictions this objective will be practically impossible, it could nonetheless constitute a normative ideal.²⁶

2. Case-by-case discretion: Prosecutors might recognize that full enforcement of every law in every case is inappropriate, but limit themselves to declining enforcement in particular cases for case-specific reasons.
3. Internal priorities: Prosecutors might go beyond such case-by-case nonenforcement by establishing internal guidelines about how recurrent types of cases should generally be treated within a particular office or jurisdiction. More concretely, prosecutors might establish an internal policy that certain crimes (low-level marijuana possession, say) are low priorities for use of enforcement resources, while others (rape, murder, or human trafficking, for example) are high priorities.
4. Announced priorities: Next up the chain, prosecutors might publicly disclose their internal priorities, while nonetheless making clear that they are only priorities, not ironclad guarantees about how particular cases will be treated.
5. Categorical nonenforcement: Prosecutors might go still further by indicating not just that a particular crime is a low priority for enforcement, but also that it categorically will not be prosecuted (or at least will not be prosecuted outside of exceptional circumstances).
6. Prospective nonenforcement: Still further, prosecutors might effectively encourage or authorize illegal conduct by providing prospective assurances that those who engage in it will face no repercussions. This approach resembles categorical nonenforcement and overlaps with it, but might entail providing more determinate guarantees, either individually or across the board, that future conduct will be treated as if it were lawful.
7. Cancellation of legal obligations: Finally, prosecutors might

²⁶ Although few scholars advocate this approach, the U.S. Justice Department professed to follow this approach under Attorney General John Ashcroft in the George W. Bush Administration and Attorney General Jeff Sessions in the Trump Administration.

presume authority not just to establish a policy or guarantee of nonenforcement, but to affirmatively declare proscribed conduct lawful. Historically, the power to eliminate legal obligations through executive action was known as a “suspending” power. English monarchs once held this power, but it was repudiated in the Glorious Revolution of 1689 and ever since has been excluded from Anglo-American understandings of executive power.²⁷

In defining prosecutors’ roles and responsibilities, different jurisdictions might choose to draw the line at different points along this spectrum.²⁸ As I have argued elsewhere and discuss further in part II, the U.S. Constitution is best understood to confer only case-specific discretion (option two) as a matter of default executive authority, though at least internal priority-setting (option three), if not also public announcement of those priorities (option four), is inevitable in areas like federal criminal law where the law’s scope vastly exceeds the government’s actual enforcement capacity.²⁹ Nevertheless, absent explicit statutory authorization, federal enforcement officials lack authority to categorically suspend enforcement of substantive laws, prospectively license violations, or eliminate legal obligations altogether (options five to seven).³⁰ By contrast, as I discuss in Part III, different state constitutions and laws might support a different understanding, or at least locate authority over enforcement choices at different places within the state government.³¹

For the moment, the key point is simply that descending down this ladder of possibilities brings enforcement policy into greater and greater conflict with substantive laws. To greater and greater degrees, these different understandings of prosecutorial authority make prosecutorial decisions, rather than legislative ones, the focus of behavioral regulation within a given jurisdiction.³² That is particularly true insofar as regulated parties are almost

²⁷ See, e.g., MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION* 115-17 (2020) (discussing historical exercise and repudiation of the suspending power); SAIKRISHNA BANGALORE PRAKASH, *IMPERIAL FROM THE BEGINNING: THE CONSTITUTION OF THE ORIGINAL EXECUTIVE* 93-94 (2015) (discussing the American constitutional tradition’s rejection of executive suspending powers).

²⁸ Cf. Fairfax, *supra* note __, at 1250-52 (assessing validity of “prosecutorial nullification,” meaning a deliberate choice not to press provable charges, by positing a “spectrum” of prosecutorial approaches from “full enforcement” to “complete discretion”).

²⁹ Price, *supra* note __, at 704-07.

³⁰ *Id.*

³¹ See *infra* Part III.B.2.

³² Cf. Fairfax, *supra* note __, at 1274 (discussing how nonenforcement based on disagreement with statutory policy “frustrates legislative prerogative”); Josh Bowers, *Legal*

certain to rely on categorical or prospective nonenforcement assurances, even if those assurances do not formally change the underlying law. Entrepreneurs, for example, have opened entire businesses based on federal assurances of marijuana nonenforcement; gun sellers and purchasers might well do the same based on local promises not to apply federal or state law.³³ Disrupting such reliance down the road may then appear unfair or even unjust, complicating any political effort to vindicate legal prohibitions after the fact through retrospective enforcement.³⁴ Accordingly, even if prosecutors remain legally free to enforce laws against offenders who foolishly relied on past nonenforcement assurances, any real-world effort to do so may be practically or politically challenging.³⁵

As an abstract matter, therefore, more categorical, transparent, and determinate nonenforcement presents an increasing challenge to the rule of law, if by the rule of law we mean the governance of society by conduct rules established either through legislation or through administrative rules based on expressly delegated lawmaking power.³⁶ It is true that if legislatures have enacted substantive laws against a backdrop of presumed enforcement discretion, or adopted particular laws as tools for convicting the culpable rather than precise rules of conduct, prosecutors will inevitably hold broad authority to pick and choose cases and charges in carrying out their enforcement functions. At the very least, they should appreciate the extent of their discretion and abjure robotic or maximal enforcement of laws in all circumstances (as option one above would dictate). Even as to accepted and generally enforced conduct rules, furthermore, enforcement discretion may be an essential safety valve against injustice in particular cases.³⁷

Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute, 110 COLUM. L. REV. 1655, 1684-85 & n.137 (2010) (distinguishing “equitable” non-prosecution based on the facts of a particular case from the “blanket decision *not* to enforce a particular statute,” which “is tantamount to relegislation”).

³³ See, e.g., Associated Press, *Legal Marijuana Industry Had Banner Year in 2018 with \$10B Worth of Investments*, NBC NEWS (Dec. 27, 2018) (reporting on massive growth in marijuana industry).

³⁴ For my analysis of this reliance problem in the federal context, see Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017).

³⁵ *Id.*

³⁶ For my prior discussion of the conflicting implications of rule-of-law values for enforcement discretion, see Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments Over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 251-58 (2016); see also Jennifer Arlen, *Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements*, 8 J. LEGAL ANALYSIS 191, 196 (2016) (arguing that prosecutorial discretion is consistent with the rule of law insofar as prosecutors “cannot determine the duties to which individuals are subject”).

³⁷ See, e.g., Stephanos Bibas, *The Need for Prosecutorial Discretion*, 19 TEMP. POL. & CIV. RTS. L. REV. 369, 370 (2010) (“By their nature, rules cannot capture every subtlety, which is why various actors need discretion to tailor their application of the law.”).

Nevertheless, it does not follow from the existence and inevitability of case-by-case discretion that prosecutors should necessarily take the further step of announcing their priorities or categorically or prospectively suspending enforcement. To do so undermines the substantive law's primacy to a greater degree, effectively supplanting the legislature's primary role in establishing conduct rules. The lesser power to forgo prosecution in particular cases or according to internal priorities does not necessarily imply the greater power to formally or functionally excuse violations of particular laws across the board.

Some scholarly advocates of more overt and deliberate nonenforcement have emphasized the law's calculated overbreadth and harshness—its seemingly deliberate provision of enforcement leverage to prosecutors—as justifications for prosecutorial nullification of criminal statutes.³⁸ But prosecutors, again, might moderate the law's on-the-ground effect in ways that stop short of overt categorical or prospective nonenforcement, and in any event, at least insofar as prosecutors are responsible for executing legislative judgments, the argument that the legislature's provision of enforcement-enabling tools justifies prosecutorial suspension of enforcement altogether is something of a non-sequitur.

Some have also highlighted racial and other disparities in criminal-justice outcomes to justify more transparent and categorical restrictions on enforcement.³⁹ Such disparities, however, might be addressed in other ways, such as through strengthened prohibitions on selective enforcement.⁴⁰ Even

³⁸ See, e.g., Luna, *supra* note __, at 793-94; Angela J. Davis, *Reimagining Prosecution: A Growing Progressive Movement*, 3 UCLA CRIM. J., REV. 1, 4-5 (2019); Donald A. Dripps, *Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies*, 109 PENN. ST. L. REV. 1155, 1174-76 (2005) (advocating adoption of “public and enforceable criteria for the exercise of prosecutorial discretion” even though doing so “would enable violation of some laws”).

³⁹ See, e.g., Davis, *supra* note __, at 5; K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285 (2014) (advocating categorical nonenforcement of misdemeanors when enforcement produces racial disparities or when courts are too overburdened to provide fair process).

⁴⁰ See, e.g., Hadar Aviram & Daniel L. Portman, *Inequitable Enforcement: Introducing the Concept of Equity into Constitutional Review of Law Enforcement*, 61 HASTINGS L.J. 413, 449 (2009) (discussing possible reforms to equal protection doctrine to address enforcement inequities); Christopher R. Green, *The Original Sense of the (Equal) Protection Clause: Subsequent Interpretation and Application*, 19 GEORGE MASON UNIV. CIVIL RTS. L. J. 219, 303 (2009) (“Current doctrine makes it very difficult for either victims or defendants to complain about inequalities in the use of prosecutorial discretion and the investigatory discretion of police.”); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 18 (1998) (advocating “use of racial impact studies in prosecution offices to advance the responsible, nondiscriminatory exercise of prosecutorial discretion”).

if prosecutors employed enforcement discretion to mitigate them, moreover, they might do so through internal guidance rather than announced categorical policies.⁴¹ Again, moving down the ladder from internal guidance to overt policy—from option three above to option four, five, or six—is an additional step that weakens legislative primacy and thus requires additional justification.

Ultimately, the extent of prosecutorial power to alter or mitigate the law is a matter of institutional authority, and prosecutors in different jurisdictions within a state could employ broad understandings of prosecutorial discretion to achieve any number of policy aims. While prosecutors in some jurisdictions might excuse narcotics or quality-of-life crimes, for example, others elsewhere might employ the same understanding of prosecutorial discretion to nullify police regulations, gun-control laws, pollution restrictions, or public-health protections, among other things. Furthermore, to the extent political pressures shift to support mitigating particular laws—and, as we shall see, there is evidence that just such a change occurred recently⁴²—channeling such pressures into changes in prosecutorial policy could prove counter-productive if it weakened pressure on legislatures to make more durable legal changes.⁴³ Indeed, prosecutorial nonenforcement might even provoke backlash, prompting legislatures to strengthen enforcement standards across the board when they might otherwise have adjusted substantive laws in particular areas.⁴⁴

For all these reasons, the extent of prosecutorial nonenforcement authority in a given jurisdiction raises important questions of relative institutional power—questions about legislative authority relative to the executive branch, for one thing, and additionally, within most states, about state-level officials’ authority relative to local prosecutors. Whether categorical or prospective nonenforcement is permissible in a given jurisdiction does not follow ineluctably from the mere fact that prosecutors

⁴¹ Cf. Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 631 (1984) (discussing how the “acoustic separation” between tough formal prohibitions and lenient enforcement may signal community disapproval and foster deterrence without harsh applications against offenders).

⁴² See *infra* Part III.A.

⁴³ See, e.g., Stuntz, *supra* note __, at 591 (discussing the difficulty repealing unenforced laws that “once represented community norms but no longer do”).

⁴⁴ See, e.g., Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1547, 1585-87 (2020) (discussing possibility that more contested prosecutor elections could lead to harsher prosecutorial policies); Bellin, *supra* note __, at 710-11 (discussing political developments such as “crime spik[ing]” that could “undo progressive prosecutors’ work”); cf. Daniel Fryer, *Race, Reform, & Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 769, 790 (2020) (raising concern that tools employed by progressive prosecutors may be “just as likely to exacerbate racial inequalities in our criminal justice system”).

hold discretion in particular cases, nor even from the presumed distortions in the political process generating harsh criminal laws. Determining its validity instead requires formal analysis of governing legal provisions and institutional arrangements.

B. Categorical Nonenforcement's Sudden and Surprising Emergence

To date, although exercises of prosecutorial discretion have drawn increasing attention and controversy, the debates surrounding it have largely abjured such formal analysis. Instead, scholars have mainly offered wholesale theories of enforcement discretion, arguing over whether it is good or bad as a normative matter, rather than over whether it is permissible under applicable governing provisions.⁴⁵ Meanwhile, actual government practice has seemed to track partisan divides more closely than any grounded understanding of particular officials' legal authority.⁴⁶

Until recently, in fact, longstanding arguments for greater prosecutorial leniency got essentially no practical traction.⁴⁷ Some scholars even doubted whether prosecutors ever would meaningfully tie their own hands with nonenforcement policies, given both the political incentives to appear tough on crime and the institutional incentives to preserve their own power.⁴⁸ But recently the ground has shifted, producing a cascading series of nonenforcement policies from enforcement officials at both the federal and state and local levels.

To give just a few examples, all described in greater depth below, the U.S. Justice Department announced in 2013 that marijuana possession and distribution in compliance with state law generally would not be prosecuted under federal law.⁴⁹ Around the same time, the administration also announced "transition relief" policies excusing non-compliance with certain

⁴⁵ See, e.g., sources cited *supra* in note 5.

⁴⁶ See *infra* Part IV.A.

⁴⁷ See, e.g., ANGELA J. DAVIS, *ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR* 8 (2007) ("Although numerous scholars in the legal academy have criticized the unchecked power of prosecutorial discretion, with a few exceptions, public criticism of prosecutors has been almost entirely absent." (footnotes omitted)); Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 *UCLA L. REV.* 1, 3-4 (1971) (advocating use of "internal policy guides governing the exercise of prosecutorial discretion to help strike . . . a balance" between competing goals of "certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other").

⁴⁸ See, e.g., Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 *STAN. L. REV.* 869, 912 (2009) ("the problem with making prosecutorial decisions more transparent is that the politics of crime might push those guidelines in a decidedly antidefendant direction").

⁴⁹ See *infra* Part II.B.

Affordable Care Act requirements, and in 2012 and 2014 the administration adopted significant immigration nonenforcement policies aimed at shielding certain sympathetic unauthorized immigrants from deportation and providing them with work authorization.⁵⁰ Meanwhile, beginning in 2014, increasing numbers of self-described “progressive” prosecutors have won election in cities such as Brooklyn, Boston, Austin, Dallas, Philadelphia, Ann Arbor, St. Louis, and San Francisco, among others, and adopted policies disclaiming prosecution of crimes including petty theft, shoplifting, drug possession, and prostitution.⁵¹ Whatever one makes of these developments of a policy matter, the sudden shift in institutional behavior across a range of jurisdictions raises important questions of both causation and legality.

With respect to causation, it presents an interesting case study in the phenomenon political scientists call “policy diffusion”: why and how did a novel understanding of prosecutorial discretion spread so rapidly across jurisdictions?⁵² As for legality, although scholars have addressed at length the extent of federal nonenforcement authority,⁵³ nearly all commentary addressing state and local examples has addressed the question in abstract and generalized terms, missing the importance of variations in applicable state and local laws.⁵⁴ In the remainder of this article, I analyze these

⁵⁰ *See id.*

⁵¹ *See infra* Part III.A.

⁵² *See generally* Andrew Karch, *Emerging Issues and Future Directions in State Policy Diffusion Research*, 7 STATE POLITICS & POLICY Q. 54 (2007) (surveying literature on policy diffusion).

⁵³ For a sampling of recent treatments of federal executive nonenforcement authority, see, e.g., Peter M. Shane, *Faithful Nonexecution*, 29 CORNELL J.L. & PUB. POL’Y 405 (2019); Urska Velikonja, *Accountability for Nonenforcement*, 93 NOTRE DAME L. REV. 1549 (2018); Aaron L. Nielson, *How Agencies Choose Whether to Enforce the Law: A Preliminary Investigation*, 93 NOTRE DAME L. REV. 1517 (2018); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489 (2017); Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Rachel E. Barkow, *Overseeing Agency Enforcement*, 84 GEO. WASH. L. REV. 1129 (2016); Leigh Ososky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73 (2015); Price, *supra* note __; Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Kate Andrias, *The President’s Enforcement Power*, 88 N.Y.U.L. Rev. 1031 (2013).

⁵⁴ *See, e.g.,* Murray, *supra* note __ (advancing general theory of “populist prosecutorial nullification”); Fairfax, *supra* note __ (discussing “prosecutorial nullification”); Luna, *supra* note __ (advocating “prosecutorial decriminalization”); Jeffrey Bellin, *Expanding the Reach of Progressive Prosecution*, 110 J. CRIM. L. & CRIMINOLOGY 707 (2020) (advocating “a conceptualization of the American prosecutor as a caretaker for the criminal justice system”); Jeffrey Bellin, *Theories of Prosecution*, 108 CAL. L. REV. 1203 (2020) (proposing a “‘servant of the law’ theory prosecutorial behavior”); David Alan Sklansky, *The Nature and Function of Prosecutorial Power*, 106 J. CRIM. L. & CRIMINOLOGY 473, 477 (2016) (emphasizing the

questions of causation and legality, beginning with federal law and practice in Part II, then turning to state and local law and practice in Part III, and offering general reflections in Part IV.

II. THE LAW AND PRACTICE OF FEDERAL NONENFORCEMENT (CIRCA 2021)

Federal criminal law is in many ways the paradigm case of excessive prosecutorial discretion. Yet this very feature of federal law—its heavy reliance on presumed prosecutorial discretion—has distorted debates over the proper basis and scope of federal enforcement discretion. In the federal context, broad prosecutorial is best understood not as an executive prerogative, as is often claimed, but instead as a function of legal structures like federal criminal law that prohibit far more conduct than can realistically be prosecuted. This understanding, moreover, implies important limits on how prosecutorial discretion may be used to moderate the strictures of substantive law: because the President is duty-bound to ensure that federal laws are “faithfully executed,” executive officials generally should not presume authority to go beyond internal prioritization and instead alter the law itself.⁵⁵

With this framework in mind, this Part surveys the law and practice of federal enforcement discretion as of this writing, meaning fall 2021. Subpart A discusses in greater detail the proper basis for, and limits on, federal enforcement discretion. Subpart B then discusses several high-profile examples from the Obama Administration that either abridged these limits or came close to the line. Subpart C then discusses the degree to which the Trump Administration did and did not build upon these examples. Subpart D turns to a key Supreme Court decision and some important scholarship that have muddied understandings of federal enforcement discretion by approving some popular but legally dubious Obama Administration immigration policies. Subpart E takes stock of the current state of play with respect to federal enforcement discretion, noting that we appear to stand at a crossroads

“mediating” and “boundary-blurring” character of the prosecutor’s role); David Alan Sklansky, *Unpacking the Relationship Between Prosecutors and Democracy in the United States*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 276 (MAXIMO LANGER & DAVID ALAN SKLANSKY, EDS., 2017) (discussing implications for democratic accountability of prosecutors’ boundary-blurring function); Daniel C. Richman, *Accounting for Prosecutors*, in *id.* at 40 (discussing prosecutors’ role in liberal democratic societies). An important exception, discussed further below, is Wright, *supra* note __, at 837, which recognizes that “[t]here is no single prosecutorial tradition that encompasses all of the many ways that prosecutors respond to their different institutional environments and distinctive threats to local public safety.”

⁵⁵ For my argument for this position, see Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671 (2014).

with respect to the law and practice of federal enforcement discretion.

A. Federal Officials' Limited Enforcement Discretion

Although modern courts and commentators often presume that Article II confers an absolute executive prerogative not to enforce disfavored laws,⁵⁶ the most relevant Article II provision, the so-called Take Care Clause, says the opposite: it obligates the President to “take Care that the Laws be faithfully executed.” Far from conferring nonenforcement authority on the Executive, the Constitution’s plain text thus obligates presidents to effectuate any constitutionally valid federal laws—even if the President disagrees with them, or indeed even if Congress overrides a presidential veto to enact them.⁵⁷

At the same time, the separation of executive and legislative power in the U.S. Constitution does support presuming some baseline discretion over enforcement. Separating legislative and executive power would accomplish little, and certainly would not protect individual liberty, as Blackstone, Montesquieu, and other foundational theorists presumed it should do,⁵⁸ if executive officials were duty-bound to robotically enforce every law in every conceivable circumstance. Indeed, even the terms of the Take Care Clause itself might support this inference: one might enforce a law “faithfully” without applying it mechanically, so long as one respected the basic policy reflected in the statute.⁵⁹ Likewise, by prohibiting bills of attainder—laws singling out particular individuals or classes of individuals for punishment—the Constitution reinforces the inference that laws establishing general rules of conduct do not necessarily dictate punishment for each particular violation; making the law and executing it are distinct constitutional functions.⁶⁰ As a normative matter, furthermore, tailoring general laws to particular facts is a natural aspect of the executive function, and the basic structure of separated executive and legislative power implies a potential gap between the strict letter of the law and its application in specific circumstances.⁶¹

In a 2014 article exploring the law and history of federal enforcement discretion at much greater length, I argued that these two competing

⁵⁶ See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 575-76 (1992); *United States v. Nixon*, 418 U.S. 683, 693 (1974).

⁵⁷ Price, *supra* note __.

⁵⁸ *Id.* at 701 (collecting sources); see also Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1536–38 & n.102 (1991) (discussing the liberty-protective purposes of separation of powers); cf. Aaron L. Nielson, *The Policing of Prosecutors: More Lessons from Administrative Law?*, 123 DICKINSON L. REV. 713, 718 (2019) (“prosecutorial discretion is both useful and potentially dangerous”).

⁵⁹ Price, *supra* note __, at 698.

⁶⁰ *Id.* at 697

⁶¹ See, e.g., *id.*

constitutional inferences—the Constitution’s mandate of faithful execution, on the one hand, and its presumption of some distinct enforcement authority, on the other—supported two countervailing presumptions.⁶² To give effect to the separation of legislative and executive power, executive officials should presume authority to decline enforcement of general laws in particular cases for case-specific reasons.⁶³ To ensure faithful execution of the law, however, they should presume they lack authority either to license violations prospectively or to suspend enforcement categorically based on policy disagreement with the statute.⁶⁴ Both these presumptions apply only by default; Congress may restrict or expand discretion provided it does so explicitly.⁶⁵ Absent more specific statutory direction, however, and even if drawing the precise boundary between case-specific discretion and policy-based categorical nonenforcement is sometimes a matter of degree as opposed to a bright-line determination, these twin presumptions provide proper points of orientation for federal executive officials charged with enforcing federal statutes.⁶⁶

While defending these presumptions as a matter of formal constitutional analysis, my article also argued that they accorded with early federal practice.⁶⁷ In early statutes and executive conduct, federal practice showed respect for the twin presumptions properly implied by the constitutional structure itself.⁶⁸ As for more recent developments, I argued that the “pathological” origins of expanded enforcement discretion in federal criminal law and some other areas—its derivation from the apparent one-way ratchet favoring ever-broader prohibitions and ever-more severe penalties—supported retaining a limited understanding of enforcement discretion rather than jettisoning it.⁶⁹ Despite its role in creating legal structures predicated on enforcement discretion, Congress might have intended only to enable broad case-by-case nonenforcement, not to confer executive authority to cancel enforcement wholesale or license violations.⁷⁰ Concluding otherwise could only reinforce the executive’s capacity to shape legal understandings at Congress’s expense through self-serving assertions of executive prerogative.⁷¹ Even worse, by diverting political pressures for reform into temporary prosecutorial policies rather than more durable legislative

⁶² *Id.* at 704-07.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 707-16.

⁶⁶ *Id.* at 755.

⁶⁷ *Id.* at 723-42.

⁶⁸ *Id.*

⁶⁹ *Id.* at 746-48.

⁷⁰ *Id.*

⁷¹ *Id.*

changes, it might ultimately compound rather than mitigate the pathological politics surrounding federal criminal law.⁷² In any event, even if Congress invited broad assertions of nonenforcement authority by enacting laws that could not be fully enforced, such indirect and implicit endorsement of broadened executive authority should not suffice to eliminate the President’s explicit constitutional duty to ensure faithful execution of federal laws, including those he or she disagrees with.

Recent years have seen a spate of further scholarship and commentary addressing these questions, including some important defenses of policy-based nonenforcement that I will address below. At least some work, however, has confirmed my core claims. According to Andrew Kent, Ethan Leib, and Jed Shugerman, for example, the phrase “faithful execution” was understood at the time of the founding as a term of art that bound executive officials to implement statutes without regard to their personal views about them.⁷³ They write, “Faithful execution was understood as requiring good faith adherence to and execution of national laws, according to the intent of the lawmaker. Waivers or refusals to enforce for policy reasons without clear congressional authorizations, then, appear to be invalid under the clauses.”⁷⁴ This principle, moreover, “offer[s] some support for the argument against systematic executive discretion to effectively ‘suspend’ laws through an assertion of categorical prosecutorial discretion.”⁷⁵ Another recent account of Article II’s original understanding likewise concludes that the framers intended to confer only limited nonenforcement authority.⁷⁶ Even apart from other formal and functional considerations supporting the same conclusion, a limited understanding of federal enforcement discretion thus appears to have strong support in the Constitution’s original understanding.

In short, although executive officials should presume authority to decline enforcement of federal laws in particular cases and to establish sensible priorities for enforcing broad laws with limited resources, presuming authority to decline enforcement prospectively for broad categories of offenders is inconsistent with the constitutional separation of powers in the U.S. Constitution.

B. The Obama Administration’s Bold Innovation

⁷² *Id.* at 747.

⁷³ Andrew Kent, Ethan J. Leib, and Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2118 (2019).

⁷⁴ *Id.* at 2185.

⁷⁵ *Id.* at 2187.

⁷⁶ MCCONNELL, *supra* note ___, at 118 (“the significance [of the Take Care Clause] is that the President has the duty, not just the authority, to carry the laws of the nation into execution”).

Despite the broad range of considerations supporting this understanding, it has become a surprising partisan flashpoint, and a significant area of potential constitutional change, as a result of controversies spanning the past three presidential administrations. To begin with, in at least three areas, the Obama Administration pushed aggressively against separation-of-powers limits on enforcement discretion, seeking instead to convert prosecutorial discretion into a policy tool for altering the effective scope of federal substantive laws.

First, in a series of policy statements addressing state-level legalization of marijuana, the administration issued explicit enforcement policies assigning low priority to certain federal marijuana crimes. In the first iteration of this policy, a 2009 directive from the Deputy Attorney General instructed U.S. Attorneys not to focus federal enforcement resources on “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”⁷⁷ Two years later, the Justice Department “clarif[ied]” that the 2009 policy “was never intended to shield” large growing operations from federal enforcement.⁷⁸ This new policy instructed U.S. Attorneys to “continue to review marijuana cases for prosecution on a case-by-case basis.”⁷⁹

In 2013, however, two states, Colorado and Washington, repealed state marijuana prohibitions not only for medical marijuana, but for recreational marijuana as well. In response, the Obama Administration issued yet another federal enforcement policy. In this last policy, the administration took its most permissive approach yet, instructing U.S. Attorneys to focus federal enforcement efforts on certain specified federal priorities and give low priority to state-compliant marijuana possession and distribution in states that maintained “strong and effective state regulatory system[s].”⁸⁰ The Justice Department followed up this policy with a further directive in 2014 indicating that federal crimes involving marijuana-related financial transactions were subject to the same priorities, meaning that federal officials should generally turn a blind eye to transactions associated with state-compliant marijuana businesses.⁸¹

⁷⁷ Memorandum from David W. Ogden, Deputy Att’y Gen., to Selected U.S. Att’ys, *Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana* (Oct. 19, 2009).

⁷⁸ Memorandum from James M. Cole, Deputy Att’y Gen., to all U.S. Att’ys, *Guidance Regarding the Ogden Memo in Jurisdictions Seeking to Authorize Marijuana for Medical Use* (June 29, 2011).

⁷⁹ *Id.*

⁸⁰ Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, *Guidance Regarding Marijuana Enforcement* (Aug. 29, 2013).

⁸¹ Memorandum from James M. Cole, Deputy Att’y Gen., to U.S. Att’ys, *Guidance Regarding Marijuana Related Financial Crimes* (Feb. 14, 2014).

A second set of enforcement-related controversies involved implementation of the Affordable Care Act, President Obama’s signature legislation seeking to extend health-insurance coverage to all Americans. In two policies announced in 2013, the administration granted “transition relief” delaying the statutory effective dates of certain prohibitions in the Affordable Care Act. One such delay suspended certain minimum coverage requirements for insurance plans; the other postponed employers’ obligation to provide employees with qualifying coverage or else incur certain penalties.⁸² Both delays reflected political controversies surrounding the provisions in question.⁸³

Finally, and most controversially of all, in 2012 and 2014 the Obama Administration adopted policies encouraging broad categories of unauthorized immigrants to apply for two- or three-year renewable promises of nonenforcement known as “deferred action.” Though technically only a non-binding assurance of enforcement forbearance, as a practical matter deferred action conferred a prospective guarantee of non-deportation for the prescribed time period, as well as the opportunity to apply for work authorization and obtain other benefits.⁸⁴ The first of these programs was called “Deferred Action for Childhood Arrivals” or “DACA”; it invited hundreds of thousands of immigrants who entered the United States without authorization as young children and met certain other criteria to apply for deferred action. The second program, “Deferred Action for Parents of Americans” or “DAPA,” extended a similar invitation to a much larger group of unauthorized immigrants who were parents of U.S. citizens.

To justify this second program, the administration released an opinion by the Justice Department’s Office of Legal Counsel that approved DAPA while rejecting a still broader program that would have also extended deferred action to parents of DACA recipients.⁸⁵ OLC’s opinion largely accepted the legal principles outlined above and advocated in my article; it characterized broad prospective assurances of nonenforcement as generally unlawful.⁸⁶

⁸² For further description and analysis of these examples, see Price, *supra* note __, at 750-54, and Nicholas Bagley, *Legal Limits and the Implementation of the Affordable Care Act*, 164 U. PA. L. REV. 1715, 1721-25 (2016).

⁸³ Bagley, *supra* note __, at 1721-25.

⁸⁴ For the administration’s description and legal defense of these programs, see *The Department of Homeland Security’s Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. 39 (Nov. 19 2014); see also, e.g., Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347, 383-92 (2017); Adam B. Cox & Cristina M. Rodriguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 131-33 (2015).

⁸⁵ *Authority to Prioritize*, 38 Op. O.L.C. 39.

⁸⁶ *Id.*

The opinion, however, claimed to find adequate statutory authority for the program based on Congress's prior acquiescence in putatively similar immigration relief programs.⁸⁷

To sum up, then, aggressive use of enforcement discretion to reshape federal law and provide relief from disfavored statutes proved to be a theme of the Obama Administration—one that few would have predicted at the outset. All these policies arose in a context of intense partisan animosity and, after 2011, divided partisan control of Congress and the presidency. Unable to obtain statutory amendments to the ACA or adjustments to drug and immigration laws, the Obama Administration resorted to executive authority over enforcement instead.

Regardless of the motivation, these policies conflicted with the separation-of-powers principles identified earlier. In my 2014 article, I argued that the marijuana policy was defensible insofar as it made clear it was non-binding and merely established priorities for federal enforcement, as opposed to any sort of legal permission for law-breakers,⁸⁸ yet over time the policy seems to have hardened into a more definitive guarantee.⁸⁹ By contrast, the ACA delays and deferred action programs crossed the line because they effectively suspended statutory requirements prospectively for broad categories of regulated parties.⁹⁰ In litigation regarding DAPA's validity, a federal district court agreed and enjoined the program nationwide before it took effect. A split Fifth Circuit panel then affirmed the injunction, and the Supreme Court, one member short following Justice Scalia's death, affirmed by an equally divided vote in 2016.⁹¹

C. The Trump Administration's Surprising Restraint

President Obama's successor Donald Trump came to office promising that Americans would "finally wake up in a country where the laws of the United States are enforced."⁹² In keeping with this promise, the Trump

⁸⁷ *Id.*

⁸⁸ Price, *Enforcement Discretion*, *supra* note ___, at 757-59.

⁸⁹ For my discussion of this point, see Zachary S. Price, *Federal Marijuana Nonenforcement: A Dubious Precedent*, in *MARIJUANA FEDERALISM: UNCLE SAM & MARY JANE* 123, 128 (JONATHAN ADLER, ED., 2020).

⁹⁰ *Id.* at 749-54, 759-62. For a similar argument regarding the second immigration program, see Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 *TEX. REV. L. & POL.* 213, 216 (2015).

⁹¹ *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

⁹² Donald J. Trump, *Republican Convention Acceptance Speech* (July 21, 2016), <https://www.politifact.com/article/2016/jul/21/donald-trumps-gop-acceptance-speech-annotated/>.

Administration rescinded the Obama Administration’s marijuana guidance and sought to end the DACA program as well. (DAPA was still enjoined, and the ACA delays had already lapsed.) Not surprisingly, however, the Trump Administration’s commitment to enforcement proved selective. Overall, as has been characteristic of other recent Republican administrations with a deregulatory bent, enforcement rates with respect to many laws and regulations cratered during the Trump Administration.⁹³ A number of environmental policies, furthermore, closely mirrored Obama-era policies by employing nonenforcement promises to effectively cancel disfavored regulations. Yet courts enjoined these policies in litigation, and in other areas the administration showed surprising restraint—in some cases even in defiance of the President’s own expressed preferences.

To begin with the environmental examples, a number of policies issued by President Trump’s Environmental Protection Agency sought to suspend binding regulations while the administration reconsidered them. Insofar as they sought to eliminate binding regulations without going through the process required to repeal them, these administrative policies violated precisely the same limits on enforcement discretion as did the Obama Administration’s deferred action programs and ACA delays: they sought to employ an authority over how laws are enforced to alter the content of the laws themselves.⁹⁴ Courts accordingly invalidated these policies, just as they had enjoined DAPA during the Obama Administration.

In *Clean Air Council v. Pruitt*, for example, the D.C. Circuit held that the Environmental Protection Agency lacked authority to “stay” a recent regulation limiting so-called “fugitive” emissions from oil and gas production.⁹⁵ Calling it “‘axiomatic’ that ‘administrative agencies may act only pursuant to authority delegated to them by Congress,’” the court held that the agency could not repeal or suspend its rule without a new notice-and-comment process because the only statutory provision invoked by the agency provided no authority for doing so.⁹⁶ Likewise, in *Natural Resources Defense Council v. National Highway Traffic Safety Administration (NRDC v. NHTSA)*, the Second Circuit invalidated an agency’s suspension of civil

⁹³ See, e.g., Velikonja, *supra* note ___, at 1558-59. For my discussion of pre-Obama nonenforcement controversies during deregulatory administrations, Zachary S. Price, *Politics of Non-Enforcement*, 65 CASE W. RESERVE L. REV. 1 (2015); see also Daniel T. Deacon, Note, *Deregulation Through Nonenforcement*, 85 N.Y.U. L. REV. 795 (2010).

⁹⁴ See, e.g., Nat’l Mining Ass’n v. McCarthy, 758 F.3d 243, 251 (D.C. Cir. 2014) (discussing the legally binding character of legislative rules); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (holding that agencies are bound by their own regulations until validly repealed).

⁹⁵ 862 F.3d 1 (D.C. Cir. 2017).

⁹⁶ *Id.* at 9 (quoting *Verizon v. FCC*, 740 F.3d 623, 632 (D.C. Cir. 2014) (internal alteration and citations omitted)).

penalties adopted in a prior fuel-economy regulation because the APA’s requirement to follow notice-and-comment procedures applies “with the same force when an agency seeks to delay or repeal a previously promulgated final rule.”⁹⁷ These decisions effectively enforced the same legal limit discussed above with respect to DACA and the ACA delays: although agencies may prioritize some violations over others because they lack the time and resources to pursue both, enforcement discretion alone provides no authority to alter the law itself.⁹⁸

Courts thus enforced appropriate limits on enforcement discretion on the administration in some areas. In other examples, the Trump Administration itself declined to build on the Obama Administration’s examples, even when doing so would have been politically convenient. For example, in 2018, the state of Idaho announced that it would allow sale of health insurance plans in the state that failed to meet coverage requirements imposed by the federal ACA. Although it could have announced that it would not enforce ACA requirements either, thereby approving Idaho’s action and encouraging other states to follow suit, the Trump Administration instead forcefully repudiated Idaho’s policy. Making clear that the ACA—a law the administration hoped to repeal—“remains the law and we have a duty to enforce and uphold the law,” it announced that it would enforce the ACA’s restrictions itself if the state failed to do so.⁹⁹

In a second example, President Trump himself promised to wipe away a disfavored law but his administration failed to follow suit. At a rose garden ceremony with faith leaders in 2017, Trump assured the audience that the so-called Johnson Amendment, which denies tax-exempt status to religious organizations that engage in political activity, would “no longer interfer[e] with your First Amendment rights.”¹⁰⁰ Earlier, Trump had promised to

⁹⁷ 894 F.3d 95, 113 (2d Cir. 2018).

⁹⁸ Some courts have held that agencies, at least as a default, retain authority to waive regulatory (as opposed to statutory) requirements in particular cases. Any such authority is an exercise of the agency’s ongoing interpretive authority with respect to the laws it administers, not an exercise of mere enforcement discretion, and case-specific waivers of this sort do not present the same issues as an across the board suspension of a previously promulgated regulation or regulatory requirement. For questions presented by this type of waiver, see generally Jim Rossi, *Waivers, Flexibility, and Reviewability*, 72 CHICAGO-KENT L. REV. 1359 (1997).

⁹⁹ See Nicholas Bagley, *Knock It Off, Idaho. (But Carry On, Idaho.)*, TAKE CARE BLOG (Mar. 9, 2018), <https://takecareblog.com/blog/knock-it-off-idaho-but-carry-on-idaho>; Nicholas Bagley, *Idaho Is Ignoring Obamacare Rules. That Could Set Off a Catastrophic Chain Reaction.*, VOX (Feb. 24, 2018), <https://www.vox.com/the-big-idea/2018/2/22/17040016/idaho-obamacare-ignore-rules-health-care-red-state-revolt>.

¹⁰⁰ Gregory Korte & Fredreka Schouten, *Trump’s Religious Freedom Order Doesn’t Change Law on Political Activity*, USA TODAY (May 5, 2017), <https://www.usatoday.com/story/news/politics/2017/05/04/president-trumps-religious->

“totally destroy” the Johnson Amendment.¹⁰¹ Yet the executive order supposedly effectuating these promises did nothing of the kind. Instead, it simply directed the Treasury Secretary to “ensure” that religious groups were not penalized in circumstances “where speech of similar character has, consistent with law, not ordinarily been treated as participation or intervention in a political campaign on behalf of (or in opposition to) a candidate for public office by the Department of the Treasury.”¹⁰²

More generally, in keeping with these examples, nonenforcement was something of a dog that didn’t bark in the Trump years. Apart from the examples discussed earlier, and despite rampant lawlessness in other areas, the administration generally did not make widespread use of overt nonenforcement policies to shape the law on the ground, even though doing so could have provided a means of limiting any number of laws that, like the ACA and the Johnson Amendment, the administration disfavored.

What might explain this pattern? As these examples illustrate, nonenforcement is hardly an inherently progressive authority. If anything, in the past it was employed more aggressively by deregulatory Republican administrations than by progressive Democratic ones.¹⁰³ Nor is pressure for restraint likely to have come from Trump himself. Despite his law-and-order rhetoric, Trump’s personal commitment to the rule of law appears highly situational. As just one illustration, at a 2017 meeting with Native American tribal leaders regarding regulatory barriers to resource extraction on native lands, President Trump reportedly stated, “But now it’s me. The government’s different now. Obama’s gone; and we’re doing things differently here. . . . So what I’m saying is, just do it.”¹⁰⁴ Still more emphatically, Trump reportedly went on: “Chief, chief, . . . what are they going to do? Once you get it out of the ground are they going to make you put it back in there? I mean, once it’s out of the ground it can’t go back in there. You’ve just got to do it. I’m telling you, chief, you’ve just got to do it.”¹⁰⁵ A president who so blithely advised regulated parties to circumvent regulatory burdens by ignoring them seems unlikely to have personally opposed employing nonenforcement policies to relax politically inconvenient

order-could-unleash-political-money/101289500/.

¹⁰¹ *Id.*

¹⁰² Exec. Order No. 13,798 § 2 (May 4, 2017).

¹⁰³ See Price, *supra* note __, at 1120 (“Newcomers to separation-of-powers controversy might be surprised that in other recent administrations the two political parties’ positions on this very issue were reversed.”).

¹⁰⁴ Jonathan Swan, *The Unfiltered Version of Trump’s Meeting with Native American Leaders*, AXIOS (Nov. 6, 2017), <https://www.axios.com/the-unfiltered-version-of-trumps-meeting-with-native-american-leaders-1513306700-7702b071-1143-4f14-b2ef-9282ba23c2f2.html>.

¹⁰⁵ *Id.*

laws.

It is more plausible that key administration lawyers did hold such personal opposition to categorical nonenforcement, in part because of principled opposition to the Obama Administration's earlier examples. In a series of speeches in 2017 and 2018, then Deputy Attorney General Rod Rosenstein repeatedly emphasized the rule of law, which he characterized as "the principle that the law must be enforced fairly, and the government must follow neutral principles," even though "[w]hen you follow the rule of law, it does not mean that you will always be happy about the outcome. To the contrary, you know for sure that you are following the rule of law when you are not always happy with the outcome."¹⁰⁶ Later, Attorney General William Barr vehemently criticized progressive prosecutors, whom he faulted for "undercutting the police, letting criminals off the hook, and refusing to enforce the law."¹⁰⁷

The administration, moreover, had rescinded DACA based in part on a professed judgment that the program was unlawful,¹⁰⁸ and throughout most of President Trump's four years in office, the administration was defending this rescission against legal challenges asserting that its reasons for repealing the program were inadequate.¹⁰⁹ Even apart from any principled commitment to a limited view of enforcement discretion, this litigation posture may have discouraged policies that would have appeared to contradict the administration's justification for rescinding the Obama immigration policy. Finally, it is possible that the OLC opinion upholding DAPA but casting doubt on categorical nonenforcement policies in general had some restraining effect, although in 2020 the administration ended up revoking that opinion.¹¹⁰ In any event, if any of these speculations are correct, then negative polarization away from Obama-era precedents may, ironically, have helped ensure legal compliance in the succeeding, very different administration.

Whatever the causes, and despite dramatically reducing enforcement rates with respect to disfavored federal laws, the Trump Administration generally did not codify its enforcement policies in overt nonenforcement assurances of the sort the Obama Administration employed with respect to marijuana, immigration, and the ACA. Its actions thus stood a chance of

¹⁰⁶ Rod J. Rosenstein, *Remarks at the Ninth Annual Judge Thomas A. Flannery Lecture on the Administration of Justice* (Nov. 1, 2017).

¹⁰⁷ William P. Barr, Att'y Gen., U.S. Dep't of Just., *Remarks at the Grand Lodge Fraternal Order of Police's 64th National Biennial Conference* (Aug. 12, 2019), <https://www.justice.gov/opa/speech/attorney-general-william-p-barr-delivers-remarks-grand-lodge-fraternal-order-polices-64th>.

¹⁰⁸ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1903 (2020) ("*UC Regents*").

¹⁰⁹ *See id.*

¹¹⁰ *See Authority to Prioritize*, 38 O.L.C. at 39 n.* (editor's note describing revocation).

arresting nonenforcement's development into a bipartisan executive tool, maintaining instead a comparatively limited understanding of federal enforcement discretion. Other developments, however, including a confused Supreme Court decision and renewed scholarly advocacy of broader presidential authority, have pushed towards maintaining the broader understanding reflected in the Obama Administration's policies.

D. Trump-Era Case Law and Scholarship

In combination with the Trump Administration's overall failure to build on Obama-era precedents, court decisions rejecting both DAPA and Trump administration environmental policies appeared to recognize and enforce appropriate limits on federal enforcement discretion as a policy tool. Late in the Trump Administration, however, the Supreme Court's 2020 decision in *Department of Homeland Security v. Regents of the University of California* (*UC Regents*) threw this understanding into doubt. At the same time, important new scholarship has offered renewed arguments for aggressive use of enforcement policy to reshape operative laws.

In *UC Regents*, the Court rejected the Trump Administration's effort to repeal DACA. Assessing whether the repeal was "arbitrary and capricious" in violation of the Administrative Procedure Act, the Court concluded that DACA's rescission was unlawful because the administration inadequately explained the reasons for its action. In particular, despite recognizing that the Secretary of Homeland Security was bound by an earlier determination by the Attorney General that DACA was unlawful,¹¹¹ the Court faulted the Secretary for failing to consider that she might have cancelled certain legal benefits associated with deferred action without terminating the policy's "forbearance component," meaning its promise that beneficiaries would not be deported.¹¹²

In addition, as a second and apparently independent defect in the agency's decision-making, the Court majority faulted the Secretary for inadequately considering the reliance interests of DACA beneficiaries. Instead of the terse statement it issued upon initially rescinding DACA, the secretary should have "asses[ed] whether there were reliance interests, determine[d] whether they were significant, and weigh[ed] any such interests against competing policy concerns."¹¹³ In fact, in response to a district court's demand for more complete explanation, the Secretary later made clear that she considered it "critically important for [the government] to project a message that leaves no doubt regarding the clear, consistent, transparent enforcement of the

¹¹¹ *UC Regents* (slip op. at 19).

¹¹² *Id.* (slip op. at 19-20).

¹¹³ *Id.* (slip op. at 26).

immigration laws against all classes and categories of aliens.” Yet the Court disregarded this statement as a “post hoc rationalization” that could not justify the policy under arbitrariness review.¹¹⁴

The Court’s reasoning in *UC Regents* was narrow to the point of incoherence and seemed calculated to limit the decision’s precedential implications.¹¹⁵ Nevertheless, key elements of the Court’s reasoning in *UC Regents* could encourage future aggressive nonenforcement policies like DACA. To begin with, by distinguishing between DACA’s affirmative benefits and its “forbearance component,” the Court appeared to validate employing “forbearance” in the unusually determinate and prospective manner that characterized DACA. The Secretary could have issued a policy, akin to the Obama Administration’s marijuana guidance, that assigned low priority to enforcing immigration laws against sympathetic and otherwise law-abiding immigrants of the sort benefitted by DACA; indeed, the department did just that before settling on the DACA policy. Yet DACA differed from such a policy precisely in that it entailed handing out prospective individualized assurances of nonenforcement to a large category of deportable immigrants. This further step—effectively a move from option four to option six in my typology in Part I—requires affirmative statutory authorization; it is not lawful simply by virtue of executive officials’ enforcement discretion. Yet, despite professing not to rule on DACA’s ultimate legality, the *UC Regents* majority implied that even such determinate promises of nonenforcement are mere garden-variety exercises of executive “forbearance.”

What is more, by applying an exacting form of arbitrariness review to DACA’s repeal, the Court encouraged further use of nonenforcement policies—even potentially unlawful ones. After all, the central constraint on abuse of nonenforcement policies is their revocability: executive officials may hesitate to invite unlawful conduct with permissive enforcement policies if they know their successors in office may rescind those policies and prosecute those who relied on them.¹¹⁶ Imposing any significant burden of explanation for repealing a nonenforcement policy thus weakens the central

¹¹⁴ *Id.* (slip op. at 14-15). This aspect of the decision also casts doubt on the previously accepted practice of remanding flawed agency decisions without vacating them. See Christopher J. Walker, *What the DACA Rescission Case Means for Administrative Law: A New Frontier for Chenery I’s Ordinary Remand Rule?*, NOTICE & COMMENT BLOG (June 19, 2020), <https://www.yalejreg.com/nc/what-the-daca-rescission-case-means-for-administrative-law-a-new-frontier-for-chenery-is-ordinary-remand-rule/>.

¹¹⁵ For my critique of the opinion’s internal contradictions, see Zachary S. Price, *DACA and the Need for Symmetrical Principles*, SCOTUSBLOG (June 19, 2020), <https://www.scotusblog.com/2020/06/symposium-daca-and-the-need-for-symmetrical-legal-principles/>.

¹¹⁶ Price, *supra* note __.

constraint on adopting such policies in the first place. This problem is particularly severe if the past policy was in fact unlawful, as I argued was true of DACA (and as Justice Thomas argued in his *UC Regents* dissent).¹¹⁷ Rigorously reviewing an agency's reasons for cancelling an unlawful program risks freezing such programs in place instead of facilitating restoration of law-bound governance.

Even accepting some arbitrariness review, moreover, the Court compounded this problem by faulting the agency specifically for insufficient consideration of reliance interests. To the extent it was lawful, DACA was justified as an exercise of agency enforcement discretion; DHS characterized the policy as an exercise of "prosecutorial discretion" and argued that past programmatic grants of deferred action, though much more limited in scope and addressed to more particularized circumstances, afforded precedents for the larger DACA program. If DACA was simply a valid exercise of enforcement discretion, however, then a necessary consequence of this theory of authority is that the DACA grants were also revocable, as indeed the agency repeatedly stated they were. Again, then, understanding hard look review to protect reliance in this context risks weakening a central constraint on adopting permissive forbearance policies in the first place.

In sum, multiple aspects of the Court's reasoning in *UC Regents* could encourage further use of nonenforcement policies, even determinate and prospective ones like DACA, to reshape statutory obligations for regulated parties. Earlier, by affirming the Fifth Circuit's invalidation of DAPA by an equally divided vote, the Court seemed to recognize (or at least leave in place) the legal limits on such policies that lower courts recognized in cases like *Clean Air Council* and *NRDC v. NHTSA*. *UC Regents*, however, has now cast doubt on those limits, potentially encouraging executive policies that invite reliance on promised nonenforcement, as the Obama Administration did in DACA. What is more, in a recent ruling, the Court cited *UC Regents* in upholding a lower-court ruling that froze another administrative policy in place, thus perhaps signaling that it may give *UC Regents* broad effect.¹¹⁸

The best argument in the *UC Regents*'s favor may be that requiring clear articulation of interests negatively affected by a policy change promotes democratic accountability by requiring the agency to acknowledge and accept its new policy's costs.¹¹⁹ Yet here, at least in its second policy statement

¹¹⁷ *UC Regents*, 591 U.S. __ (2020) (Thomas, J., concurring in part and dissenting in part).

¹¹⁸ *Biden v. Texas*, No. 21A21, 2021 WL 3732667, at *1 (U.S. Aug. 24, 2021). For my analysis of this ruling and its connection to *UC Regents*, see Zachary Price, *Paying the Piper in the Remain-in-Mexico Case*, NOTICE & COMMENT BLOG (Sept. 1, 2021), <https://www.yalejreg.com/nc/paying-the-piper-in-the-remain-in-mexico-case-by-zachary-price/>.

¹¹⁹ For an extended defense of exercising judicial review to achieve this effect, see

(which the Court majority conveniently disregarded), the agency did in fact take responsibility for the rescission’s harsh effects by deeming it “critically important for [the government] to project a message that leaves no doubt regarding the clear, consistent, transparent enforcement of the immigration laws against all classes and categories of aliens.” In context, such generalized acknowledgement of policy tradeoffs should be enough; requiring greater specificity only invites an indeterminate and inevitably subjective assessment of how much detail suffices. In the enforcement context, furthermore, any benefit to democratic accountability in requiring such a statement is more than offset by the loss to statutory primacy and law-bound governance in impairing agencies’ authority to reverse permissive policies.¹²⁰

While the Court has thus muddied the waters surrounding enforcement discretion’s legal limits, some prominent scholarship has advanced new arguments for executive unilateralism. In particular, in their impressive book *The President and Immigration Law*, Adam Cox and Cristina Rodriguez have embraced DACA not only as an appropriate response to current immigration dilemmas, but also as a normative model for the future operation of separation of powers in our divided republic.¹²¹ Cox and Rodriguez argue that in immigration, and perhaps in other areas as well, the President has not functioned as a “faithful agent” of Congress’s statutory directives and policy aims, but instead as a “co-principal” who has actively shaped the operative law, at times even defying Congress’s apparent wishes to do so.¹²² Cox and Rodriguez further argue that by enacting broad and punitive immigration laws while consistently providing inadequate resources for their enforcement, Congress has accomplished a “de facto delegation” of lawmaking power to the executive, effectively enabling presidents to determine the contours of the immigration population through enforcement choices rather than formal law.¹²³ On both these grounds, Cox and Rodriguez embrace DACA and DAPA as model policies: through these programmatic exercises of enforcement discretion, President Obama not only exercised a form of

Benjamin Eidelson, *Reasoned Explanation and Political Accountability in the Roberts Court*, YALE L.J. (forthcoming 2021).

¹²⁰ William Buzbee has instead analyzed the DACA rescission as an example of what he calls “agency statutory abnegation,” meaning an attempt to undo past regulatory action by claiming the past action was undertaken without proper legal authority. William W. Buzbee, *Agency Statutory Abnegation in the Deregulatory Playbook*, 68 DUKE L.J. 1509 (2019). DACA differs from other examples of this phenomenon, however, in that the government’s past action was based solely on a theory of enforcement discretion, not any exercise of delegated interpretive authority that courts would have reviewed deferentially.

¹²¹ ADAM B. COX & CRISTINA M. RODRIGUEZ, *THE PRESIDENT & IMMIGRATION LAW* (2020).

¹²² *Id.*

¹²³ *Id.*; see also Shane, *supra* note __ (arguing that the scope of federal prosecutorial discretion in any given area is a question of statutory law).

delegated power, but also acted as Congress’s co-principal, reshaping the law on the ground in ways that shifted immigration debates in Congress and beyond.¹²⁴

These twin rationales for Obama’s immigration nonenforcement policies—de facto delegation and the “co-principals” theory—seem somewhat in tension and may carry different implications. If Congress intended to enable determinate, prospective nonenforcement, then DACA and DAPA faithfully discharged congressional policy. On the other hand, if, as seems more accurate, these programs reflected a bold effort to reshape immigration law through unilateral executive action, then it is harder to see them as valid exercises of delegated power, de facto or otherwise. In any event, Cox and Rodriguez’s theory that Presidents have often acted as co-principals with Congress rather than mere faithful agents seems descriptively compelling. Not only in immigration, but also in other areas, unilateral presidential initiatives have often shaped future legal understandings, establishing precedents that enable statutory or constitutional limits to be bent or broken going forward.

Nevertheless, deriving an “ought” from an “is” here is unconvincing. It may be inevitable, and perhaps sometimes desirable, that presidents will push legal boundaries to achieve key policy goals or gratify important constituencies. But the constitutional separation of powers should limit this presidential impulse, not encourage it. For that reason, arguments from past practice have normally sought limiting principles to cabin past examples and preserve important restraints; they have not characterized past presidential norm-breaking as itself normative.¹²⁵ With respect to enforcement discretion, DACA’s and DAPA’s novelty—their programmatic suspension of immigration laws on a far larger scale than past deferred-action programs—should thus have counted against them; the policies were unlawful precisely because they employed enforcement discretion in a manner at odds with both the formal constitutional structure and the bulk of past practice.¹²⁶

Cox and Rodriguez’s contrary argument effectively goes up a level of generality in evaluating historic practice, making the ongoing inter-branch

¹²⁴ COX & RODRÍGUEZ, *supra* note __.

¹²⁵ On the strength of practice arguments in constitutional interpretation, see, e.g., Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097 (2013).

¹²⁶ For elaborations of this argument, see, e.g., Price, *supra* note __, at 759-61; Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POLICY 213 (2015); Peter Margulies, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers* 94 B.U. L. REV. 105 (2014). For the competing argument, see, e.g., COX & RODRÍGUEZ, *supra* note __; Shoba Sivaprasad Wadhia, *Response: In Defense of DACA, Deferred Action, and the DREAM Act*, 91 TEX. L. REV. SEE ALSO 59 (2013).

tug-of-war itself, rather than the limits reflected in past practice, the proper reference point in evaluating disputes. But that outlook will normally favor the executive, which can always point to its status as “co-principal” as grounds for stretching or defying statutory limits. Furthermore, although in this instance the Obama Administration’s actions circumvented an apparent political logjam in Congress to achieve a popular policy goal, other presidents could just as easily employ unilateral powers to satisfy special interests or advance more parochial policy goals. Encouraging such executive adventurism thus seems at odds not only with the formal constitutional structure, which obligates the President to ensure faithful execution of Congress’s enactments, but also with the U.S. Constitution’s implicit premise that Congress, with its broad and varied constituency and capacity for logrolling and compromise, has superior legitimacy in effecting major policy changes.¹²⁷

All that said, the key point here is not so much to critique the merits of Cox and Rodriguez’s theory or other recent defenses of nonenforcement, but rather to highlight the post-DACA development of a more robust intellectual infrastructure to legitimate future initiatives. As things now stand, between DACA itself, the Supreme Court’s protection of DACA against repeal, and the new scholarship defending and elaborating the policy’s conceptual underpinnings, presidents today would have considerable resources to draw from in seeking to mitigate federal laws’ impact through overt and deliberate nonenforcement policies. Indeed, at the very start of his administration, President Biden directed the Department of Homeland Security to preserve and “fortify” DACA, though renewed litigation challenging DACA has led, as of this writing, to an injunction against accepting new applicants and appeals could potentially lead to a new Supreme Court decision regarding the program’s validity.¹²⁸ To the extent both DACA and federal marijuana nonenforcement to continue, they could stand as precedents for similarly bold executive action in other areas.

On the other hand, the immigration and marijuana examples might also be considered *sui generis*. After all, court decisions like *Clean Air Council* and *NRDC v. NHTSA*, negative scholarship and commentary, and even OLC’s DAPA opinion have cast doubt on the validity of categorical federal nonenforcement policies, particularly when they assume the unusually determinate and prospective character of deferred action. Federal practice might then stand at a crossroads, with two alternative paths open. The Biden Administration might attempt broad use of nonenforcement, building on

¹²⁷ For a discussion of Congress’s role in legitimating major legal changes over the course of American history, see DAVID R. MAYHEW, *THE IMPRINT OF CONGRESS* (2017).

¹²⁸ *Texas v. United States*, No. 1:18-CV-00068, 2021 WL 3025857 (S.D. Tex. July 16, 2021).

Obama Administration examples, or it might simply leave DACA and marijuana nonenforcement lingering as isolated outliers. Likewise, courts might employ *UC Regents* expansively, as the Supreme Court seems to have recently encouraged, or instead recognize it as a case-specific ruling with limited general significance. To further compound the uncertainty, however, debates over federal policy have since gotten entangled with debates over state and local prosecutorial discretion and nonenforcement—debates that, if anything, have become a greater focus of attention in the past few years.

III. THE LAW AND PRACTICE OF STATE AND LOCAL PROSECUTORIAL DISCRETION (ALSO CIRCA 2021)

At the state and local level, much as in the federal context, prosecutorial discretion has recently emerged as a political flashpoint. As one aspect of a broader reform movement, a number of self-styled “progressive prosecutors” at the local level have employed categorical nonenforcement to adjust the effective scope of criminal laws. In doing so, these prosecutors have effectively embraced and extended the theory of enforcement discretion as a plenary executive power that also underlay the Obama Administration’s marijuana, immigration, and ACA nonenforcement policies. In less than a decade, we have thus seen the rapid ascent, at both federal and state and local levels, of a progressive conception of prosecutorial authority as entailing a de facto power to nullify laws applicable within the jurisdiction based on the perceived electoral mandate of elected officials with enforcement responsibility.

Yet theoretical justifications for this practice advanced at the federal level do not readily apply to local progressive prosecutors, nor are state laws regarding local prosecutorial authority uniform across the fifty states. After first describing the rise of local nonenforcement policies of this sort and discussing their potential connection to Obama Administration examples, this Part will address what state constitutions and laws in fact say about the scope of prosecutorial discretion and who ultimately exercises it.

A. From Tough on Crime Politics to Progressive Prosecution

Progressive prosecutors have gained traction within a particular political context, one that may also have influenced the Obama Administration’s policies. For decades if not longer, an electoral preference for “tough on crime” measures appeared to be an iron law of American politics. Voters consistently favored severity over lenience and deterrence over mercy, producing what William Stuntz famously called the “pathological politics of

criminal law.”¹²⁹ Many scholars credited these political incentives with generating, or at least powerfully reinforcing, the overbreadth and severity of federal and state criminal law discussed earlier. While legislators could curry favor with a tough-on-crime electorate by enacting harsh and punitive laws, they could count on prosecutors to exercise discretion to mitigate those laws in practical operation, thus sparing legislators full accountability for their enactments.¹³⁰ Prosecutorial discretion thus apparently fueled a self-reinforcing cycle: discretionary enforcement enabled enactment and perpetuation of broad and harsh laws, while broad and harsh laws further expanded the degree of discretion exercised by prosecutors.

To a surprising degree, this pattern appears to have broken, or at least relaxed, in the past decade. Legislatures at both the state and federal levels have enacted reforms to reduce sentences and even release some prisoners.¹³¹ Administrative bodies like sentencing commissions have done likewise, and even some state electorates have adopted significant reforms. In California, for example, voters approved a ballot measure downgrading felony offenses for drug possession and theft of up to \$950 in goods to misdemeanors.¹³² These changes appear to reflect significant shifts in public opinion: recent polls have shown significant public support for reforms including reductions in punishment and increased accountability for law enforcement abuses.¹³³ These trends may or may not prove durable; a backlash is certainly possible and in some places rising crime rates have already caused reformers to lose steam. Yet some evidence suggests that softened attitudes toward crime could persist. Rebecca Goldstein, for instance, predicts based on differing attitudes toward crime in different age cohorts that “electoral input into criminal-justice policy is likely to produce reforms in the future, as the current cohort of young voters slowly replaces the current cohort of older voters.”¹³⁴

¹²⁹ William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001); see also Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583 (2005).

¹³⁰ *Id.*

¹³¹ See, e.g., First Step Act of 2018, PUB. L. NO. 115-391, 132 STAT. 3194.

¹³² Proposition 47: The Safe Neighborhoods and Schools Act, <https://www.courts.ca.gov/prop47.htm>.

¹³³ See, e.g., Daniel Gotoff & Celinda Lake, *Voters Want Criminal Justice Reform. Are Politicians Listening?*, MARSHALL PROJECT (Nov. 13, 2018), <https://www.themarshallproject.org/2018/11/13/voters-want-criminal-justice-reform-are-politicians-listening>; PEW RESEARCH CTR., *America’s Changing Drug Policy Landscape* (Apr. 2, 2014), <https://www.pewresearch.org/wp-content/uploads/sites/4/legacy-pdf/04-02-14-Drug-Policy-Release.pdf>.

¹³⁴ Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446 (2019). For discussion of how budget pressures during the post-2008 financial crisis helped stimulate criminal-justice reform as a cost-saving measure, see HADAR AVIRAM, CHEAP ON CRIME:

Whatever its causes and likely durability, one key manifestation of this softening in public attitudes has been the rise of the self-styled “progressive” prosecutors mentioned earlier. In a number of jurisdictions, ranging from Philadelphia, New York, and San Francisco to Caddo Parish, Louisiana and Nueces County, Texas, prosecutors have won election with campaigns that broke, to varying degrees, with the conventional tough-on-crime playbook.¹³⁵ Among other things, many have promised greater accountability for police abuses, greater attention to racial biases and disparities, less punitive approaches to certain offenses, less reflexive harshness in sentencing recommendations, and retrospective review of potentially flawed convictions.¹³⁶

In addition, some, but not all, of these prosecutors have embraced nonenforcement as a policy tool. Brooklyn District Attorney Kenneth Thompson, for example, adopted a policy in 2014 that low-level marijuana possession would no longer be prosecuted (at least outside of exceptional circumstances).¹³⁷ Philadelphia District Attorney Larry Krasner adopted a policy in 2018 of declining, outside of “exceptional circumstances,” any charges for marijuana possession or prostitution, while generally diverting certain other offenses, including marijuana distribution and possession of a firearm without a permit, to non-criminal resolution.¹³⁸ Before taking office in January 2019, Boston-area district attorney Rachael Rollins campaigned on a promise to generally decline criminal charges for thirteen crimes, including shoplifting, larceny below \$250, drug possession, and receipt of stolen property.¹³⁹ San Francisco district attorney Chesa Boudin announced in 2020 that his office generally would neither seek gang-related and “three

RECESSION-ERA POLITICS AND THE TRANSFORMATION OF AMERICAN PUNISHMENT (2015); see also Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581 (2012) (identifying a durable cost-saving approach of “rehabilitation pragmatism”).

¹³⁵ For accounts of these elections, see, e.g., Sklansky, *supra* note __; Davis, *supra* note __; BAZELON, *supra* note __. For discussion of the complex interplay of democratic and bureaucratic forces shaping current reform efforts, see Ouziel, *supra* note __.

¹³⁶ See, e.g., Sklansky, *supra* note __.

¹³⁷ *Id.* at 652.

¹³⁸ *New Policies Announced Feb. 15, 2018*, <https://www.documentcloud.org/documents/4415817-Philadelphia-DA-Larry-Krasner-s-Revolutionary-Memo.html#document/p1>; Jennifer Gonerman, *Larry Krasner’s Campaign To End Mass Incarceration*, NEW YORKER (Oct. 22, 2018).

¹³⁹ Rachael Rollins, *Charges To Be Declined*, <https://rollins4da.com/policy/charges-to-be-declined/>. In office, Rollins adopted a policy based on this pledge that established strong presumptions of non-prosecution for these offenses, but provided greater detail about circumstances in which prosecution could be warranted. *The Rachael Rollins Policy Memo*, Suffolk County District Attorney’s Office, appendix C (Mar. 2019), <http://files.suffolkdistrictattorney.com/The-Rachael-Rollins-Policy-Memo.pdf>.

strikes” sentencing enhancements nor charge offenses based on drug evidence observed in pretextual “infraction-related” traffic stops.¹⁴⁰ During his campaign, he pledged not to prosecute “quality of life” crimes “such as public camping, offering or soliciting sex, public urination, [and] blocking a sidewalk.”¹⁴¹ In Austin, Texas, the district attorney elected in November 2020 campaigned on forbearing from prosecution of possession or sale of any controlled substance in small amounts,¹⁴² and the district attorney in Dallas announced in 2019 that he would not prosecute certain thefts and marijuana offenses.¹⁴³ In 2021, the prosecutor’s office in Washtenaw County, Michigan (the jurisdiction including Ann Arbor) announced it would no longer prosecute offenses relating to consensual sex work.¹⁴⁴

In effect, local nonenforcement policies like these employ at the state and local level the same conception of enforcement discretion embodied in the Obama Administration’s marijuana, ACA, and immigration initiatives. Just as the Obama Administration claimed authority to prospectively decline enforcement with respect to broad categories of offenses, these district attorneys have claimed power to publicly disclaim any application of specified laws within their jurisdictions.

Were these separate developments at the federal and state and local levels related? Although establishing causation is difficult, and both developments might well have a common origin rather than a causal relationship, it seems at least possible that high-profile federal examples helped catalyze this new approach at the state and local level. For one thing, the timing is at least suggestive. Commentators have often described Thompson’s 2013 election as the Brooklyn District Attorney based on campaign promises to moderate

¹⁴⁰ Evan Sernoffsky, *DA Chesa Boudin Sets New Policies on SF Police Stops, Gang Enhancements, Three Strikes*, SF CHRONICLE (Feb. 27, 2020), <https://www.sfchronicle.com/crime/article/San-Francisco-DA-Chesa-Boudin-sets-new-policies-15091160.php>; Press Release, San Francisco District Attorney, *District Attorney Boudin Pioneers First In the Nation Policy Directives* (Feb. 27, 2020), <https://www.sfdistrictattorney.org/press-release/da-boudin-pioneers-first-in-nation-policy-directives/>.

¹⁴¹ Phil Matier, *What’s the Answer to Quality-of-Life Crimes in SF. DA Candidates Give Answers* (Oct. 26, 2019), <https://www.sfchronicle.com/local-politics/article/What-s-the-answer-to-quality-of-life-crimes-in-14563426.php>.

¹⁴² Michael Barajas, *José Garza Redefines ‘Progressive Prosecutor’*, TEXAS OBSERVER (Nov. 2, 2020), <https://www.texasobserver.org/jose-garza-redefines-progressive-prosecutor/>.

¹⁴³ Catherine Marfan, *Texas Prosecutors Want To Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren’t Happy.*, TEXAS TRIBUNE (May 21, 2019), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/>.

¹⁴⁴ Washtenaw County, Office of the Prosecuting Attorney, *Policy Directive 2021-08: Policy Regarding Sex Work* (Jan. 14, 2021), <https://www.washtenaw.org/DocumentCenter/View/19157/Sex-Work-Policy>.

criminal enforcement and improve law enforcement accountability as the signal event that precipitated a national wave of progressive victories.¹⁴⁵ But Thompson’s July 2014 marijuana policy followed DACA by two years and the Obama Administration’s most expansive marijuana nonenforcement policy by roughly eleven months. In a suggestive echo of federal policies, furthermore, Thompson’s main nonenforcement policy was a promise not to prosecute low-level marijuana possession offenses, though admittedly a handful of local marijuana diversion programs preceded both Thompson’s and Obama’s initiatives.¹⁴⁶ (Other progressive aspects of Thompson’s program included more actively prosecuting police crimes, reviewing convictions for integrity, clearing old open warrants, and establishing a special court for young offenders.¹⁴⁷) Prosecutors with more expansive nonenforcement agendas came still later: Krasner in 2018 and Boudin in 2020, for example.

In a further potential connection, former Department of Homeland Security Secretary Janet Napolitano—a key architect of the DACA policy—suggested a connection between DACA and progressive prosecutorial reforms in a 2015 essay.¹⁴⁸ Contributing to a volume titled *Solutions: American Leaders Speak on Criminal Justice*, Napolitano defended DACA as a valid “exercise of prosecutorial discretion on the largest of scales.”¹⁴⁹ Though she stopped short of endorsing any particular criminal justice reform, she emphasized that “prosecutorial discretion is as fundamental a principle and practice to criminal justice, writ large, as it is to immigration enforcement.”¹⁵⁰ She wrote: “[A]s we contemplate reforms of our nation’s criminal justice system, we must remember to preserve those elements, like prosecutorial discretion, that are essential to our eternal quest for balance and fairness in the service of justice and freedom.”¹⁵¹ As legal scholar Jonathan Simon recognized in a 2017 essay of his own, Napolitano was pointing to DACA’s example of “transparency combined with broad categorical

¹⁴⁵ See, e.g., Sklansky, *supra* note __, at 647.

¹⁴⁶ For discussion of marijuana diversion or non-prosecution policies adopted in Philadelphia and Seattle in 2010, see Luna, *supra* note __, at 802-03. In another pre-2012 example of nonenforcement, a sheriff in Illinois announced that he would not enforce foreclosure evictions during the 2008 financial crisis. See Kevin S. Marshall, *Free Enterprise and the Rule of Law: The Political Economy of Executive Discretion (Efficiency Implications of Regulatory Enforcement Strategies)*, 1 WM. & MARY BUS. L. REV. 235, 242-43 (2010).

¹⁴⁷ Sklansky, *supra* note __, at 651-54.

¹⁴⁸ Hon. Janet Napolitano, *Prosecutorial Prioritization*, in *SOLUTIONS: AMERICAN LEADERS SPEAK OUT ON CRIMINAL JUSTICE* (INIMAI CHETTIAR AND MICHAEL WALDMAN, EDS., 2015).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 78.

¹⁵¹ *Id.*

exercises of discretion” as “a possible model” for criminal justice reform.¹⁵² Though Simon in 2017 saw “little evidence that this model [was] being taken up by local elected prosecutors or state Attorney Generals,”¹⁵³ such examples have accumulated rapidly in the years since.

In short, it seems plausible, if not clearly demonstrable, that salient federal examples, not to mention the high-profile and highly partisan debates that surrounded those examples, shaped perceptions of the prosecutorial role among both candidates and voters in progressive-dominated urban Democratic strongholds, enabling campaigns advocating nonenforcement to succeed where earlier they might have failed.

Of course, there were other factors at work too. Shifts in public opinion discussed earlier paved the way for these electoral developments, and increased attention, particularly in progressive circles, on police violence and racial disparities in criminal justice made urban electorates receptive to a political message of prosecutorial leniency toward private citizens and increased toughness towards police abuse. Furthermore, progressive advocacy groups, candidates, and district attorneys have coordinated with each other, actively sharing ideas and resources.¹⁵⁴ In particular, against the backdrop of protests over police violence in 2015 and 2016, the Obama White House apparently helped coordinate reform efforts and the President himself reportedly expressed support for a focus on prosecutor elections in at least one private meeting.¹⁵⁵ These coordination efforts, rather than the federal precedents per se, may have more precipitated the rise of local nonenforcement. In addition, as David Sklansky has observed, each election in the apparent wave of progressive victories involved particular dynamics unique to the particular local jurisdiction, making generalization about future trends difficult.¹⁵⁶ For all these reasons, the relatively quick succession from high-profile federal nonenforcement policies to local progressive nonenforcement may be a story of correlation rather than causation: both might have shared a common cause in underlying political trends rather than the one prompting the other.

Nevertheless, the timing of progressives’ embrace of local nonenforcement is striking. Academic commentary had long proposed more deliberate and transparent use of prosecutorial discretion to mitigate criminal law’s harshness and overbreadth,¹⁵⁷ yet before 2012 this theory gained

¹⁵² Jonathan Simon, *Beyond Tough on Crime: Towards a Better Politics of Prosecution*, in *PROSECUTORS AND DEMOCRACY: A CROSS-NATIONAL STUDY* 250, 263 (MAXIMO LANGER & DAVID ALAN SKLANSKY, EDs., 2017).

¹⁵³ *Id.* at 264.

¹⁵⁴ BAZELON, *supra* note ___, at 77-88.

¹⁵⁵ *Id.* at 77-78.

¹⁵⁶ Sklansky, *supra* note ___, at 667-68.

¹⁵⁷ *See supra* ___.

essentially no practical traction, whereas since then its use has snowballed in jurisdictions across the country.¹⁵⁸ It seems at least possible, therefore, that high-profile application of this theory at the federal level was the watershed event that shifted the permission structure surrounding prosecutorial behavior, making what had previously been unthinkable into something plausible and even attractive, given its association in progressive-dominated jurisdictions with an admired presidential administration. At the very least, enthusiasm for prosecutorial discretion as a policy tool seems to have risen in tandem in progressive circles at the federal and local levels within a very short space of time. At the same time, conservative opposition seems to have arisen mainly in opposition to progressive use of nonenforcement, as evident in the Trump Administration’s relative restraint, even though nonenforcement could also be put to conservative use on matters ranging from gun restrictions and pollution controls to pandemic restraints and civil rights violations.¹⁵⁹

In any event, the key question now is whether local nonenforcement of the sort practiced by some progressive prosecutors is lawful. This question ultimately cannot be answered through abstract analysis or by reference to federal examples—examples that may themselves be unlawful for reasons discussed earlier. Instead, it requires attention to the applicable laws and constitutional arrangements of the fifty states.

B. Fifty States, Fifty (Potential) Conceptions of Enforcement Discretion

Although the rise of progressive prosecutors has prompted wide-ranging debate and commentary, most public discussion has been remarkably disconnected from the actual positive law governing prosecutorial authority

¹⁵⁸ Simon, *supra* note __, at 263-64 (characterizing “transparency about prosecution priorities” as “an objective with a long history of academic advocacy”).

¹⁵⁹ For some examples of conservative noneoforcement, see Wright, *supra* note __, at 832-33 (discussing Tennessee prosecutor who announced in 2018 that he would not prosecute domestic-violence offenses involving same-sex couples). In addition, local officials in an increasing number of jurisdictions have announced their refusal to enforce certain gun-control laws. *See, e.g.*, Bethany Blankley, *Report: 61 Percent of U.S. Counties Now ‘Second Amendment Sanctuaries’*, HIGHLAND COUNTY PRESS (July 5, 2021) <https://highlandcountypress.com/Content/In-The-News/In-The-News/Article/Report-61-percent-of-U-S-counties-now-Second-Amendment-sanctuaries-/2/20/69827>; David Gutman, *Washington Voters Said Yes to Tough New Gun Law; At Least 13 County Sheriffs Say No to Enforcing It*, SEATTLE TIMES (Feb. 10, 2019) <https://www.seattletimes.com/seattle-news/politics/voters-said-yes-to-tough-new-gun-law-at-least-12-county-sheriffs-say-they-wont-enforce-it/>. Local officials also refused to enforce state-wide mask mandates during the recent coronavirus pandemic. *See, e.g.*, Teo Armus, *‘Don’t Be a Sheep’: Sheriffs Rebel Against New Statewide Mask Requirements*, WASH. POST (June 26, 2020) <https://www.washingtonpost.com/nation/2020/06/26/sheriffs-mask-covid/>.

in different localities. All fifty states employ some form of separation of powers in their constitutions, and all fifty states participate in the United States's common legal culture, which tends to produce convergence in institutional understandings across jurisdictions. As we have seen, moreover, certain national trends with respect to crime and criminal justice have shaped the current understanding of prosecutors' role, and new trends in public opinion might well reshape it again. Nevertheless, there is no reason in principle why states could not adopt differing understandings of prosecutorial discretion, particularly with respect to local officials charged with enforcing state-wide laws. And in fact state constitutional arrangements do differ, both from each other and from the federal constitution, in ways that should properly inform resolution of this question.

Here, I will briefly canvas these state-level constitutional arrangements and how courts and other authoritative interpreters have understood them. As a prelude to this state-by-state overview, I begin in section 1 by contrasting the states with the federal government. Section 2 then compares the states to each other, canvassing key differences between states with respect to the degree of autonomy they afford local prosecutors, and thus the degree of plausibility to any claimed power on the part of those prosecutors to nullify state laws through categorical nonenforcement.

1. States Compared to the United States

a. General State-Federal Differences and Their History

All fifty state constitutions prescribe some version of separation of powers with distinct legislative, executive, and judicial branches. All but one, moreover, require the state's governor to ensure faithful execution of the laws, just as the U.S. Constitution does with respect to the U.S. President.¹⁶⁰ Without more, these parallels might suggest that equivalent limitations on nonenforcement should apply at the state and federal levels. Yet most state constitutions differ from the federal constitution in at least two ways that complicate any such inference.

First, many states provide for separate election of an Attorney General and other state-wide executive officials in addition to the Governor.¹⁶¹ Most states thus have "unbundled" executives, as one leading scholarly account puts it: their executive branches include multiple distinct offices with separate electoral mandates, offices that are sometimes even occupied

¹⁶⁰ Marshall, *supra* note __, at 239-40 & n.11 (collecting sources).

¹⁶¹ Neal Devins & Saikrishna Bangalore Prakash, *Fifty States, Fifty Attorneys General, and Fifty Approaches to the Duty to Defend*, 124 *YALE L.J.* 2100, 2104 & n.10 (2015).

simultaneously by political rivals.¹⁶² By contrast, although scholars debate the degree to which Congress may insulate federal executive officers from presidential direction, the federal executive branch is in principle “unitary”: the President alone holds an electoral mandate, and all executive officials are subject to some degree of presidential supervision, if not outright control.¹⁶³ Indeed, in that context, many understand the Take Care Clause itself to guarantee some degree of presidential control over other executive officials’ performance of their duties,¹⁶⁴ though some argue instead that Article II’s vesting of “the Executive Power” in the President guarantees presidential control of the executive branch.¹⁶⁵ State constitutions’ Take Care Clauses might afford equivalent ultimate authority over law enforcement to state governors; some state courts, at least, have so held.¹⁶⁶ But separate election of other state officials at least raises the question whether those officials are properly subject to gubernatorial control in performing their duties—a question that different states’ constitutional provisions, statutes, and court decisions might resolve differently.

Second, and even more importantly, all but five states provide further for separate election of local prosecutors, typically at the county level.¹⁶⁷ This feature of American criminal justice is unique in the world; no other country has elected local prosecutors.¹⁶⁸ What is more, no state had this structure at the time of the founding; all instead provided for appointed prosecutors (and often some degree of private prosecution), though who appointed prosecutors varied from state to state.¹⁶⁹ Provisions for locally elected prosecutors, along with elected judges in many cases, swept the nation in the mid-nineteenth century as a Jacksonian populist reform.¹⁷⁰ Mississippi led the way in 1832, with Ohio following close behind in 1833.¹⁷¹ More states followed in the 1840s and 1850s, until “[b]y the outbreak of the Civil War, twenty-five of thirty-four states had adopted elected prosecutors, and all but four would soon

¹⁶² See, e.g., Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385 (2008); William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446 (2006).

¹⁶³ For my own overview of schools of thought on this point, see Zachary S. Price, *Congress’s Power over Military Offices*, 99 TEX. L. REV. 491, 500-04 (2021).

¹⁶⁴ See, e.g., MCCONNELL, *supra* note ____.

¹⁶⁵ See, e.g., PRAKASH, *supra* note ____.

¹⁶⁶ See, e.g., *People ex rel. Deukmejian v. Brown*, 624 P.2d 1206 (Cal. 1981).

¹⁶⁷ Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 & n.3 (2012). As discussed below, the exceptions are Alaska, Connecticut, Delaware, New Jersey, and Rhode Island.

¹⁶⁸ *Id.* at 1530.

¹⁶⁹ *Id.* at 1536, 1537.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1540, 1543.

follow.”¹⁷² After the Civil War, every newly admitted state provided for elected prosecutors.¹⁷³ Accordingly, provisions in state constitutions obligating faithful execution on the part of governors or otherwise providing for gubernatorial control of law enforcement must account today for this structure of local prosecutorial responsibility, which in most cases is also a feature of state constitutional law.

What implications, if any, this structure should hold for the extent of local nonenforcement authority is not necessarily obvious. As we shall see, structures for integrating local prosecutors with state-wide government vary from state to state, as do other provisions bearing on the question of nonenforcement discretion.¹⁷⁴ Even at an abstract level, however, competing inferences are possible. On the one hand, why provide for locally accountable prosecutors if not to ensure enforcement in accordance with local preferences? On the other hand, why provide for state-wide legislative authority if local prosecutors may annul state-wide laws in particular jurisdictions? In effect, reliance on locally accountable enforcement officials makes nonenforcement a matter of subsidiarity as well as separation of powers in state governance, but broadened nonenforcement authority is not necessarily the only or most convincing inference from this structure.

The history surrounding adoption of local prosecution also carries contradictory lessons. As Michael Ellis documents in his study of elected prosecutors’ rise, reformers hoped to establish greater accountability to the people, yet limiting centralized patronage and gubernatorial power seem to have been more salient motivations than ensuring local nonenforcement of locally disfavored state laws.¹⁷⁵ As a matter of fact, although official prosecutors at the time were beginning to acquire exclusive authority over prosecution and resulting unreviewable discretion over particular charging decisions,¹⁷⁶ the broad expansion of criminal codes and resulting rise in prosecutorial discretion lay decades in the future at the time of these initial reforms.¹⁷⁷ In Massachusetts debates, one reformer even defended electing prosecutors on grounds that their duties were essentially ministerial and thus easily subject to popular oversight.¹⁷⁸

In the event, reformers’ hopes proved naïve and prosecutorial elections often made the positions more political rather than less, at least in big cities

¹⁷² *Id.* at 1568, 1569.

¹⁷³ *Id.* at 1568.

¹⁷⁴ *See infra* ____.

¹⁷⁵ Ellis, *supra* note __, at 1550 (“In many states, supporters of elected district attorneys believed popular election would distance the office from patronage politics.”).

¹⁷⁶ *Id.*

¹⁷⁷ For my account of this history, see Price, *supra* note __, at 742-46; *see also, e.g.*, GEORGE FISHER, PLEA BARGAINING’S TRIUMPH 2, 111-14 (2004).

¹⁷⁸ Ellis, *supra* note __, at 1552-53.

with powerful political machines.¹⁷⁹ In some cases, that process of politicization seems to have led to deliberate nonenforcement; at the least, in the New York City of Tammany Hall days, prosecutors regularly suppressed, or “pigeon-holed,” politically inconvenient indictments, and liquor laws that were unpopular with local constituencies were systematically disregarded.¹⁸⁰ As Bruce Green and Rebecca Roiphe have discussed, however, this politicization generated a new push in the Progressive Era to professionalize large prosecutors’ offices.¹⁸¹ Among other things, reformers of this era “sought to replace political cronies with disinterested experts who applied the law to facts rather than basing their decisions on impermissible personal, partisan, or political considerations.”¹⁸² This model of “disinterested and independent prosecutorial professionalism” came to be “widely accepted, if not taken for granted.”¹⁸³ Today, it is effectively the “mainstream” approach that reformers hope to dislodge, but in consequence it is this model of professionalized prosecutorial authority, and not any widespread practice of overt and deliberate prosecutorial nullification of laws, that formed the backdrop for the steady expansion of criminal laws’ scope and severity in the tough-on-crime era.¹⁸⁴

b. Resulting Problems for Generalized Theories of Prosecutorial Discretion

For all these reasons, provisions for locally elected prosecutors in state constitutions do not necessarily support the expansive nonenforcement powers claimed by some locally elected progressive prosecutors today. At the same time, these provisions, like unbundled state executives, do at least complicate any ready translation of federal principles to state and local governance, necessitating a closer look at applicable state constitutions and laws.

The converse, however, is also true: the differences between states and

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 1565.

¹⁸¹ Bruce A. Green & Rebecca Roiphe, *When Prosecutors Politick: Progressive Law Enforcers Then and Now*, 110 J. OF CRIM. L. & CRIMINOLOGY 719, 721 (2020).

¹⁸² *Id.* at 721. Less attractively, Progressive Era reformers “also rejected nineteenth-century notions of free will and personal responsibility, believing instead that biology and environment shaped individuals’ conduct.” *Id.*

¹⁸³ *Id.* at 722.

¹⁸⁴ Price, *supra* note __, at 746-48. The 1993 American Bar Association publication quoted at the start of this article helpfully articulates the current “mainstream” view: The public interest is best served and evenhanded justice best dispensed, not by the unseeing or mechanical application of the ‘letter of the law,’ but by a flexible and individualized application of its norms through the exercise of a prosecutor’s thoughtful discretion.” AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION STANDARDS § 3–3.9 Commentary (3d ed. 1993).

the federal government equally preclude state reliance on some leading academic justifications for broad federal nonenforcement. For example, Cox and Rodriguez’s notion that Presidents are not properly Congress’s faithful agents, but rather “co-principals” with equal power to shape operative legal understandings, may not readily translate to state governing structures. To begin with, in states with unbundled executives, any gubernatorial power to shape the law’s on-the-ground meaning is shared with other officials, complicating any argument that responsibility for faithful execution should entail power to reshape the law to match a perceived electoral mandate. If anything, such constitutional structures seem designed to reinforce executive subservience to law by creating multiple possible checks on officials seeking to evade legal restraints or pursue political aims at odds with statutory directives.

The notion of “de facto delegation” holds more relevance to local prosecutorial nullification, but applying it in that context would require presuming that local prosecutors are the proper targets of any such delegation. To begin with, as in the federal context, any such inference encounters the difficulty that legislators may have intended to confer discretion without expecting it to be employed to cancel laws outright. Legislating in an era of professionalized, ostensibly apolitical law enforcement, state legislatures may have intended and expected that prosecutors would set sensible priorities and abjure prosecution in inappropriate cases without taking the further step of overriding legislative conduct rules altogether; they might, in other words, have expected prosecutors to exercise options two through two and three from my initial typology, without proceeding down the ladder to options four to seven.

This problem undermines arguments by Cox and Rodriguez,¹⁸⁵ as well as Erik Luna among others,¹⁸⁶ that legislatures’ role in creating broad prosecutorial discretion necessarily implies unrestricted authority on prosecutors’ part to employ such discretion in whatever manner they choose. Even apart from this problem, however, a de facto delegation argument in this context encounters the difficulty that legislatures might have expected state-level officials, rather than local prosecutors, to exercise any categorical nonenforcement power—or, for that matter, that they might have expected that state-level officials would override any such policy if a local prosecutor adopted one. Examining the strength of such expectations requires looking at particular state laws, as we shall do shortly; it cannot be resolved in the abstract.

Related problems attend efforts to generalize a nationwide model of local prosecutorial authority from the mere fact of local prosecutor elections. In a

¹⁸⁵ COX & RODRÍGUEZ, *supra* note __.

¹⁸⁶ Luna, *supra* note __.

thoughtful article, W. Kerrel Murray proposes that categorical nonenforcement policies—what he calls “populist prosecutorial nullification”—should be permissible when prosecutors campaigned on them ahead of time.¹⁸⁷ Murray defends this proposal based in part on normative democratic theory and the value of effectuating local preferences in government policy.¹⁸⁸ He also points to the historic role of local juries in nullifying disfavored regulations as support for giving prosecutors parallel authority in an era of pervasive plea bargains and infrequent jury trials.¹⁸⁹ Whatever the force of these points, however, they are at best reasons to interpret operative state laws one way rather than another, to the extent doing so is textually possible.

Ultimately, the extent of prosecutorial authority is a matter of positive law, at both the state and federal levels. Prosecutors, after all, are creatures of constitutional law and statutory enactments. Accordingly, to the extent valid state laws resolve questions of prosecutorial authority, or determine who within state government holds final say over enforcement questions, constitutionalism requires giving effect to those choices, even if we might prefer different arrangements as a first-order preference. Indeed, adhering to state constitutional requirements itself has a particularly strong democratic pedigree. As Jessica Bulman-Pozen and Miriam Seifter have recently highlighted, state constitutions, unlike the U.S. Constitution, have been subject to recurrent revision and reconsideration, meaning that their provisions in many cases reflect democratic preferences instead of limiting them.¹⁹⁰

In contrast to Murray and others offering generalized theories of prosecutorial discretion, Ronald Wright has argued powerfully for a variable understanding of local prosecutorial authority.¹⁹¹ “A uniform theory of declinations,” he argues, “does not work well for all the varied state and local prosecutor offices in the United States.”¹⁹² Wright, however, substitutes for such generalized inferences a cumbersome and indeterminate functional analysis focused on balancing prosecutors’ competing political allegiances.¹⁹³ In his view, local prosecutors should think of themselves as owing duties both to the state-wide electorate that enacted the laws they enforce and to the local electorate that put them in office.¹⁹⁴ What relative

¹⁸⁷ Murray, *supra* note __.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021)

¹⁹¹ Wright, *supra* note __, at 837.

¹⁹² *Id.* at 840.

¹⁹³ *Id.* at 840-41.

¹⁹⁴ *Id.*

weight to give these competing duties should properly turn, Wright argues, not only on state laws and constitutional provisions defining prosecutors' relative duties, but also on such factors as funding sources (whether state or local) for prosecutors' offices, the degree of local home rule allowed by state law, and whether particular crimes have "concentrated local effects."¹⁹⁵

Much as Murray's twin lodestars of jury practice and subsidiarity might properly inform interpretation of otherwise ambiguous laws, these varied factors identified by Wright might properly inform prosecutors' sense of their responsibilities at the margins—and in fact we shall see that some states' arrangements may invite reliance on functional interpretive considerations. Yet we should turn to such nebulous factors only after exhausting applicable positive laws and any natural inferences to be drawn from them. Again, to the extent state law directly answers questions regarding either the scope of prosecutors' discretion or who within the state government has final say over that question, taking state constitutional law seriously requires giving effect to those answers.

In sum, most state governments differ from the federal government in at least two respects that bear importantly on questions of prosecutorial authority—the unbundling of their executive branches and their provisions for locally elected prosecutors. These differences preclude generalizing from federal-law principles to state and local examples (and vice versa). Yet these features of state government and the history behind them also do not yield clear general implications for local prosecutorial authority. To determine whether local prosecutors have authority to categorically suspend enforcement of state laws, we must look at the laws of the fifty states themselves.

2. States Compared to Each Other

I turn, then, to a survey of the fifty states' laws regarding local prosecutors' authority. As noted at the outset, my analysis here focuses solely on whether local prosecutors should presume authority to adopt explicit, publicly communicated policies that suspend enforcement of a given law either across the board or with such minor caveats as to amount to the same thing. This practice, which I call "categorical nonenforcement" but which others have called "prosecutorial nullification" or "prosecutorial decriminalization," among other things,¹⁹⁶ was once unheard of but has become increasingly common, principally among prosecutors with a self-described "progressive" bent.

As a further preliminary caveat, given this article's limited scope, my

¹⁹⁵ *Id.* at 854.

¹⁹⁶ *See supra* __.

state-law survey moves quickly at a high level; it focuses on key provisions of each state’s constitutions and statutes, as well as controlling interpretations of those laws by state high courts and attorneys general. It likewise focuses solely on the power to initiate criminal charges in trial courts, not on appeals from convictions (which in some states are controlled by the state Attorney General even though local prosecutors have authority over initial charges¹⁹⁷). I also hold aside special cases like conflicts of interest addressed in state ethics laws, and I focus here entirely on the scope of prosecutors’ duties and authorities under governing law; I do not comprehensively address whether those duties are judicially enforceable. Under federal law, although in my view courts may invalidate particularly determinate nonenforcement guarantees, the executive responsibility of faithful execution is not fully enforceable by courts; I have argued that it is best understood as a non-justiciable, or at least only partially justiciable, political question.¹⁹⁸ Federal officials’ obligations are nonetheless real, and the same may be true for state and local officials, at least if we take state constitutionalism seriously.

In short, my analysis is not necessarily exhaustive in every respect and does not resolve every potential interpretive question; it aims more to start a conversation than to provide the final word. Even with all those caveats and limitations, the survey offered here suffices to document significant differences between states with respect to local categorical nonenforcement’s validity. I establish this point by presenting a rough typology of state laws that proceeds generally from those least amenable to permitting such nonenforcement to those most amenable to it.

a. States with Explicit Bans on Enforcement Suspension

Five states’ constitutions include provisions that bar not only executive suspensions of law, but also suspensions of the law’s “execution.” Massachusetts’s constitution, for example, provides that “[t]he power of suspending the laws, or the execution of the laws, ought never to be exercised but by the legislature, or by authority derived from it, to be exercised in such particular cases only as the legislature shall expressly provide for.”¹⁹⁹ The New Hampshire constitution includes identical language,²⁰⁰ and Vermont’s anti-suspension clause is closely similar.²⁰¹ North Carolina’s constitution

¹⁹⁷ See generally Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519, 560-61 (2011).

¹⁹⁸ Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571 (2016).

¹⁹⁹ MASS. CONST. pt. I, art. XX.

²⁰⁰ N.H. CONST., Bill of Rights, art. XXIX.

²⁰¹ VT. CONST. art. XV.

directs that “[a]ll power of suspending laws or the execution of laws by any authority, without the consent of the representatives of the people, is injurious to their rights and shall not be exercised,”²⁰² while Maryland’s states that “no power of suspending Laws or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.”²⁰³

Another three state constitutions include anti-suspension provisions that do not refer specifically to law-execution, but nevertheless employ language that seems designed to reach beyond the letter of the law to its practical effect. Specifically, Indiana’s constitution provides that “[t]he operation of the laws shall never be suspended, except by the authority of the General Assembly.”²⁰⁴ Oregon’s constitution includes an equivalent prohibition,²⁰⁵ and Arkansas’s similarly states that “[n]o power of suspending or setting aside the law or laws of the State, shall be exercised, except by the General Assembly.”²⁰⁶

These provisions, or at least those that refer specifically to the law’s execution, would appear to preclude categorical nonenforcement. Indeed, it is hard to see what else would constitute “suspending . . . the execution of the laws,” as distinct from suspending the law itself.²⁰⁷ These provisions, furthermore, are framed generally; they limit such suspension power to the legislature alone. By their terms, therefore, these provisions seem equally applicable to both state and local enforcement officials, and their express treatment of the question would seem to override any more speculative inference of nonenforcement authority from separate provisions for local election of prosecutors and the like. Thus, for example, although North Carolina vests prosecutorial authority in elected district attorneys whose decisions cannot be overridden by state-level officials,²⁰⁸ the North Carolina

²⁰² N.C. CONST. art. I, § 7.

²⁰³ MD. CONST.

²⁰⁴ IND. CONST. art. I, § 26.

²⁰⁵ ORE. CONST. art. I, §22.

²⁰⁶ ARK. CONST. art. I, § 12.

²⁰⁷ An otherwise well-crafted student note addressing non-prosecution in Massachusetts misses the importance of this feature of the Massachusetts constitution. John E. Foster, Note, *Charges To Be Declined: Legal Challenges and Policy Debates Surrounding Non-Prosecution Initiatives in Massachusetts*, 60 B.C. L. REV. 2511 (2019). Although state statutes and decisions in Massachusetts have recognized prosecutors’ discretion over criminal charges, *see id.* at 2523-24, the state constitution’s explicit anti-suspending clause precludes any inference of categorical nonenforcement power from this general discretion over enforcement. What is more, as the note acknowledges, some Massachusetts court decisions have in fact limited executive nonenforcement actions. *Id.* at 2524-25.

²⁰⁸ N.C. CONST. art. IV, § 18 (“The District Attorney shall . . . be responsible for the prosecution on behalf of the State of all criminal actions in the Superior Courts of his district . . .”); N.C. GEN. STAT. ANN. § 7A-61 (“The district attorney shall prepare the trial dockets, prosecute in a timely manner in the name of the State all criminal actions and

constitution’s anti-suspension provision appears to bar those district attorneys from construing their autonomous prosecutorial authority to include the power to adopt categorical nonenforcement policies.

Another eight states (Alabama, Kentucky, Louisiana, Maine, Ohio, South Carolina, South Dakota, and Texas) have constitutional provisions banning executive suspensions of law, without express reference to execution of the laws.²⁰⁹ As noted, I have argued elsewhere that the U.S. Constitution’s requirement of executive faithful execution—a requirement generally understood to prohibit suspensions of law²¹⁰—should also presumptively bar categorical suspensions of enforcement.²¹¹ The same inference may well follow from state anti-suspension provisions, or at least fall within the range of valid interpretive inferences available to state courts and other interpreters. Nevertheless, provisions for locally elected prosecutors complicated this inference in the state context, for all the reasons discussed earlier.

Finally, two other states, Nebraska and West Virginia, despite lacking any anti-suspension clause in their constitutions, impose obligations on local prosecutors at odds with presuming categorical nonenforcement power. Nebraska law requires local county attorneys to prosecute when they possess “sufficient evidence to warrant the belief that a person is guilty and can be convicted of a felony or misdemeanor.”²¹² The state then backstops this obligation by providing the state Attorney General with equivalent powers of

infractions requiring prosecution in the superior and district courts of the district attorney’s prosecutorial district and advise the officers of justice in the district attorney’s district.”); *id.* § 114-2(4) (granting state Attorney General the authority to “consult with and advise the prosecutors, when requested by them”); *id.* § 114-11.6 (establishing a Special Prosecution Division within the Attorney General’s Office whose attorneys are “available to prosecute or assist in the prosecution of criminal cases when requested to do so by a district attorney and the Attorney General approves”); *State v. Camacho*, 406 S.E.2d 868, 871 (1991) (indicating that “the responsibility and authority to prosecute all criminal actions in the superior courts is vested solely in the several District Attorneys of the State” and that the Attorney General lacks independent power to prosecute crimes).

²⁰⁹ ALA. CONST. § 21 (“no power of suspending laws shall be exercised except by the legislature”); KY. CONST. § 15 (“No power to suspend laws shall be exercised unless by the General Assembly or its authority.”); LA. CONST. art. III, § 20 (“Only the legislature may suspend a law”); ME. CONST. art. I, § 13 (“The laws shall not be suspended but by the Legislature or its authority.”); OHIO CONST. art. I, § 18 (“No power of suspending laws shall ever be exercised, except by the General Assembly.”); S.C. CONST. art. I, § 7 (“The power to suspend the laws shall be exercised only by the General Assembly or by its authority in particular cases expressly provided for by it.”); S.D. CONST. art. VI, § 21 (“No power of suspending laws shall be exercised, unless by the Legislature or its authority.”); TEX. CONST. art. I, § 28 (“No power of suspending laws in this State shall be exercised except by the Legislature.”).

²¹⁰ *See, e.g.*, PRAKASH, *supra* note __, at 93-94.

²¹¹ Price, *supra* note __, at 689.

²¹² NEB. REV. STAT. ANN. § 23-1201(1)

prosecution, thus enabling that official to step in whenever a county attorney fails to pursue certain crimes.²¹³ West Virginia’s statute is less emphatic: it obligates the local prosecutor only to “institute and prosecute all necessary and proper proceedings against the offender” whenever “the prosecuting attorney has information of the violation of any penal law committed within the county.”²¹⁴ West Virginia, moreover, allows the attorney general to appear in local criminal proceedings only “on the written request of the governor.”²¹⁵ The state’s high court, however, has interpreted these statutes to impose on the local prosecuting attorney “a nondiscretionary obligation to institute criminal proceedings against persons whom the prosecutor has reason to believe have violated a criminal statute.”²¹⁶

To be sure, in practice, local prosecutors in these states may well lack the capacity to pursue every provable legal violation. These statutory obligations, in other words, may often be obeyed in the breach. Even so, this obligatory conception of prosecutorial authority at least precludes presuming authority to categorically suspend prosecution of some set of offenses. Thus, in Nebraska and West Virginia, as well as in at least five other states with express bans on suspending execution of laws, state law appears to foreclose categorical nonenforcement policies.

b. States with Affirmative Duties on State-Level Officials to Ensure Enforcement

In another set of states, local categorical nonenforcement power seems equally unlawful because officials hold specific duties to ensure that state laws are given meaningful effect.

The California constitution, for example, not only obligates the governor to “see that the law is faithfully executed,” but also assigns to the separately elected state attorney general “the duty . . . to see that the laws of the State

²¹³ *Id.* §§ 84-203, 84-204; *see also* *State v. Douglas*, 349 N.W.2d 870, 891 (Neb. 1984) (“Although § 84–205 provides that the Attorney General shall have the same powers and prerogatives in each of the several counties of the state as the county attorneys have in their respective counties, the affirmative duty to prosecute all criminal matters is specifically placed upon the county attorney.”). Barkow reports evidence from interviews that this power is used very rarely (or was used rarely as of 2011), *see* Barkow, *supra* note __, at 552, but any such practice does not alter the availability of this authority if a particular Attorney General decided that broader intervention was necessary.

²¹⁴ W. VA. CODE ANN. § 7-4-1.

²¹⁵ W. VA. CODE ANN. § 5-3-2.

²¹⁶ *State ex rel. Bailey v. Facemire*, 413 S.E.2d 183, 187 (W. Va. 1991); *see also* *State ex rel. Ginsberg v. Naum*, 318 S.E.2d 454, 455–56 (W. Va. 1984) (“‘Shall’ [in the statute] is mandatory and makes it a prosecutor’s non-discretionary duty to institute proceedings against persons when he has information giving him probable cause to believe that any penal law has been violated.”).

are uniformly and adequately enforced.”²¹⁷ It further grants the Attorney General supervisory authority over local district attorneys, and even provides that “[w]henever in the opinion of the Attorney General any law of the State is not being adequately enforced in any county, it shall be the duty of the Attorney General to prosecute any violations of law of which the superior court shall have jurisdiction, and in such cases the Attorney General shall have all the powers of a district attorney.”²¹⁸ Added to the state constitution by ballot proposition in 1934, this provision aimed to “make possible the coordination of county law enforcement agencies and provide the necessary supervision to insure that result.”²¹⁹ According to the official statement supporting the amendment—signed by then-district attorney and future California Attorney General, Governor, and U.S. Chief Justice Earl Warren—the prior system of local prosecutorial autonomy made sense “when our population was small, our colonies separated by wilderness, when there were no repeating firearms and when the fastest mode of transportation was the horse and buggy,” but it had proven inadequate to the “complex society” of 1934.²²⁰ Lamenting that “[t]he vast majority of felonies committed in this country go down into history as unsolved crimes,” the statement urged adoption of the measure to “make [the Attorney General] responsible for the uniform and adequate enforcement of law throughout the state.”²²¹

In keeping with these goals, state Attorney General (and future Governor) Edmund G. Brown indicated in a 1952 opinion that the “will of the people as expressed in [the state constitution] would be defeated” if local prosecutors could neglect enforcement of state laws.²²² The opinion explained: “[A] general system of law enforcement in this state was initiated by the people in the adoption of [this constitutional provision] which makes it the duty of the Attorney General to see that the laws of this state are uniformly and adequately enforced in every county of the state.”²²³ For their part, courts have observed that although the California constitution “‘does not contemplate absolute control and direction’ of the officials subject to the Attorney General’s supervision,”²²⁴ it does aim “to ease the difficulty of solving crimes, and arresting responsible criminals, by coordinating county law enforcement agencies and providing the necessary supervision by the

²¹⁷ CAL. CONST. art. V, § 13.

²¹⁸ CAL. CONST. art. V, § 13.

²¹⁹ California Proposition 4 (1934), *Argument in Favor of Initiative Proposition 4*, http://repository.uchastings.edu/ca_ballot_props/319.

²²⁰ *Id.*

²²¹ *Id.*

²²² 20 Op. Cal. Atty. Gen. 234, 237 (1952).

²²³ *Id.* at 236.

²²⁴ *See, e.g.,* *Brewster v. Shasta County*, 275 F.3d 803 (9th Cir. 2001) (quoting *People v. Brophy*, 120 P.2d 946, 953 (Cal.Ct.App.1942)).

Attorney General over them.”²²⁵ As a state appellate court has put it, the “provision was intended to ensure that the laws of the state are enforced rather than to insulate criminal defendants from enforcement of the laws. It . . . confers broad discretion upon the Attorney General to determine when to step in and prosecute a criminal case.”²²⁶ In light of the California Attorney General’s supervisory authority, the state supreme court has even observed that “it is difficult to imagine how a district attorney’s enforcement of state law could be characterized as creating local policy.”²²⁷

In short, although California’s constitutional structure grants considerable authority to locally elected prosecutors,²²⁸ that power exists only as a default. As reflected in the state constitution but reinforced by various state statutes, the Attorney General holds not only the power but the duty to step in when local prosecutors are failing to ensure “adequate” enforcement of state laws on par with other jurisdictions.²²⁹ Furthermore, although it is true one might read this language to allow the Attorney General to determine what level of enforcement state-wide is adequate (including potentially no enforcement at all),²³⁰ the language more naturally suggests, as the 1952

²²⁵ *Pitts v. County of Kern*, 949 P.2d 920, 931 n. 4 (Cal. 1998).

²²⁶ *People v. Honig*, 55 Cal. Rptr. 2d 555, 595 (Cal. Ct. App. 1996).

²²⁷ *Pitts*, 949 P.3d at 933.

²²⁸ The ballot proposition’s sponsors noted that their amendment would not “curtail[] the right of local self government.” California Proposition 4 (1934), *Argument in Favor of Initiative Proposition 4*, http://repository.uchastings.edu/ca_ballot_props/319.

²²⁹ CAL. CONST. art. V, § 13; *see also* CAL. PENAL CODE § 923 (“Whenever the Attorney General considers that the public interest requires, he or she may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of those matters of a criminal nature that he or she desires to submit to it.”); CAL. GOV’T CODE § 12550 (“The Attorney General has direct supervision over the district attorneys of the several counties of the State When he deems it advisable or necessary in the public interest, or when directed to do so by the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of which the superior court has jurisdiction.”); *id.* § 12524 (“The Attorney General may . . . call into conference the district attorneys and sheriffs of the several counties and the chiefs of police of the several municipalities of this state, or such of them as he may deem advisable, for the purpose of discussing the duties of their respective offices, with the view of uniform and adequate enforcement of the laws of this state as contemplated by Section 13 of Article V of the Constitution of this state.”). Until recently, biannual reports by the California Attorney General emphasized the Attorney General’s responsibility for uniform enforcement of state laws. *See, e.g.*, KAMALA D. HARRIS, ATTORNEY GENERAL, CALIFORNIA DEP’T OF JUSTICE, OFFICE OF THE ATTORNEY GENERAL, BIENNIAL REPORT, MAJOR ACTIVITIES 2015-2016 at 2 (“As chief law officer of California, the Attorney General is responsible for ensuring that state laws are uniformly and adequately enforced. The Attorney General carries out this constitutional responsibility through the programs of the Department of Justice.”).

²³⁰ *Cf. Honig*, 55 Cal. Rptr. At 595 (“The only limitations [on Attorney General prosecution of local cases] are that the action be within the superior court’s jurisdiction, and

Attorney General opinion indicates, that the Attorney General must strive to give all state laws at least some effect.²³¹ Overall, then, even if historically California Attorneys General have rarely exercised their power to supplant local prosecutorial choices,²³² the state’s legal structure rebuts, by its plain terms, any assumption that local prosecutors may categorically suspend enforcement of locally disfavored state laws. Local district attorneys may exercise such authority only insofar as the attorney general neglects his or her duty to override it.

In New Jersey, state law similarly obligates the state Attorney General to “maintain a general supervision over . . . county prosecutors with a view to obtaining effective and uniform enforcement of the criminal laws throughout the State.”²³³ Though New Jersey’s local prosecutors are not elected—the Governor appoints them to five-year terms with the state Senate’s advice and consent²³⁴—they do hold a constitutionally prescribed office with primary responsibility for local law enforcement.²³⁵ The Attorney General, however, may independently initiate prosecution in any case or may take any case away from the county attorney;²³⁶ the Attorney General may even assume the county prosecutor’s responsibilities in total if requested to do so by the governor, a grand jury, or certain local officials.²³⁷ Thus, although the state supreme court has said “[t]here is no ordinary chain of command between the attorney-general and the county prosecutors,”²³⁸ state law obligates the Attorney General to ensure “effective and uniform enforcement” of state laws and empowers that official (as well as the Governor) to take over prosecutorial responsibilities when local prosecutors fail to undertake such enforcement.²³⁹ Much as in California, this legal structure seems at odds with any authority on local prosecutors’ part to categorically suspend enforcement of any given state law.²⁴⁰

that the Attorney General be of the opinion that any law of the state is not being adequately enforced in any county.”).

²³¹ 20 Op. Cal. Atty. Gen. 234 (1952).

²³² Barkow, *supra* note ___, at 552.

²³³ N.J. STAT. ANN. § 52:17B-103.

²³⁴ N.J. CONST. art. VII, § 2, ¶ 1.

²³⁵ *Yurick v. State*, 875 A.2d 898, 903 (N.J. 2005) (indicating that “the county prosecutor is constitutionally created and statutorily endowed with powers that arm him or her to perform wide ranging duties,” including responsibility “for the prosecution of crimes committed in the county”).

²³⁶ N.J. STAT. ANN. § 52:17B-107.

²³⁷ N.J. STAT. ANN. § 52:17B-106.

²³⁸ *Morss v. Forbes*, 132 A.2d 1 (N.J. 1957)

²³⁹ *See Yurick*, 875 A.2d at 903 (discussing these provisions and how they interact).

²⁴⁰ New Jersey courts have in fact required state-wide charging guidelines with respect to charges under certain statutes. *See Ronald F. Wright, Prosecutorial Guidelines and the New Terrain in New Jersey*, 109 PENN. ST. L. REV. 1087 (2005).

For its part, Florida appears to have arrived at a similar legal understanding through judicial construction. Although Florida’s state constitution provides that a state attorney elected in each judicial district “shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law,”²⁴¹ a 1986 amendment provides for an appointed “statewide prosecutor” with “concurrent jurisdiction with the state attorneys to prosecute violations” that occurred in or affected multiple judicial circuits.²⁴² In addition, as in many other states, the governor holds “supreme executive power,” as well as the duty to “take care that the laws be faithfully executed.”²⁴³ In a 2017 decision, the Florida Supreme Court upheld the Governor’s authority to transfer all death-eligible cases away from a state attorney who announced a blanket policy against seeking the death penalty.²⁴⁴ It based this result on the constitutional provisions just mentioned as well as a statutory power to transfer cases from one state attorney to another when “the ends of justice would be best served” by the transfer.²⁴⁵

In the course of its reasoning, moreover, the Florida Supreme Court rejected any notion that state attorneys could adopt blanket nonenforcement policies in the first place. “[E]xercising discretion,” the majority reasoned, “demands an individualized determination ‘exercised according to the exigency of the case, upon a consideration of the attending circumstances.’”²⁴⁶ Accordingly, the state attorney’s “blanket refusal to seek the death penalty in any eligible case, including a case that ‘absolutely deserve[s] [the] death penalty’ does not reflect an exercise of prosecutorial discretion; it embodies, at best, a misunderstanding of Florida law.”²⁴⁷ Florida’s Supreme Court thus appears to have not only rejected any notion that local prosecutors hold categorical nonenforcement power, but also interpreted state law to grant the state governor the power, if not also the duty, to override any such policies by transferring cases away from prosecutors who adopt them.

c. States with Centralized Law Enforcement Responsibility

A third group of states impose no specific enforcement obligation on state or local officials, but have nonetheless centralized control over criminal

²⁴¹ FLA. CONST. art. V, § 17.

²⁴² FLA. CONST. art. IV, § 4(b).

²⁴³ FLA. CONST. art. IV, § 1.

²⁴⁴ *Ayala v. Scott*, 224 So. 3d 755, 759 (Fla. 2017).

²⁴⁵ FLA. STAT. § 27.14(1).

²⁴⁶ *Id.* (quoting *Barber v. State*, 5 Fla. 199, 206 (Fla. 1853) (Thompson, J., concurring)).

²⁴⁷ *Id.*

prosecution to such a degree that broad nonenforcement power, at least at the local level, is implausible.

In particular, three states—Alaska, Delaware, and Rhode Island—not only lack locally elected prosecutors but also vest all power of criminal prosecution specifically in a state-wide official (the state Attorney General in the case of Alaska²⁴⁸ and Rhode Island²⁴⁹, and a state prosecutor appointed by the Attorney General in the case of Delaware²⁵⁰). In Alaska, the state Attorney General has exercised statutory power to appoint local district attorneys who serve at the Attorney General’s pleasure and subject to his or her supervision.²⁵¹ Rhode Island’s Attorney General appears to directly control all criminal prosecution in the state,²⁵² and in Delaware, the Criminal Division of the state’s Department of Justice includes an office for each of the state’s three counties, each of which is led by a County Prosecutor appointed by the Attorney General who reports to the State’s Attorney.²⁵³

The degree of centralized control over prosecution in each of these states makes it implausible to claim that local prosecutors (to the extent they even exist) hold any independent power of categorical nonenforcement.²⁵⁴ State-

²⁴⁸ ALASKA STAT. ANN. § 44.23.020(b)(4).

²⁴⁹ 42 R.I. GEN. LAWS. ANN. § 42-9-4.

²⁵⁰ 29 DEL. CODE. ANN. §§ 2504(6), 2505(c).

²⁵¹ ALASKA STAT. ANN. § 44.17.040 (“The principal executive officer of each department may establish necessary subordinate positions, make appointments to these positions, and remove persons appointed within the limitations of appropriations and subject to state personnel laws. Each person appointed to a subordinate position established by the principal executive officer is under the supervision, direction, and control of the officer.”); *see also* State v. Breeze, 873 P.2d 627, 633 (Alaska Ct. Crim. App. 1994) (discussing Attorney General’s power to appoint and supervise prosecutors); State of Alaska Dept. of Law, Press Release, *Anchorage District Attorney John Novak to Retire; Deputy District Attorney Brittany Dunlop Named as Successor* (Apr. 16, 2020), <http://law.alaska.gov/press/releases/2020/041620-AnchorageDA.html> (announcing appointment of district attorney by state Attorney General).

²⁵² State of Rhode Island, Attorney General Peter F. Neronha, *About the Office*, <http://www.riag.ri.gov/home/OurOffice.php> (“As the central legal agency of the State, the Office of Attorney General is responsible for prosecution of all felony criminal cases and misdemeanor appeals, as well as prosecution of misdemeanor cases brought by state law enforcement agencies.”).

²⁵³ Delaware Dept. of Justice, Criminal Division, *About the Division*, <https://attorneygeneral.delaware.gov/criminal/>.

²⁵⁴ Tyler Quinn Yeargain, *Discretion Versus Supersession: Calibrating the Power Balance Between Local Prosecutors and State Officials*, 68 EMORY L.J. 95, 113 (2018) (observing that in these states “[a]ny local prosecutors . . . serve at the will of the statewide officer, and enjoy no statutorily-guaranteed discretion at all”); *cf.* BUREAU OF JUSTICE STATISTICS, BULLETIN: PROSECUTORS IN STATE COURTS, 2001 at 2 (“In Alaska, Delaware, and Rhode Island criminal prosecution was the primary responsibility of the State’s Attorney General.”); *see also, e.g.*, State v. Rollins, 359 A.2d 315, 318 (R.I. 1976) (“It is well settled in this state that the Attorney General is the only state official vested with prosecutorial

wide prosecutors, by contrast, might claim such authority, but these states also impose statutory mandates on the relevant officials that indicate no such power and may be at odds with presuming one.²⁵⁵

Several other states—Alabama, Arizona, Montana, New Hampshire, South Carolina, Utah, Vermont, and Washington—provide for locally elected prosecutors, but subject them to plenary supervision by state-level officials. In Alabama, although elected local district attorneys have primary prosecutorial authority,²⁵⁶ the elected state “Attorney General, either in person or by one of his or her assistants, at any time he or she deems proper, either before or after indictment, may superintend and direct the prosecution of any criminal case in any of the courts of this state.”²⁵⁷ Similarly, Arizona provides that the state Attorney General not only “[e]xercise[s] supervisory powers over county attorneys of the several counties in matters pertaining to that office,” but also may, at the Governor’s direction or “when deemed necessary by the Attorney General,” directly “prosecute and defend any proceeding [in state court] in which the state . . . is a party.”²⁵⁸

For its part, although Montana’s constitution provides only for elected state-wide officials including an Attorney General,²⁵⁹ the state has established local elected county attorneys by statute.²⁶⁰ The state Attorney General, however, holds statutory authority “to exercise supervisory powers over

discretion.” (citing *Rogers v. Hill*, 48 A. 670 (R.I. 1901)).

²⁵⁵ For Alaska, see ALASKA STAT. ANN. § 44.23.020(b)(4) (“The attorney general shall . . . prosecute all cases involving violation of state law, and file informations and prosecute all offenses against the revenue laws and other state laws where there is no other provision for their prosecution”); *Breeze*, 873 P.2d at 633 (holding that “the attorney general has the power and duty under [this statute] to ensure that state law violations are investigated and prosecuted”); *but cf.* *Pub. Def. Agency v. Superior Ct.*, Third Jud. Dist., 534 P.2d 947, 950 (Alaska 1975) (indicating that “[t]he authority to proceed under [this statute] does not . . . empower the court to order the Attorney General to prosecute any particular contempt for non-support”). For Delaware, see 29 DEL. CODE. ANN. § 2505(c) (“The State Prosecutor shall be responsible for the prosecution of all criminal matters and shall have such powers and duties as the Attorney General shall designate.”). For Rhode Island, see 42 R.I. GEN. LAWS. ANN. § 42-9-4(a) (“The attorney general shall draw and present all informations and indictments, or other legal or equitable process, against any offenders, as by law required, and diligently, by a due course of law or equity, prosecute them to final judgment and execution.”).

²⁵⁶ ALA. CONST. art. VI, § 160(a) (establishing office of elected district attorney); ALA. CODE § 12-17-184 (“It is the duty of every district attorney and assistant district attorney, within the circuit, county, or other territory for which he or she is elected or appointed . . . (2) To draw up all indictments and to prosecute all indictable offenses. . .”).

²⁵⁷ ALA. CODE § 36-15-14. The same statute further provides: “The district attorney prosecuting in such court, upon request, shall assist and act in connection with the Attorney General or his or her assistant in such case.” *Id.*

²⁵⁸ ARIZ. REV. STAT. § 41-193(A)(2), (4).

²⁵⁹ MONT. CONST. art. VI, § 1.

²⁶⁰ MONT. CODE ANN. § 7-4-2712.

county attorneys in all matters pertaining to the duties of their offices,” including “the power to order and direct county attorneys in all matters pertaining to the duties of their office.”²⁶¹ When so directed by the Attorney General, the county attorneys must “promptly institute and diligently prosecute in the proper court and in the name of the state of Montana any criminal or civil action or special proceeding.”²⁶² In New Hampshire, although the state Attorney holds exclusive authority to prosecute crimes punishable by death or life imprisonment,²⁶³ elected county prosecutors otherwise hold authority to prosecute state crimes.²⁶⁴ They do so, however, under the “direction” or even “control” of the attorney general,²⁶⁵ who “shall have and exercise general supervision of the criminal cases pending before the supreme and superior courts of the state, and with the aid of the county attorneys, the attorney general shall enforce the criminal laws of the state.”²⁶⁶

South Carolina’s constitution provides that “[t]he Attorney General shall be the chief prosecuting officer of the State with authority to supervise the prosecution of all criminal cases in courts of record.”²⁶⁷ The state constitution also obligates the Attorney General to “assist and represent the Governor” in carrying out the Governor’s responsibility to ensure faithful execution of the laws.²⁶⁸ Although the state’s constitution and laws also provide for locally elected “solicitors” who prosecute crimes in each judicial circuit,²⁶⁹ the state Supreme Court has understood these provisions to signify that “the Attorney General has the constitutional duty to supervise all criminal prosecutions and ensure all laws be faithfully executed, as well as the statutory duty to direct the state solicitors, including the ability to assign solicitors to assist in matters outside of their respective judicial circuits.”²⁷⁰

²⁶¹ MONT. CODE ANN. § 2-15-501.

²⁶² *Id.*

²⁶³ N.H. Rev. Stat. Ann. § 7:6.

²⁶⁴ N.H. Rev. Stat. Ann. § 7:6.

²⁶⁵ N.H. Rev. Stat. Ann. §§ 7:11, 7:34.

²⁶⁶ N.H. Rev. Stat. Ann. § 7:6.

²⁶⁷ S.C. CONST. art. V, § 24.

²⁶⁸ S.C. CONST. art. IV, § 15.

²⁶⁹ S.C. CONST. art. V, § 24 (“in each judicial circuit a solicitor shall be elected by the electors thereof”); S.C. CODE ANN. § 1-7-320 (“Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them, required to do so; and they shall assist the Attorney General, or each other, in all suits of prosecution in behalf of this State when directed so to do by the Governor or called upon by the Attorney General.”); *id.* § 1-7-100 (requiring the state Attorney General to appear with solicitors in grand jury proceedings in capital cases and allowing the Attorney General to appear and assume “direction and management” in any criminal trials).

²⁷⁰ *State v. Harrison*, 854 S.E.2d 468, 471 (S.C. 2021); *cf. Hampton v. Haley*, 743 S.E.2d 258, 262 (S.C. 2013) (holding that “the executive branch . . . may exercise discretion in executing the laws, but only that discretion given by the legislature” and accordingly that,

In Utah, the Attorney General must “exercise supervisory powers over the district and county attorneys of the state in all matters pertaining to the duties of the district and county attorneys’ offices.”²⁷¹ This supervisory authority, moreover, specifically includes the power to require status reports on pending matters and to “review investigation results de novo and file criminal charges, if warranted, in any case involving a first degree felony” if the local prosecutor declined to press charges despite a law enforcement agency’s submission of “investigation results” to the prosecutor.²⁷² In Vermont, similarly, local elected State’s Attorneys have authority to prosecute offenses in their jurisdiction,²⁷³ but the state Attorney General exercises “the general supervision of criminal prosecutions” and may assist local prosecutions “when, in his or her judgment, the interests of the State require it.”²⁷⁴ In addition, the Attorney General must appear for the state in homicide cases and may do so in any other criminal case “when, in his or her judgment, the interests of the State so require,”²⁷⁵ and in general “[t]he Attorney General may represent the State in all civil and criminal matters as at common law and as allowed by statute,” exercising “the same authority throughout the State as a State’s Attorney.”²⁷⁶ The Vermont Supreme Court has held that the Attorney General is free to independently pursue criminal charges even when a State’s Attorney exercises his or her “broad discretion” not to pursue the same offense.²⁷⁷

Finally, Washington gives prosecutorial authority to elected county prosecuting attorneys,²⁷⁸ but obligates the state Attorney General, upon request by the Governor, to “investigate violations of the criminal laws within this state.”²⁷⁹ Under state law, “[i]f, after such investigation, the attorney general believes that the criminal laws are improperly enforced in any county, and that the prosecuting attorney of the county has failed or neglected to

“while non-legislative bodies may make policy determinations when properly delegated such power by the legislature, absent such a delegation, policymaking is an intrusion upon the legislative power”).

²⁷¹ UTAH CODE ANN. § 67-5-1(6); *see also* UTAH CONST. art. VIII, § 16 (providing for establishment of elected local prosecutors with “primary responsibility for the prosecution of criminal actions brought in the name of the State of Utah”); UTAH CODE ANN. §§ 17-18a-201-204 (establishing local elected public prosecutors)

²⁷² UTAH CODE ANN. § 67-5-1(6); *see also id.* § 67-5-1(8) (requiring the state Attorney General, “when required by the public service or directed by the governor, assist any county, district, or city attorney in the discharge of county, district, or city attorney’s duties”).

²⁷³ VT. STAT. ANN. tit. 24, § 361.

²⁷⁴ VT. STAT. ANN. tit. 3, § 153.

²⁷⁵ VT. STAT. ANN. tit. 3, § 157.

²⁷⁶ VT. STAT. ANN. tit. 3, § 152.

²⁷⁷ *Off. of State's Att'y Windsor Cty. v. Off. of Atty. Gen.*, 409 A.2d 599, 601 (Vt. 1979).

²⁷⁸ Wash. Rev. Code Ann. § 36.27.020(4).

²⁷⁹ Wash. Rev. Code Ann. § 43.10.090.

institute and prosecute violations of such criminal laws, either generally or with regard to a specific offense or class of offenses,” then the Attorney General may direct the prosecuting attorney to take any steps the Attorney General considers “necessary and proper,” and may even take over the prosecution altogether if the attorney fails to follow such directions.²⁸⁰

Much as with respect to the three states discussed earlier (Alaska, Delaware, and Rhode Island), these strong provisions for control seem to preclude any understanding that local prosecutors hold categorical nonenforcement power. Washington makes this inference explicit by providing specifically for a state takeover if the local prosecutor “has failed or neglected” to pursue “a specific offense or class of offenses,”²⁸¹ and Utah’s statutory scheme likewise seems designed to ensure that at least any first degree felonies are taken seriously.²⁸² Yet the extent of centralized control in all these states suggests, once again, that state-level officials, and not local prosecutors, hold ultimate authority over enforcement policy. Here, too, moreover, although those state-level officials might conceivably hold power to adopt nonenforcement policies themselves, the New Hampshire and Vermont constitutions foreclose this inference by forbidding categorical suspension of the laws’ execution,²⁸³ and the South Carolina Supreme Court has understood its constitution to do so as well.²⁸⁴ As for the remaining three states, laws or decisions in Montana, Utah, and Washington at least cast doubt upon it.²⁸⁵

It is true that, despite such provisions for centralized control, local prosecutors might well enjoy considerable autonomy in practice. In a 2011 study of hierarchical relationships between state and local prosecutors, Rachel Barkow reported based on interviews and other evidence that although state attorneys general in Alabama and (to a lesser degree) Arizona regularly took responsibility for prosecuting local crimes, state-level officials

²⁸⁰ Wash. Rev. Code Ann. § 43.10.090. A separate statute allows a police body to request Attorney General intervention in certain organized crime cases. Yeargain, *supra* note __, at 119.

²⁸¹ Wash. Rev. Code Ann. § 43.10.090.

²⁸² UTAH CODE ANN. § 67-5-1(6).

²⁸³ See *supra* note __ and accompanying text.

²⁸⁴ *State v. Harrison*, 854 S.E.2d 468, 471 (S.C. 2021) (holding that the state Attorney General has “the constitutional duty to . . . ensure all laws be faithfully executed”).

²⁸⁵ *Montana Power Co. v. Montana Dep’t of Pub. Serv. Regul.*, 709 P.2d 995, 1002 (1985) (“it is the duty of the Attorney General to institute and prosecute all actions or proceedings necessary for the enforcement of the regulation of utilities”); UTAH CODE ANN. § 67-5-1(6) (requiring state-level review if a local prosecutor declined to press charges after a law enforcement agency submitted “investigation results” regarding certain felonies to the prosecutor); Wash. Rev. Code Ann. § 43.10.090 (providing for state takeover of prosecution if a local prosecutor has “failed or neglected” to pursue “a specific offense or class of offenses”).

in Montana, New Hampshire, and Washington rarely did so.²⁸⁶ As a more recent student note observes, however, state-level officials' hands-off attitude at the time might have reflected "an implicitly-agreed upon set of mutual expectations: state officials expect that local prosecutors will vigorously enforce the laws passed by the state legislatures, and local prosecutors expect that, in all but the rarest cases, their discretion will not be superseded."²⁸⁷ To the extent progressive prosecutors and the Obama Administration's federal precedents have disrupted those expectations, the "cooperate relationship" Barkow documented in most states²⁸⁸ might give way to more adversarial relationships in at least some jurisdictions. In any event, even if state-level officials in these states rarely use their powers of direction and control, the state's choice to grant such powers makes clear that those officials are the primary vessels of state prosecutorial discretion and thus that local prosecutors may exercise any categorical nonenforcement power only at the sufferance of state-level officials.

d. States with Broad Centralized Supersession Powers

A fourth, broad group of states provides state officials, typically the Attorney General or Governor, with broad power to displace local prosecutors' choices, but does not impose any duty to do so under any specific circumstances. These states' laws are ambiguous: they could support competing and uncertain inferences about the extent of any local nonenforcement power.

Some states in this category allow the state attorney general to take over local prosecutions in his or her discretion.²⁸⁹ Some others allow or require

²⁸⁶ Barkow, *supra* note __, at 555, 558-59, 567-69.

²⁸⁷ Yeagain, *supra* note __, at 109; *see also* Lauren M. Ouziel, *Democracy, Bureaucracy, and Criminal Justice Reform*, 61 B.C. L. REV. 523, 565-66 (2020) (suggesting that though state-level officials' power to intervene in local prosecutions "has historically been exercised sparingly[,] . . . it may become increasingly prevalent in states where voters' criminal justice preferences are markedly divergent, and that divergence begins to manifest in locally elected prosecutors' exercise of enforcement discretion").

²⁸⁸ Barkow, *supra* note __, at 560.

²⁸⁹ *See* NEV. REV. STAT. ANN. § 228.120 (granting the state Attorney General "supervisory powers over all district attorneys of the State in all matters pertaining to the duties of their offices" and empowering him or her to "[a]pppear in, take exclusive charge of and conduct any prosecution in any court of this State for a violation of any law of this State, when in his or her opinion it is necessary, or when requested to do so by the Governor"); *id.* § 252.080 ("The district attorney in each county shall be public prosecutor therein."); N.M. STAT. ANN. § 8-5-2(B) ("the attorney general shall . . . prosecute and defend in any other court or tribunal all actions and proceedings, civil or criminal, in which the state may be a party or interested when, in his judgment, the interest of the state requires such action or when requested to do so by the governor"); *id.* § 8-5-3 (providing that, "upon the failure or

some other official or officials—typically the governor but also in some cases local officials, courts, or the state legislature or legislative officers—to request intervention.²⁹⁰

Still others obligate the state attorney general to take over particular matters when requested by the governor, thus effectively vesting the governor

refusal of any district attorney to act in any criminal or civil case or matter in which the county, state or any department thereof is a party or has an interest, the attorney general be, and he is hereby, authorized to act on behalf of said county, state or any department thereof, if after a thorough investigation, such action is ascertained to be advisable by the attorney general” and further providing that the Attorney General must initiate such an investigation if directed to do so by the Governor); *id.* § 36-1-18(A)(1) (“Each district attorney shall . . . prosecute and defend for the state in all courts of record of the counties of his district all cases, criminal and civil, in which the state or any county in his district may be a party or may be interested . . .”); *id.* § 8.630 (“District attorneys shall possess the qualifications, have the powers, perform the duties and be subject to the restrictions provided by the Constitution for prosecuting attorneys, and by the laws of this state.”); *S. Pac. Transp. Co. v. Redden*, 458 F. Supp. 593, 598 n.8 (D. Or. 1978) (“The Attorney General may investigate alleged violations of state law and initiate prosecutions only when the Governor has requested him to do so.”), *aff’d sub nom.* *S. Pac. Transp. Co. v. Brown*, 651 F.2d 613 (9th Cir. 1980); S.D. CODIFIED LAWS § 1-11-1(2) (establishing the state Attorney General’s duty, “[w]hen requested by the Governor or either branch of the Legislature, or whenever in his judgment the welfare of the state demands, to appear for the state and prosecute or defend, in any court or before any officer, any cause or matter, civil or criminal, in which the state may be a party or interested”); *id.* § 7-16-9 (“The state’s attorney shall appear in all courts of his county and prosecute and defend on behalf of the state or his county all actions or proceedings, civil or criminal, in which the state or county is interested or a party.”); ME. REV. STAT. tit. 5, § 199 (“The Attorney General [who is appointed by the legislature] may, in the Attorney General’s discretion, act in place of or with the district attorneys, or any of them, in instituting and conducting prosecutions for crime, and is invested, for that purpose, with all the rights, powers and privileges of each and all of them.”); *id.* tit. 30-A, § 283 (establishing prosecutorial duties of local district attorneys).

²⁹⁰ KY. REV. STAT. ANN. § 15.200 (“Whenever requested in writing by: (a) The Governor; (b) The President of the Senate or Speaker of the House of Representatives of the General Assembly; (c) Any of the courts or grand juries of the Commonwealth; or (d) A sheriff, mayor, or majority of a city legislative body; stating that his or her participation in a given case is desirable to effect the administration of justice and the proper enforcement of the laws of the Commonwealth, the Attorney General may intervene, participate in, or direct any investigation or criminal action, or portions thereof, within the Commonwealth of Kentucky necessary to enforce the laws of the Commonwealth.”); *id.* § 15.205 (allowing state Attorney General to direct another Commonwealth attorney or county attorney to prosecute in such instances); *id.* § 15.220 (generally limiting the state Attorney General’s authority “to deprive prosecuting attorneys of any of their authority in respect to criminal prosecutions, or relieve them from any of their duties to enforce the criminal laws of the Commonwealth”); WIS. STAT. ANN. § 165.25(2) (requiring the state department of justice, “[i]f requested by the governor or either house of the legislature, . . . [to] prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested”); *id.* § 978.05 (assigning authority to prosecute certain crimes to local district attorneys).

with discretion to supplant local enforcement choices.²⁹¹ Idaho law in

²⁹¹ See COLO. REV. STAT. ANN. § 24-31-101 (obligating the state Attorney General to “appear for the state and prosecute and defend all actions and proceedings, civil and criminal, in which the state is a party or is interested when required to do so by the governor”); COLO. REV. STAT. ANN. § 20-1-102(1)(a) (“Every district attorney shall appear in behalf of the state and the several counties of his or her district . . . [i]n all indictments, actions, and proceedings which may be pending in the district court in any county within his district wherein the state or the people thereof or any county of his district may be a party”); *People ex rel. Tooley v. Dist. Ct. in & for Second Jud. Dist.*, 549 P.2d 774, 776 (1976) (en banc) (holding that “in the absence of a command from the governor or the general assembly, the attorney general is not authorized to prosecute criminal actions”); *People ex rel. Losavio v. Gentry*, 606 P.2d 57, 62 (1980) (“Except as otherwise provided for by statute, the district attorney is the sole authority charged with performing [various prosecutorial] duties and he may not be supplanted in his duties by any other authority.”); GA. CONST. art. V, § 3, ¶ IV (“The Attorney General . . . shall represent the state in the Supreme Court in all capital felonies and in all civil and criminal cases in any court when required by the Governor”); *id.* art. VI, § 8, ¶ I (establishing elected district attorneys for each judicial circuit and providing that “[i]t shall be the duty of the district attorney to represent the state in all criminal cases in the superior court of such district attorney’s circuit and in all cases appealed from the superior court and the juvenile courts of that circuit to the Supreme Court and the Court of Appeals and to perform such other duties as shall be required by law”); GA. CODE ANN. § 15-18-6 (listing district attorneys’ duties including the duty to “prosecute all indictable offenses”); *id.* § 45-15-3(3) (“It is the duty of the Attorney General . . . [w]hen required to do so by the Governor, to participate in, on behalf of the state, all criminal actions in any court of competent jurisdiction when the district attorney thereof is being prosecuted, and all other criminal or civil actions to which the state is a party”); *id.* § 45-15-35 (“The Governor shall have the power to direct the Department of Law, through the Attorney General as head thereof, to institute and prosecute in the name of the state such matters, proceedings, and litigations as he shall deem to be in the best interest of the people of the state.”); MINN. STAT. ANN. § 8.01 (allowing the Attorney General to appear in local criminal cases at the local county attorney’s request and further providing that “[w]hen the governor shall so request, in writing, the attorney general shall prosecute any person charged with an indictable offense, and in all such cases may attend upon the grand jury and exercise the powers of a county attorney”); *State ex rel. Graham v. Klumpp*, 536 N.W.2d 613, 616 (Minn. 1995) (interpreting this statute as a “directive mandating that the attorney general prosecute [when requested by the governor] if a person is charged with an indictable offense”); MINN. STAT. ANN. § 388.051(3) (establishing the county attorneys’ duty to “prosecute felonies, including the drawing of indictments found by the grand jury, and, to the extent prescribed by law, gross misdemeanors, misdemeanors, petty misdemeanors, and violations of municipal ordinances, charter provisions and rules or regulations”); N.Y. EXEC. LAW § 63 (obligating the state Attorney General, “[w]hen required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement”); *Johnson v. Pataki*, 691 N.E.2d 1002, 1003, 1006 (N.Y. 1997) (rejecting arguments that the constitutional status of the local prosecutor’s office guaranteed him “a ‘zone of independence’ based on a delegation to him of exclusive authority to prosecute crimes” in his jurisdiction and holding instead that the state constitution leaves “the delineation of law enforcement functions” to the legislature); W. VA. CODE ANN. § 5-3-2 (“[the attorney general] shall appear in any cause in which the

particular vests “the primary duty of enforcing all the penal provisions of any and all statutes of this state, in any court, . . . in the sheriff and prosecuting attorney of each of the several counties,” but allows the Governor to displace that authority and transfer prosecutorial responsibility to the state Attorney General “[w]hen in the judgment of the governor the penal laws of this state are not being enforced as written, in any county, or counties, in this state.”²⁹² Somewhat like Idaho, another group of states requires the Attorney General to take action upon request, but vests this requesting power in other bodies or officials besides the governor, including in some instances local officials or the state legislature (or one house of it).²⁹³

state is interested that is pending in any other court in the state, on the written request of the governor, and when such appearance is entered he shall take charge of and have control of such cause”); *id.* § 7-4-1 (“The prosecuting attorney shall attend to the criminal business of the state in the county in which he or she is elected and qualified and when the prosecuting attorney has information of the violation of any penal law committed within the county, the prosecuting attorney shall institute and prosecute all necessary and proper proceedings against the offender . . .”).

²⁹² IDAHO CODE ANN. § 31-2227(1), (3).

²⁹³ *See* IOWA CODE ANN. § 13.2(1)(a), (g) (making it the duty of the state Attorney General to “[s]upervise county attorneys in all matters pertaining to the duties of their offices” and to “[p]rosecute and defend in any other court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general’s judgment, the interest of the state requires such action, or when requested to do so by the governor, executive council, or general assembly”); KAN. STAT. ANN. § 75-702 (“The attorney general shall also, when required by the governor or either branch of the legislature, appear for the state and prosecute or defend, in [any state lower court] or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested . . .”); OKLA. STAT. ANN. tit. 74, § 18b (requiring the state Attorney General “to appear at the request of the Governor, the Legislature, or either branch thereof, and prosecute and defend in any court or before any commission, board or officers any cause or proceeding, civil or criminal, in which the state may be a party or interested”); *id.* tit. 19, § 215.4 (“The district attorney, assistant district attorneys, or special assistant district attorneys authorized by [another statute], shall appear in all trial courts and prosecute all actions for crime committed in the district . . .”); MICH. COMP. LAWS ANN. § 14.28 (“the attorney general shall also, when requested by the governor, or either branch of the legislature, and may, when in his own judgment the interests of the state require it, intervene in and appear for the people of this state in any other court or tribunal, in any cause or matter, civil or criminal, in which the people of this state may be a party or interested”); *id.* § 49.153 (“The prosecuting attorneys shall, in their respective counties, appear for the state or county, and prosecute or defend in all the courts of the county, all prosecutions, suits, applications and motions whether civil or criminal, in which the state or county may be a party or interested.”); *Fieger v. Cox*, 734 N.W.2d 602, 612 (Mich. Ct. App. 2007) (noting that the state Attorney General possesses all the powers of a local prosecuting attorney unless the legislature withdraws them by statute and that “prosecuting attorneys in Michigan possess broad discretion to investigate criminal wrongdoing, determine which applicable charges a defendant should face, and initiate and conduct criminal proceedings”); *People v. Karalla*, 192 N.W.2d 676, 677 (Mich. App. Ct. 1971) (rejecting argument that the state Attorney General “lacks the power to initiate a prosecution” and may only “intervene in proceedings”); 1977-1978 Mich. Op. Att’y

In some of these states, applicable laws appear to presume that local prosecutors should be giving effect to state statutes. For example, by allowing supersession by the state Attorney General only when “the penal laws . . . are not being enforced as written,” Idaho law arguably implies an expectation that state criminal laws should be so enforced.²⁹⁴ Likewise, state

Gen. 502 (1978) (“the duty to prosecute is not absolute but rests in the sound discretion of a prosecuting attorney”); OHIO REV. CODE ANN. § 109.02 (“When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime.”); *id.* § 2939.10 (“In all matters or cases which the attorney general is required to investigate or prosecute by the governor or general assembly, or which a special prosecutor is required by [an organized crime statute] to investigate and prosecute, the attorney general or the special prosecutor, respectively, shall have and exercise any or all rights, privileges, and powers of prosecuting attorneys . . .”); OHIO REV. CODE ANN. § 309.08 (“The prosecuting attorney may inquire into the commission of crimes within the county. The prosecuting attorney shall prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party [except with respect to cases assigned specifically by listed statutes to another official.]”); *Mootispaw v. Eckstein*, 667 N.E.2d 1197, 1199 (Ohio 1996) (“A prosecuting attorney will not be compelled to prosecute a complaint except when the failure to prosecute constitutes an abuse of discretion.”); OR. REV. STAT. ANN. § 180.070 (“The Attorney General may, when directed to do so by the Governor, take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction.”).

²⁹⁴ IDAHO CODE ANN. § 31-2227(3). Some other states pair provisions in the categories addressed here with constitutional provisions expressly or impliedly banning suspensions of enforcement. *See supra* notes __ and accompanying text; MASS. GEN. LAWS ANN. ch. 12, § 27 (“District attorneys within their respective districts shall appear for the commonwealth in the superior court in all cases, criminal or civil, in which the commonwealth is a party or interested, and in the hearing, in the supreme judicial court, of all questions of law arising in the cases of which they respectively have charge, shall aid the attorney general in the duties required of him, and perform such of his duties as are not required of him personally; but the attorney general, when present, shall have the control of such cases. They may interchange official duties.”); *Commonwealth v. Kozlowsky*, 131 N.E. 207, 211 (Mass. 1921) (interpreting this statute to recognize “the right of the Attorney General to be present and exercise his authority whenever his public duty seems to him to require it,” including in grand jury proceedings); MD. CONST. art. V, § 3 (requiring the state Attorney General to prosecute criminal cases when “the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct [those cases] to be investigated, commenced and prosecuted or defended” and further requiring the state Attorney General to aid local state’s attorneys “in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions” when required to do so “by the General Assembly by law or joint resolution, or by the Governor”); OR. REV. STAT. ANN. § 180.070 (“The Attorney General may, when directed to do so by the Governor, take full charge of any investigation or prosecution of violation of law in which the circuit court has jurisdiction.”). However attorneys general should understand their supersession responsibility in these states, the anti-suspension provisions in these states’ constitutions appear to render categorical nonenforcement impermissible, for reasons discussed earlier in section III.B.2.a.

laws that allow legislatures to direct supersession of local prosecutions seem designed to ensure that prosecutors give effect to legislative policies, even if prosecutors would prefer to nullify the legislature’s enactments. On the other hand, though Minnesota requires the Attorney General to take over prosecutions at the governor’s request, a different state statute requires local county attorneys to “adopt written guidelines governing the county attorney’s charging and plea negotiation policies and practices,” including “the factors that are considered in making charging decisions and formulating plea agreements.”²⁹⁵ Though this statute does not specifically contemplate categorical nonenforcement policies, its mandate to adopt and disclose general charging practices might suggest that such policies are permissible, subject, at least, to public oversight and potential gubernatorial override.

On the whole, while none of these states meaningfully limits the grounds for overriding local prosecutorial choices, neither do any of them, including even Idaho, impose an affirmative duty on other officials to intervene, even if local prosecutors have chosen to categorically suspend enforcement of particular laws. Accordingly, the extent of local prosecutorial nonenforcement authority may depend in practice on discretionary choices by state-level officials, and evolving practice or judicial construction might resolve questions about the scope of such authority one way or the other. Insofar as state laws thus carry ambiguous or competing implications with respect to local prosecutors’ nonenforcement authority, functional considerations of the sort Murray and Wright emphasize might properly factor into the resolution of such questions.²⁹⁶

e. States that Require Non-Executive Approval for Supersession

Tipping now more sharply in the direction of local prosecutorial autonomy, some other states specifically protect local prosecutors’ autonomy by requiring approval from a court or local official for any displacement of the local prosecutor.

In Pennsylvania, although the state legislature recently adopted temporary statutory amendments conferring authority to prosecute certain gun crimes on the state Attorney General,²⁹⁷ state laws generally limit state-level interference with local prosecutorial choices. In general, outside of specified categories of offenses, the Pennsylvania Attorney General may pursue criminal charges in place of a district attorney only if the Attorney General petitions the district court and “establishes by a preponderance of the

²⁹⁵ MINN. STAT. ANN. § 388.051(3).

²⁹⁶ Murray, *supra* note __; Wright, *supra* note __.

²⁹⁷ H.B. 1614, 2019 Gen. Assemb., Reg. Sess. (Pa. 2019); *see also* Ouziel, *supra* note __, at 566 & n.162.

evidence that the district attorney has failed or refused to prosecute and such failure or refusal constitutes abuse of discretion.”²⁹⁸ As a practical matter, by providing only a “narrowly circumscribed power to supersede a district attorney,”²⁹⁹ this statutory arrangement grants the district attorney considerable space to adopt nonenforcement policies.³⁰⁰ In effect, no one but the Attorney General may override the district attorney’s choices, and the Attorney General may do so only if a court agrees not only that the district attorney has failed to prosecute, but also that such failure constitutes an “abuse of discretion”—a standard that seems designed to require more than mere “failure or refusal” to pursue particular crimes.

In Tennessee, elected local district attorneys general likewise have authority to prosecute crimes within their district subject to limited mechanisms for court-approved displacement. By contrast, the state-wide Attorney General, who is appointed by the Tennessee Supreme Court, generally has authority to prosecute a criminal offense only if the district attorney general has a conflict of interest³⁰¹ or requests the state Attorney General’s help³⁰². What is more, although under the Tennessee Constitution, “[i]n all cases where the Attorney for any district fails or refuses to attend and prosecute according to law, the Court shall have power to appoint an Attorney pro tempore,³⁰³ a statute limits the grounds for such appointments to circumstances in which “the district attorney general fails to attend the circuit or criminal court, or is disqualified from acting, or if there is a vacancy in the office.”³⁰⁴ According to Tennessee courts, “one of these three situations must occur before a judicial appointment is appropriate.”³⁰⁵ The Tennessee

²⁹⁸ 71 PA. STAT. ANN. § 732-205(a). The president judge in the jurisdiction may request the Attorney General to consider seeking supersession, but the Attorney General must choose to act on the request. 71 PA. STAT. ANN. § 732-205(a)(5). Pennsylvania law also appears to allow a private prosecutor to petition the court to override the district attorney’s choices in handling particular cases in some circumstances. 16 PA. STAT. ANN. § 7710.

²⁹⁹ *Carter v. City of Philadelphia*, 181 F.3d 339, 353 (3d Cir. 1999) (also noting “Pennsylvania’s consciously and deliberately designed autonomous role for its district attorneys”).

³⁰⁰ *See, e.g., Commonwealth v. Mulholland*, 702 A.2d 1027, 1037 (Pa. 1997) (reversing a court sua sponte substitution of the Attorney General for the district attorney because “the attorney general may intervene in criminal prosecutions only in accordance with provisions enumerated by the legislature”).

³⁰¹ TENN. CODE ANN. § 8-6-112(a).

³⁰² TENN. CODE ANN. § 8-6-106(b)(4). This statute also allows the district attorney general to transfer a case to another district attorney general or certain other officials. *Id.* § 8-6-106(b); *see also* *State v. Finch*, 465 S.W.3d 584, 596 (Tenn. Crim. App. 2013) (upholding this provision against a state constitutional challenge), *overruled on other grounds* by *State v. Menke*, 590 S.W.3d 455 (Tenn. 2019).

³⁰³ TENN. CONST. art. VI, § 5.

³⁰⁴ TENN. CODE ANN. § 8-7-106(a).

³⁰⁵ *Quillen v. Crockett*, 928 S.W.2d 47, 51 (Tenn.Crim.App.1995).

Supreme Court, moreover, has emphasized the breadth of the district attorney general’s unreviewable discretion,³⁰⁶ and it has further held that because the district attorney general is “an elected constitutional officer,” the state legislature “cannot enact laws which impede the inherent discretion and responsibilities of the office of district attorney general.”³⁰⁷ Tennessee thus appears to give local elected prosecutors effectively absolute discretion to determine whether state laws are enforced within their jurisdictions—a power they might use to adopt categorical nonenforcement policies without anyone else in state government (at least under current law) holding power to countermand them.

Louisiana, too, allows the state Attorney General, and only the state Attorney General, to prosecute crimes in place of locally elected district attorneys only if requested by the district attorney or else “for cause, when authorized by the court which would have original jurisdiction and subject to judicial review.”³⁰⁸ Likewise, Wyoming law allows the state-wide attorney general to prosecute particular crimes when the local elected district or county attorney fails to act, but only if the Attorney General does so “at the request of the board of county commissioners of the county involved or of the district judge of the judicial district involved.”³⁰⁹ In North Dakota, the elected state’s attorney in each judicial district is the “public prosecutor” with responsibility for criminal prosecution in the jurisdiction; he or she may be displaced by the attorney general or another court-appointed attorney only if a judge in the relevant district determines that the state’s attorney “has refused or neglected to perform” that duty.³¹⁰ More modestly, Missouri appears to allow the state Attorney General to sign indictments in place of the local prosecutor only with court approval.³¹¹ Outside of that circumstance,

³⁰⁶ *Dearborne v. State*, 575 S.W.2d 259, 262 (Tenn.1978) (quoting *Pace v. State*, 566 S.W.2d 861, 866 (Tenn.1978) (Henry, C.J., concurring)) (“He or she is answerable to no superior and has virtually unbridled discretion in determining whether to prosecute and for what offense.”).

³⁰⁷ *State v. Superior Oil, Inc.*, 875 S.W.2d 658, 660, 661 (Tenn. 1994).

³⁰⁸ LA. CONST. ANN. art. IV, § 8; *see also* LA. CONST. ANN. art. V, § 26 (“Except as otherwise provided by this constitution, a district attorney, or his designated assistant, shall have charge of every criminal prosecution by the state in his district . . .”); *State v. Neyrey*, 341 So. 2d 319, 322 (La. 1976) (noting that “the intent of the Constitutional Convention delegates was definitely to restrict the Attorney General’s power to institute criminal proceedings”).

³⁰⁹ WYO. STAT. ANN. § 9-1-603(c); *see also id.* § 9-1-801 (establishing office of district attorney); *id.* § 9-1-804(a)(i) (“each district attorney has exclusive jurisdiction to . . . [a]ct as prosecutor for the state in all felony, misdemeanor and juvenile court proceedings arising in the counties in his district, and prosecute such cases in the district courts and courts of limited jurisdiction or in other counties upon a change of venue”).

³¹⁰ N.D. CENT. CODE ANN. § 11-16-06.

³¹¹ MO. ANN. STAT. § 27.030 (“when so directed by the trial court, [the Attorney

Missouri law requires only that the Attorney General “assist” local prosecutors when directed to do so by the governor; it does not otherwise contemplate supersession of the local prosecutors’ authorities.³¹²

Finally, although Connecticut’s local state’s attorneys are not elected—they are appointed by a commission composed of the chief state’s attorney and six appointees (two of whom must be judges) nominated by the governor and confirmed by the general assembly³¹³—state law insulates their judgments as well from override by superior officials. The chief state’s attorney generally cannot appear in local state courts without the local state’s attorney’s permission,³¹⁴ and to intervene in a particular investigation or prosecution, the chief state’s attorney must “find[] by clear and convincing evidence, misconduct, conflict of interest or malfeasance of a state’s attorney” and, if the state’s attorney objects, must persuade the appointing commission to allow the intervention.³¹⁵

The legal structures in all these states support a strong inference that local prosecutors have broad authority over the scope and degree of enforcement in their jurisdiction, potentially including the power to adopt categorical nonenforcement policies that may be overridden only under narrow circumstances and if other specified officials choose to countermand them.

f. States with Specific Limits on Centralized Supersession

A last group of states limits state-level officials’ authority over local prosecution still more sharply or even eliminates it altogether. Here, too, state law supports a strong inference of de facto local nonenforcement power, even if state law does not specifically provide such power.

To begin with, in Hawaii, state law places elected local prosecutors “under the authority of the attorney general,”³¹⁶ yet the Hawaii Supreme Court has held that this statutory scheme “cannot sensibly be construed as a reservation of power [to the Attorney General] to usurp, at his sole discretion,

General] may sign indictments in lieu of the prosecuting attorney”). Missouri law also gives the Attorney General an independent duty to enforce certain gambling laws. *See id.* § 27.105.

³¹² *Id.* (“When directed by the governor, the attorney general, or one of his assistants, shall aid any prosecuting or circuit attorney in the discharge of their respective duties in the trial courts and in examinations before grand juries”); *id.* § 56.060 (“Each prosecuting attorney shall commence and prosecute all civil and criminal actions in the prosecuting attorney’s county in which the county or state is concerned”); *id.* § 56.450 (“The circuit attorney of the city of St. Louis shall manage and conduct all criminal cases, business and proceedings of which the circuit court of the city of St. Louis shall have jurisdiction.”).

³¹³ CONN. GEN. STAT. § 51-275a(a).

³¹⁴ CONN. GEN. STAT. § 51-277(d)(2).

³¹⁵ CONN. GEN. STAT. § 51-277(d)(3).

³¹⁶ HAW. REV. STAT. ANN. § 46-1.5(17).

the functions of the public prosecutor.”³¹⁷ Accordingly, the court indicated that the state Attorney General could displace a local prosecutor only, “for example, where the public prosecutor has refused to act and such refusal amounts to a serious dereliction of duty on his part, or where, in the unusual case, it would be highly improper for the public prosecutor and his deputies to act.”³¹⁸ Depending on what constitutes “a serious dereliction of duty” in the court’s view, this standard might be understood to allow significant nonenforcement by local prosecutors without any means of overriding their policy.

In Texas, “the attorney general has no authority to initiate criminal prosecutions but is generally limited to representing the State in civil litigation”; as a general matter, prosecutorial authority resides exclusively in local elected county and district attorneys.³¹⁹ Local prosecutors in Texas thus appear to have substantial autonomy in exercising their charging discretion.³²⁰ In Mississippi, too, state law vests autonomous responsibility for criminal prosecutions in their districts in elected district attorneys.³²¹ Its laws do obligate the Attorney General to “assist the district attorney there in the discharge of his duties” if “required [to do so] by the public service or when directed by the Governor, in writing.”³²² But the Mississippi Supreme Court has emphasized that “[t]he operative word in Section 7–5–53 is but

³¹⁷ *Amemiya v. Sapienza*, 629 P.2d 1126, 1129 (Haw. 1981).

³¹⁸ *Id.*

³¹⁹ *Lone Starr Multi Theatres, Inc. v. State*, 922 S.W.2d 295, 298 (Tex. Ct. App. 1996); see also TEX. CONST. art. IV, § 22 (establishing office of Attorney General); *id.* art. V, § 21 (establishing office of district and county attorneys); TEX. CODE CRIM. PROC. ANN. art. 2.01 (“Each district attorney shall represent the State in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely. . . . It shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done.”); *Landers v. State*, 256 S.W.3d 295, 303–04 (Tex. Ct. Crim. App. 2008) (“The office of a district attorney is constitutionally created and protected; thus, the district attorney’s authority cannot be abridged or taken away.” (internal quotation marks omitted)).

³²⁰ See, e.g., *Taylor v. Gately*, 870 S.W.2d 204, 204–05 (Tex. Ct. App. 1994) (“Discretion is a necessary ingredient in the determination of whether the requisites for accepting and filing a criminal complaint have been met.”), *writ dismissed w.o.j.* (June 2, 1994); Tex. Att’y Gen. Op. JC-0042 (1999) (indicating that “[a] county attorney’s constitutional and statutory duty to prosecute criminal cases in his or her county traditionally provides the prosecutor broad discretion to determine not to prosecute an offense,” but nonetheless deeming it unlawful to condition non-prosecution on a contribution to a public or private organization).

³²¹ MISS. CODE. ANN. § 25-31-11 (“It shall be the duty of the district attorney to represent the state in all matters coming before the grand juries of the counties within his district and to appear in the circuit courts and prosecute for the state in his district all criminal prosecutions and all civil cases in which the state or any county within his district may be interested . . .”).

³²² MISS. CODE. ANN. § 7-5-53.

one: *assist*.”³²³ In the Mississippi Supreme Court’s view, “[i]ntervention of the attorney general into the independent discretion of a local district attorney regarding whether or not to prosecute a criminal case constitutes an impermissible diminution of the statutory power of the district attorney.”³²⁴ Thus, Mississippi district attorneys generally appear to have autonomous discretion over prosecution within their jurisdictions, discretion they could conceivably employ to adopt categorical policies.³²⁵

In Illinois, likewise, state law empowers the state Attorney General only to “consult with and advise” local State’s Attorneys and to “attend the trial of any party accused of crime, and assist in the prosecution,” when the Attorney General judges “the interest of the people of the State [to] requires it.”³²⁶ In combination with constitutional and statutory provisions establishing the office of State’s Attorney,³²⁷ this statutory language by its terms appears to limit the Attorney General’s power to override State’s Attorneys’ prosecutorial judgments.³²⁸ The Illinois Supreme Court has nonetheless held that the Attorney General retains certain common-law powers, including the authority to initiate and prosecute criminal charges so long as the responsible State’s Attorney does not object.³²⁹ Yet if the State’s Attorney does object,

³²³ *Williams v. State*, 184 So. 3d 908, 914 (Miss. 2014).

³²⁴ *Id.* at 913; *see also Moore v. State*, 309 So. 3d 7, 11 (Miss. Ct. App. 2020) (indicating that the state Attorney General is not “the district attorney’s ‘boss’”).

³²⁵ *Cf. Williams*, 184 So. 3d at 915 (holding that state law “does not authorize the intervention of the attorney general into a matter statutorily relegated to the discretion of a local district attorney where that official has decided not to prosecute and, in fact, objects to the involvement of the attorney general”).

³²⁶ 15 ILL. COMP. STAT. ANN. 205/4. This same statute authorizes the Attorney General to prosecute certain election law offenses independently if the local State’s Attorney fails to act on a request to do so from the Attorney General. *Id.* This specification carries a negative inference that the Attorney General otherwise lacks such independent prosecutorial power.

³²⁷ ILL. CONST. art. VI, § 19 (establishing office); 55 ILL. COMP. STAT. ANN. 5/3-9005(1) (“The duty of each State’s Attorney shall be . . . [t]o commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in the circuit court for the county, in which the people of the State or county may be concerned. . .”).

³²⁸ In addition to referring only to “assist[ing]” prosecution, the statute establishing the Attorney General’s powers specifically authorizes the Attorney General to prosecute certain election law offenses independently if the local State’s Attorney fails to act on a request to do so from the Attorney General. 15 ILL. COMP. STAT. ANN. 205/4. This specification would seem to carry a negative implication that the Attorney General otherwise lacks such independent prosecutorial power.

³²⁹ *See, e.g., People v. Buffalo Confectionery Co.*, 401 N.E.2d 546, 549 (Ill. 1980) (discussing the “common law powers and duties of the Attorney General,” indicating that those powers “include the initiation and prosecution of litigation on behalf of the People,” and holding that the Attorney General could exercise this power in the case at hand because the State’s Attorney not only did not object but also “obvious[ly] acquiesce[ed]”); *People v. Roberts*, 389 N.E.2d 596, 599 (Ill. Ct. App. 1979) (“absent objection by the state’s attorney, the attorney general may discharge all the powers of the state’s attorney at all stages

case authority appears to recognize the State’s Attorney’s authority as paramount, thus potentially affording autonomous power to establish nonenforcement policies within the jurisdiction.³³⁰

Virginia’s legal structure is roughly similar to Mississippi and Illinois, though with a broader role for the state Attorney General. Its law, too, vests prosecutorial authority in local Commonwealth Attorneys³³¹ and it also limits state-level control by providing that, “[u]nless specifically requested by the Governor to do so, the Attorney General shall have no authority to institute or conduct criminal prosecutions in the circuit courts of the Commonwealth except” in specified types of cases.³³² Although this standard appears to leave supersession within the governor’s discretion, and although unlike in Mississippi and Illinois it does not limit Attorney General involvement to assistance, the statute’s emphatic negative formulation suggests an intent to generally insulate local prosecutorial choices, perhaps even including categorical nonenforcement policies, from state-level override.

Finally, Arkansas and Indiana are peculiar cases. In Arkansas, local prosecuting attorneys must “commence and prosecute all criminal actions in which the state or any county in [their] district may be concerned.”³³³ The state Attorney General generally appears to play no role in initiating criminal charges or overseeing local prosecuting attorneys’ decisions.³³⁴ Local prosecuting attorneys’ discretion might thus be effectively autonomous and plenary,³³⁵ but Arkansas’s unusually broad anti-suspending clause suggests such authority does not extend to categorical suspensions of enforcement.³³⁶

in a prosecution”).

³³⁰ See, e.g., *Cty. of Cook ex rel. Rifkin v. Bear Stearns & Co.*, 831 N.E.2d 563, 570 (Ill. 2005) (rejecting arguments that the legislature could “reduce a State’s Attorney’s constitutionally derived power to direct the legal affairs of the county”); *People v. Dasaky*, 709 N.E.2d 635, 640 (Ill. Ct. App. 1999) (“The Attorney General lacks the power to take exclusive charge of the prosecution of those cases over which the State’s Attorney shares authority.”); cf. *People v. Mulcahey*, 365 N.E.2d 1013, 1016 (Ill. Ct. App. 1977) (“the State’s Attorney has discretion in choosing which offense should be prosecuted”), *aff’d*, 381 N.E.2d 254 (Ill. 1978).

³³¹ VA. CODE ANN. § 15.2-1627(B) (“The attorney for the Commonwealth and assistant attorney for the Commonwealth shall be a part of the department of law enforcement of the county or city in which he is elected or appointed, and shall have the duties and powers imposed upon him by general law, including the duty of prosecuting all warrants, indictments or informations charging a felony, and he may in his discretion, prosecute [certain misdemeanors and other violations].”).

³³² *Id.* § 2.2-511(A).

³³³ ARK. CODE ANN. § 16-21-103.

³³⁴ See ARK. CODE ANN. § 25-16-702 (outlining Attorney General’s duties).

³³⁵ See *Smith v. Simes*, 430 S.W.3d 690, 697 (Ark. 2013) (discussing prosecuting attorneys’ discretion over charges).

³³⁶ ARK. CONST. art. I, § 12 (“No power of suspending or setting aside the law or laws of the State, shall be exercised, except by the General Assembly.”).

As for Indiana, its local prosecuting attorneys, whose office (unlike the state Attorney General's) is established by the Indiana Constitution,³³⁷ hold statutory authority, "within their respective jurisdictions," to "conduct all prosecutions for felonies, misdemeanors, or infractions and all suits on forfeited recognizances."³³⁸ The state Attorney General, by contrast, may only "consult with and advise" local prosecuting attorneys and "attend the trial of any party accused of an offense, and assist in the prosecution," if, "in the attorney general's judgment, the interest of the public requires it."³³⁹ As one court has explained, "the general rule in Indiana is that the Attorney General cannot initiate prosecutions; instead, he may only join them when he sees fit."³⁴⁰ With limited statutory exceptions,³⁴¹ local prosecuting attorneys thus appear to hold charging discretion that no other official can override; indeed, the Indiana Supreme Court has held that "[t]he determination as to who shall be prosecuted lies within the sole discretion of the prosecuting attorney."³⁴²

On the other hand, however, an Indiana statute appears to create a mandatory obligation of investigation, if not prosecution, when the prosecuting attorney receives evidence of a potential crime.³⁴³ In addition, Indiana's constitution, as we saw, includes an unusually broad anti-suspension clause,³⁴⁴ and in 1964 the Indiana Supreme Court held that a

³³⁷ IND. CONST. art. VII, § 16; *see also* *State v. Mkt.*, 302 N.E.2d 528, 533 (Ind. 1973) (rejecting arguments that the state Attorney General could not be given statutory control over criminal appeals and instead holding that, "[w]hile the office of Prosecuting Attorney may have been created by the Constitution of Indiana, the rights and duties of that office are prescribed by statute").

³³⁸ IND. CODE ANN. § 33-39-1-5.

³³⁹ IND. CODE ANN. § 4-6-1-6.

³⁴⁰ *Doe v. Holcomb*, 883 F.3d 971, 977 (7th Cir. 2018).

³⁴¹ *See* IND. CODE ANN. § 12-15-23-6 (allowing prosecution of Medicaid fraud cases by the attorney general upon referral by the local prosecuting attorney).

³⁴² *Johnson v. State*, 675 N.E.2d 678, 683 (Ind. 1996); *see also* *Sharpe v. State*, 369 N.E.2d 683, 687 (Ind. Ct. App. 1977) ("The prosecuting attorney is vested with the discretion to determine what offense can be proved with the evidence at hand and to decide the crime with which a suspect will be charged."); *Brune v. Marshall*, 350 N.E.2d 661, 662 (Ind. App. Ct. 1976) (describing the prosecuting attorneys' "broad scope of discretion" as "extend[ing] to the power to investigate and determine who shall be prosecuted and the crime with which those parties will be charged").

³⁴³ IND. CODE ANN. § 33-39-1-4 (requiring prosecuting attorney to obtain subpoenas for relevant witnesses when he or she "receives information of the commission of a felony or misdemeanor"); *but cf.* *Worthington v. State*, 409 N.E.2d 1261, 1268 (Ind. Ct. App. 1980) (noting the prosecuting attorney's discretion over whether to prosecute and thus concluding that, "[e]ven if the prosecutor knew all the facts pertinent to the instant case when he indicted Dorothy there is no authority requiring him to indict Worthington at the same time").

³⁴⁴ IND. CONST. art. I, § 26 ("The operation of the laws shall never be suspended, except by the authority of the General Assembly.").

prosecuting attorney could be disbarred for neglect of duty even if he was “merely was oblivious of the repeated violations of the law which occurred uninterruptedly in his view in [the county] when he was prosecuting attorney.”³⁴⁵ Overall, then, Indiana law appears to give local prosecuting attorneys substantial autonomy in deciding what offenses to prosecute in their jurisdiction, but some authority suggests they should not understand their authority to extend to adopting categorical nonenforcement policies.

g. Summary

To sum up, even a fairly cursory and high-level overview of governing state laws and constitutional provisions reveals substantial variation in the allocation of prosecutorial authority. Some state constitutions specifically ban suspensions of enforcement, a requirement at odds with adopting categorical nonenforcement policies at any level of government. A handful of states impose an affirmative duty on state-level officials to ensure “adequate” or “effective” enforcement of state laws, a duty that seems designed to ensure that any permissive local policies are overridden. Some others impose such tight requirements of supervision and control by state-level officials that presuming categorical nonenforcement power at the local level is implausible. In an intermediate category, a large number of states grant state-level officials the power to override local choices, but no clear duty to do so; these states’ laws seem amenable to competing interpretations and evolving practical understandings. Finally, some states impose specific procedural constraints on any override local prosecutorial choices, and a last group sharply constrains or eliminates altogether any such power, making it at least plausible, if not altogether inevitable, to infer broad local nonenforcement power.

As I have stressed throughout, abjuring categorical nonenforcement does not necessarily require swinging to the opposite extreme of maximal enforcement instead. Given the overall structure of modern American criminal law, prosecutors are almost never obligated to pursue charges in any given case; nor should they feel compelled to pursue the maximum available punishment for every given conduct violation. Even in states that appear to forbid categorical nonenforcement, entire categories of cases might never rise in practice to a level of perceived importance warranting commitment of resources. As outlined in Part I, however, a premise of my argument throughout is that taking the further step of disclosing implicit prioritization choices may matter in this area: in practical effect, it may powerfully influence public behavior, perceptions of law, and relative institutional

³⁴⁵ In re Holovachka, 198 N.E.2d 381, 391 (Ind. 1964).

authority within the government. On the question whether taking that step is permissible, the fifty states' laws vary considerably and there is no single model of local prosecutorial authority.³⁴⁶ An analysis that takes state law and state constitutionalism seriously requires looking at each state one by one.

IV. LESSONS FOR CONTEMPORARY CONSTITUTIONAL POLITICS

What lessons might we draw about the contemporary United States based on the variation in state law and the trajectory of current controversies at both the state and federal levels? The snapshot of current law and practice offered in Parts II and III holds several general implications. The first and most important is practical: analysts, courts, and commentators should focus more on state and federal positive law, and less on policy aims and abstract generalizations, in assessing categorical nonenforcement's validity in different jurisdictions. Yet the analysis also supports two other more speculative—and more unsettling—observations, one about the weakness of state constitutionalism and another about the power of contemporary partisanship in shaping institutional understandings.

A. Towards a More Grounded Analysis

To start with the practical point, questions about enforcement discretion arise almost inevitably when a governing system separates legislative and executive authority.³⁴⁷ If the law proscribes certain conduct but vests enforcement exclusively in certain officials, are those officials duty bound to punish every infraction? If not, on what grounds, and to what degree, may they forebear from enforcement? Legal systems can and do answer these questions differently. While broad prosecutorial discretion is the norm in American criminal justice, some civil law systems at least purport to follow a “principle of legality” according to which prosecutors must pursue every violation.³⁴⁸ Even within the United States, as we have seen, the practical scope and operation of prosecutors' discretion has varied considerably over time. In general, it has expanded enormously over the past century or so as limited criminal codes and case-based compensation gave way to expansive codes and salaried professionalization aimed at encouraging case-by-case

³⁴⁶ Cf. Wright, *supra* note __, at 840 (disputing the existence of any “single definition of the role of the prosecutor”).

³⁴⁷ See, e.g., N.W. BARBER, *THE PRINCIPLES OF CONSTITUTIONALISM* 65 (2018) (noting early historical recognition that “the separation of powers gave the executive a role that extended beyond mechanical application of [statutory] rules”).

³⁴⁸ Luna, *supra* note __, at 807; John H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); *but cf.* Sklansky, *supra* note __ (discussing increasing use of prosecutors internationally to “blur” boundaries).

forebearance.³⁴⁹

Nevertheless, the prevalence of a common status quo model in the early twenty-first-century United States should not dictate that a common understanding must always prevail across all jurisdictions going forward. At least on the question considered here—whether categorical nonenforcement is permissible—governing laws for the federal government and the fifty states vary considerably.

At the federal level, the President’s duty to ensure faithful execution should foreclose categorical nonenforcement, though as we have seen the Supreme Court’s *UC Regents* decision has clouded the question and current litigation over DACA’s validity could either clarify it or obscure it further.³⁵⁰ At the state level, a number of states allocate prosecutorial power in ambiguous ways—conferring authority generally on locally elected prosecutors while giving state-level officials discretionary power to override local choices—that might support competing interpretations or allow differing institutional practices to develop over time.³⁵¹ But others allocate power in more determinate ways. For example, though local prosecutors have claimed powers of categorical nonenforcement in both states, such power seems hard to square with either Massachusetts’s ban on suspending the execution of laws³⁵² or the California Attorney General’s constitutional duty “to see that the laws of the State are uniformly and adequately enforced”³⁵³ and to take over prosecution “[w]henver in the opinion of the Attorney General any law of the State is not being adequately enforced in any county.”³⁵⁴ On the other hand, although state-level officials have decried local nonenforcement in Texas,³⁵⁵ local categorical nonenforcement power seems much more plausible there given state law’s deliberate insulation of local prosecutors’ choices from state-level supervision.³⁵⁶ The same is true in Mississippi, Illinois, and Pennsylvania, among other places.³⁵⁷

Taking state constitutions and framework statutes seriously—itsself an important requirement of the rule of law—should mean giving effect to these

³⁴⁹ For my account of this development, see Price, *supra* note __, at 742-46; see also NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780-1940* (2013).

³⁵⁰ See *supra* __.

³⁵¹ See *supra* Part III.B.2.

³⁵² MASS. CONST. pt. I, art. XX.

³⁵³ CAL. CONST. art. V, § 13.

³⁵⁴ CAL. CONST. art. V, § 13.

³⁵⁵ See, e.g., Catherine Marfan, *Texas Prosecutors Want To Keep Low-Level Criminals Out of Overcrowded Jails. Top Republicans and Police Aren’t Happy.*, TEXAS TRIBUNE (May 21, 2019), <https://www.texastribune.org/2019/05/21/dallas-district-attorney-john-cruezot-not-prosecuting-minor-crimes/>.

³⁵⁶ See *supra* __.

³⁵⁷ See *supra* __.

differences. Even when litigation regarding the question is unlikely, it should be incumbent on state and local officials to abide by legal limitations on their authority, or at least to explain why they do not interpret applicable laws not to limit their conduct. By the same token, continued diffusion of categorical nonenforcement at the state and local level should not necessarily support embracing it at the federal level, nor should federal repudiation necessarily mean categorical nonenforcement is impermissible in all fifty states. Federalism should entail authority to adopt different arrangements and make different choices.

Such diversity, indeed, could advance federalism's core purposes of adapting local laws "to local conditions and local tastes."³⁵⁸ Different approaches to prosecutorial discretion and criminal justice might well accord better with local conditions in different places. Allowing different institutional arrangements to persist, furthermore, might enable valuable experiments within the "laboratories of democracy" afforded by federalism.³⁵⁹ Is categorical enforcement prone to abuse and corruption, or does its transparency instead prevent sweetheart deals and unequal treatment? Does allowing local nullification of state-wide laws promote greater democratic legitimacy for governing institutions, or does it instead erode respect for law across the board? Do state legislatures have greater capacity than executive officials to legitimate major policy changes, as appears to be the case at the federal level,³⁶⁰ or is that function unique to the national Congress? We might learn the answers to these and other questions by comparing different jurisdictions' experiences and then adapt legal and constitutional arrangements over time based on the answers. By contrast, subsuming all such variation within a common model could impoverish this process of local adaptation and regional experimentation, to the detriment of overall constitutional governance.

B. Implications for Contemporary Constitutional Politics

So far, in stark contrast to these prescriptions, variations in state positive law appear to have had limited effect on actual institutional behavior in this area. Categorical nonenforcement now appears equally entrenched in California, Massachusetts, and New York as in Illinois, Texas, and Louisiana, even though laws in the first three states (to varying degrees) seem hostile to any such practice while laws in the latter three (again to varying degrees) may

³⁵⁸ Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)).

³⁵⁹ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁶⁰ See MAYHEW, *supra* note __.

encourage it. In effect, categorical nonenforcement has spread through a partisan geography rather than a legal one: progressive local jurisdictions have increasingly embraced it while so far conservative ones by and large have not. The question then arises why that is so. At least two factors with potentially broader significance seem to have been crucial.

1. Weak Enforcement of State Structural Law

The first is the weak extra-judicial enforcement of state constitutional and statutory law. As Miriam Seifter has observed, enforcing constitutional laws and other framework arrangements requires not only laws on paper, but also “extra-judicial constitutional capacity,” meaning an infrastructure of lawyers, commentators, and judges invested in interpreting and enforcing state constitutional and legal restraints.³⁶¹ Federal constitutional law has such capacity in spades. States, by contrast, almost universally lack it. Accordingly, while federal constitutional law is subject to extensive scholarly debate and discussion, scholars and lawyers, not to mention the public at large, are generally less invested in debates over particular state constitutional provisions, and the same is true of the public at large.³⁶²

The example of categorical nonenforcement discussed here appears to confirm Seifter’s observation that this difference matters. The Obama Administration’s nonenforcement policies prompted extensive scholarly debate over associated legal questions. Though often partisan in character, that debate also highlighted the broader implications of particular legal and constitutional understandings, and this debate ultimately preceded and informed court decisions over particular policies’ legality. To be sure, important questions about those policies’ validity remain unresolved; as we saw, the *UC Regents* decision creates considerable confusion, which courts may or may not clear up in the course of current litigation over DACA. Yet the debate itself may have imposed important constraints on executive behavior. At the least, as we also saw, it is possible that lawyers’ principled commitment to a particular understanding of faithful execution helped restrain the Trump Administration from embracing broader nonenforcement policies.

By contrast, states’ receptivity to broadened prosecutorial discretion has largely tracked the national, federal-law debate rather than focusing on concrete state-law provisions.³⁶³ This pattern might be an example of what

³⁶¹ Seifter, *supra* note ___, at 387-88.

³⁶² *Id.* at 388-89.

³⁶³ There are exceptions, of course. Some noteworthy examples of state-specific analysis include Foster, *supra* note ___, and several entries on the SCOCAblog regarding the California Supreme Court.

my colleague Scott Dodson has called federal law’s “gravitational force”: state and local actors have gravitated toward the federal examples they have found most politically congenial.³⁶⁴ Yet here following those examples has required not only emulation of federal law, but also in some cases an affirmative disregard for state requirements. The reasons seem rooted in Seifter’s concerns about state constitutionalism’s weak enforcement. Whereas the U.S. Constitution is a matter of intense study by scholars and deep emotional attachment among citizens, state governing arrangements rarely, if ever, have the same degree of scholarly and public support. As a result, it seems doubtful that challenges to state and local actions based on state constitutional provisions and framework statutes could have the same political resonance as parallel objections to federal actions based on the U.S. Constitution. For example, even in California—a large state with a comparatively robust body of state constitutional law and related scholarship—it seems doubtful that accusing the state Attorney General or Governor of neglecting state constitutional duties could carry the same force as similar objections directed at the U.S. President. The end result is likely that state officials have more latitude to embrace novel or even implausible understandings of the legal restraints governing their conduct.

In fairness, this greater state-level flexibility may not always be entirely a bad thing. As relevant here, to the extent one views progressive prosecution as a positive development, states’ openness to this form of institutional innovation, even in the face of formal legal restraints, might seem positive. One might even argue that federal constitutional law suffers from an excess of extra-judicial capacity: the frequent constitutionalization of political conflicts may elevate the stakes and impede negotiated resolution of policy conflicts, contributing to a sense of gridlock and paralysis with respect to federal governance. Finally, constitutional restraint may well be far more important at the federal level than the state level, given the awesome powers of the modern presidency and federal government, including powers relating to foreign affairs and warfare as well as domestic policy.

All that said, even at the state level, constitutionalism is an essential bedrock for democracy. Without some settled rules for resolving conflicts between branches and institutions, or at least procedures for establishing such rules, political conflicts can spin out of control in destructive ways. Conflicts over prosecutorial discretion might be unlikely to rise to that level: on this question, after all, state-level actors in most places hold at least notional capacity to override local choices by establishing alternative state-level enforcement mechanisms. Yet other sorts of conflicts—logjams between governors and legislatures, for example, or between competing officials

³⁶⁴ Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703 (2016).

within divided state executive branches—may not be so readily defused.³⁶⁵ The pattern documented here thus has quite worrisome general implications for state-level governance in our increasingly divided and polarized polity.

2. Diffusion (and Restraint?) Through Partisanship

The second key factor in the trajectory documented here is the intensely partisan character of current debates over institutional authority. Here, the story, oddly, is not entirely negative, as negative partisanship seems to have acted simultaneously as both an accelerant and a restraint with respect to understandings of prosecutorial authority.

As we have seen, categorical nonenforcement has spread rapidly across jurisdictions with progressive-leaning electorates, perhaps in part due to high-profile precedents set by the Obama Administration.³⁶⁶ Among political scientists who have explored the process of “policy diffusion”—the mechanisms by which policies spread across jurisdictions within the United States—some have suggested that partisan networks may be important vectors for such diffusion: politicians in one jurisdiction may be especially prone to copy policies and examples set by co-partisans in other jurisdictions, even if doing so is at odds with past practice in their own state or locality.³⁶⁷ The trajectory so far with respect to categorical nonenforcement appears to fit that account quite well, thus providing a valuable case study to confirm this mechanism of diffusion.

Yet there is another side to the story, at least in this case. As we also have seen, the flipside of progressives’ embrace of categorical nonenforcement has been conservative resistance to it. Although in fact nonenforcement could be employed to achieve valuable goals for either political camp, the acrimonious debate over President Obama’s initiatives and more recent local prosecutorial policies seems to have generated a high degree of partisan polarization around the point of principle itself, i.e., over categorical nonenforcement’s lawfulness. Along with the weaknesses in state constitutional enforcement just discussed, nationalized partisanship thus seems to have been another key factor in suppressing discussion of the state and local positive laws that should properly govern the question.

As with states’ apparent constitutional flexibility, the implications here

³⁶⁵ Seifter, *supra* note __, at 389; see also Miriam Seifter, *Judging Power Plays in the American States*, 97 TEX. L. REV. 1217, 1218-20 (2019) (“[I]f the national branches are playing constitutional hardball, the states are playing hand grenades.”).

³⁶⁶ See *supra* __.

³⁶⁷ See, e.g., Karch, *supra* note __, at 63-65 (discussing literature positing that policies may diffuse across states through “use of ideological or partisan cues” or through “political forces that operate in multiple states”).

may not be entirely negative. Diffusion through partisan networks seems to have accelerated categorical nonenforcement's spread through some jurisdictions while restraining it in some others. In particular, it is at least possible that polarization around this question of legal authority imposed restraints on the Trump Administration that might otherwise have been absent. Partisan polarization may thus have bought some breathing space for continued debate at all levels of government.

Yet the current equilibrium seems unlikely to last. Instead, approaches to prosecution at all levels of government will probably tip one way or the other: either reversals and setbacks will accumulate at both the federal and state levels and eventually place the genie of categorical nonenforcement back in the bottle, or instead conservatives will eventually abandon principle and employ nonenforcement for their own ends, generating nationwide embrace of the new broadened theory of prosecutorial power. In fact, we have seen precisely this pattern on other key questions of state and federal institutional authority. As Neal Devins and Saikrishna Prakash have documented, for example, partisan dynamics and high-profile federal precedents brought about a rapid collapse just a few years ago of state attorney generals' perceived duty to defend state laws against constitutional challenges, even though positive state laws varied widely regarding the extent of any such duty, much as they do on questions of local prosecutorial autonomy.³⁶⁸ As this example and the ones discussed here illustrate, nationalization of debates over institutional authority raises the stakes at every level of government in an unhealthy way: in each particular example, decision-makers may be setting a precedent not only for their own particular level of government, but also potentially for the nation as a whole.

CONCLUSION

The current structure of criminal law in many jurisdictions in the United States—a structure with deliberately excessive punishments and expansive crime definitions aimed at imposing trial penalties and facilitating conviction—is costly to the rule of law. It gives prosecutors too much discretion, weakens due process guarantees, and places citizens at undue risk of punishment for socially accepted conduct. Nevertheless, one emerging response to this structure's flaws—a model of prosecutorial discretion that encourages categorical nonenforcement—may be costly as well. Among other things, it weakens societal reliance on enacted legislation as the focus of behavioral regulation, creates confusion about what the law really requires, invites reliance on policies that may not in fact protect individuals against

³⁶⁸ Devins & Prakash, *supra* note __, at 2107.

future enforcement, and gives prosecutors a form of law-making power that few previously anticipated and that longstanding Anglo-American constitutional anxieties warn against. Even worse, this prosecutorial practice might well be counterproductive with respect to reformers' own aims. By siphoning off pressure for political change, prosecutorial nonenforcement may only make more durable legislative reform less likely.

How to balance these competing harms is an important policy question. But it is also a question of legal and institutional authority that different jurisdictions may answer differently. As I have tried to demonstrate here, federal law should not allow a general practice of categorical nonenforcement except in areas where Congress has specifically authorized it, yet state governments differ both from each other and from the federal government in their organization. These varied state governing arrangements seem to make inferring a local categorical nonenforcement power quite plausible in some states, quite implausible in others, and potentially up for grabs in another group. To enable federalist experimentation and strengthen state constitutionalism—and because it is what the law requires—we should give effect to these differences in debates and litigation over categorical nonenforcement in different jurisdictions.

In all likelihood, however, we will not follow this path. Instead, we will continue the trajectory evident so far—one in which a nationalized and highly partisan conversation over policy has overridden attention to state and local positive law. At both the federal and state levels, a more dispassionate and grounded legal analysis could help diffuse political tensions and channel political pressures into avenues that reinforce both federal and state constitutionalism rather than weakening them. But prosecutorial discretion will probably not be the last issue on which we choose to amplify political conflict instead.