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Executive Enforcement Discretion and the Separation of Powers: A Case Study on the Constitutionality of DACA and DAPA

Louis W. Fisher

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EXECUTIVE ENFORCEMENT DISCRETION AND THE SEPARATION OF POWERS: A CASE
STUDY ON THE CONSTITUTIONALITY OF DACA AND DAPA

Louis W. Fisher*

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I. INTRODUCTION

In November 2015, the United States Court of Appeals for the Fifth Circuit made headlines,¹ upholding a nationwide preliminary injunction against implementation of the Obama Administration’s controversial Deferred Action for Parents of Americans (“DAPA”) program.² Almost exactly a year earlier, the

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² Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015).
Department of Homeland Security ("DHS") created DAPA while simultaneously expanding\(^3\) a preexisting program called Deferred Action for Childhood Arrivals ("DACA").\(^4\) DHS initiated DACA in 2012, permitting certain individuals, who came to the United States as children and were raised here, to apply for "deferred action"\(^5\) and employment authorization.\(^6\) In a 2014 memorandum, DHS launched DAPA, which similarly extends consideration for deferred action to "individuals who... have, [as of November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident" and meet five additional criteria.\(^7\)

In response to this 2014 memorandum, 26 states sued the United States government and DHS officials (hereinafter "United States") in federal district court, arguing that the program violated the Administrative Procedure Act ("APA") and the Take Care Clause\(^8\) of the Constitution.\(^9\) In February 2015, Judge Hanen of the United States District Court for the Southern District of Texas granted a nationwide preliminary injunction against DAPA and the 2014

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4 See Texas v. United States, 809 F.3d 134, 146–48 (5th Cir. 2015).

5 DHS defines "deferred action" as "a long-standing administrative mechanism dating back decades, by which the Secretary of Homeland Security may defer the removal of an undocumented immigrant for a period of time." See 2014 DAPA MEMO, supra note 3, at 2.


7 See Texas v. United States, 809 F.3d 134, 147 (5th Cir. 2015). According to the 2014 DAPA Memo, individuals may be considered for deferred action under DAPA if they:

- [1] have, on [November 20, 2014], a son or daughter who is a U.S. citizen or lawful permanent resident;
- [2] have continuously resided in the United States since before January 1, 2010;
- [3] are physically present in the United States on [November 20, 2014], and at the time of making a request for consideration of deferred action with USCIS;
- [4] have no lawful status on [November 20, 2014];
- [5] are not an enforcement priority as reflected in the November 20, 2014 Policies for the Apprehension, Detention and Removal of Undocumented Immigrants Memorandum; and
- [6] present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate.

8 Id. at n.12 (quoting 2014 DAPA MEMO, supra note 3).

9 U.S. CONST. art. II, § 3, cl. 5 (stating that the President "shall take care that the laws be faithfully executed").

9 Texas v. United States, 809 F.3d 134, 146 (5th Cir. 2015).
expansion of DACA. The district court held that Texas had standing to challenge DAPA and that DHS violated the APA’s procedural requirements because DAPA was a “substantive” rule that did not undergo the requisite notice-and-comment rulemaking procedures.

The United States appealed, and a divided Fifth Circuit panel affirmed, upholding the preliminary injunction against DAPA. The court of appeals agreed with the lower court that Texas had standing to challenge DAPA and that DAPA is a substantive rule subject to the APA’s notice-and-comment requirements. The Fifth Circuit’s decision, however, is notably broader than the district court’s decision below. In addition to this procedural APA violation, the Fifth Circuit also held that DAPA is “manifestly contrary” to the Immigration and Naturalization Act (“INA”) and is thus substantively unlawful agency action under section 706(2) of the APA.

The Solicitor General filed a petition for a writ of certiorari with the United States Supreme Court in an effort to salvage the Administration’s key immigration initiative before the end of President Obama’s final term. The Supreme Court granted certiorari and instructed the parties to address the question “whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.” An equally divided Court ultimately affirmed the

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11 Id. at 643–44, 671.
12 In addition to appealing the district court’s decision, the United States filed an Emergency Motion to Stay the district court’s preliminary injunction, which Judge Hanen denied. Texas v. United States, No. B–14–254, 2015 WL 1540022, at *8 (S.D. Tex. Apr. 7, 2015). On May 26, 2015, a divided panel of the Fifth Circuit affirmed the district court’s denial of the stay. Texas v. United States, 787 F. 3d 733, 743 (5th Cir. 2015).
13 Texas v. United States, 809 F.3d 134, 188 (5th Cir. 2015).
14 Id. at 168.
15 Id. at 178.
16 Id. at 186. In the Fifth Circuit, “alternative holdings are binding precedent and not obiter dictum.” Id. at 178 n.158 (internal citations and quotation marks omitted). The district court specifically declined to reach the plaintiffs’ substantive APA claim. See Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (“In this order, the Court is specifically not addressing Plaintiffs’ likelihood of success on their substantive APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine.”).
17 Petition for Writ of Certiorari, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-674).
18 See, e.g., Ford, supra note 1.
Fifth Circuit, leaving the nationwide injunction in place and the Take Care Clause issue ultimately unresolved.

In spite of its protracted procedural history, politically contentious nature, and non-precedential dénouement, the Texas v. United States litigation made a valuable and perhaps previously unforeseen contribution to our understanding of the constitutional separation of powers, independent of the formal outcome of the case. The states’ challenge to DACA and DAPA brought renewed public and scholarly attention to an otherwise under-theorized aspect of the separation of powers: executive branch enforcement discretion.

22 809 F.3d 134 (5th Cir. 2015).
23 Other cases challenging DACA have similarly contributed to the increased public and academic salience of the constitutional issues surrounding executive enforcement discretion, including Crane v. Johnson, 783 F.3d 244, 255 (5th Cir. 2015) (affirming dismissal for lack of standing of DACA challenge brought by states and Immigrations and Customs Enforcement agents), and Arpaio v. Obama, 797 F.3d 11, 25 (D.C. Cir. 2015) (affirming dismissal for lack of standing in challenge to DACA and DAPA brought by county sheriff).
24 Although the Texas v. United States litigation deals only with DAPA and the 2014 expansion of DACA, scholars have also previously raised questions about the constitutionality of DACA as it stood in 2012. See, e.g., Robert J. Delahunty & John C. Yoo, Dream On: The Obama Administration’s Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause, 91 Tex. L. Rev. 781, 850 (2013) [hereinafter Delahunty & Yoo] (arguing DACA is an “unexcused, and perhaps unconstitutional, breach of the Executive’s duty to enforce”). Throughout the rest of this paper, for the sake of convenience, the Author will use the term “DACA/DAPA” to refer broadly to deferred action in the context of immigration, including both the 2012 and 2014 versions of DACA and DAPA. The constitutional analysis under the Take Care Clause should not differ between these three aspects of the Administration’s nonenforcement policy in the immigration context.
Although both the district court\textsuperscript{26} and the court of appeals\textsuperscript{27} in \textit{Texas} declined to reach the states’ constitutional argument that DACA violated the President’s duty to “take care that the laws are faithfully executed,” President Obama’s use of nonenforcement to promote policy goals\textsuperscript{28} prompted scholars to dedicate careful and searching attention to the constitutional puzzles posed by exercises of executive enforcement discretion.\textsuperscript{29} Particularly in the context of DACA/DAPA, commentators have vigorously disagreed about whether executive nonenforcement violates the Take Care Clause.\textsuperscript{30}

Indeed, this increase in the quantity and quality of scholarly commentary on the constitutionality of DACA/DAPA, and executive enforcement discretion more broadly, continues to play a crucial role in the national political discourse, despite the Court’s summary affirmance in \textit{Texas}. President Trump has expressed equivocal (and at times, inconsistent) views on DACA, which initially remained in force in the wake of the \textit{Texas} decision. Ultimately, in September 2017, President Trump announced his decision to end the DACA program, sparking a new wave of litigation based on the APA and the Equal Protection

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{26} Texas v. United States, 86 F. Supp. 3d 591, 677 (S.D. Tex. 2015) (“In this order, the Court is specifically not addressing Plaintiffs’ likelihood of success on their \textit{substantive} APA claim or their constitutional claims under the Take Care Clause/separation of powers doctrine.”) (emphasis in original).
\item\textsuperscript{27} Texas v. United States, 809 F.3d 134, 146 n.3 (5th Cir. 2015) (“We find it unnecessary, at this early stage of the proceedings, to address or decide the challenge based on the Take Care Clause.”).
\item\textsuperscript{28} Both Republican and Democratic presidents have used enforcement discretion to forward their preferred policy objectives. \textit{See}, \textit{e.g.}, Zachary S. Price, \textit{Politics of Nonenforcement}, 65 Case W. Res. L. Rev. 1119, 1136 (2015) [hereinafter \textit{Politics}] (noting aggressive use of “policy-driven nonenforcement” by Presidents Reagan and George W. Bush and arguing that Obama has “continued the trend”). Perhaps the increased scholarly salience of nonenforcement during the Obama administration is traceable to the President’s decision to “publicly [announce] nonenforcement policies on high-profile issues and [claim] credit for them to a degree earlier presidents did not.” \textit{Id.} In addition to DACA and DACA, the Obama Administration has also controversially employed enforcement discretion to “abstain[] from investigating and prosecuting certain federal marijuana offenses in states where possession of the drug is legal and [to delay] for substantial periods the enforcement of key provisions of the Affordable Care Act (“ACA”).” Price, \textit{Enforcement Discretion}, \textit{supra} note 25, at 673.
\item\textsuperscript{29} \textit{See}, \textit{e.g.}, Michael T. Morley, \textit{Reverse Nullification and Executive Discretion}, 17 U. Pa. J. Const. L. 1283, 1284 n.3 (2015) (identifying numerous recent normative defenses of executive enforcement discretion).
\end{enumerate}
\end{footnotesize}
Clause rather than separation of powers principles. Nonetheless, separation-of-powers arguments remain at the forefront of the debate of DACA: threats by 10 Republican state Attorneys General to sue unless the President revoked the program were likely critical in prompting him to do so, and United States Attorney General Jeff Sessions characterized DACA as “unconstitutional” in announcing its demise.32

This Article aims to bring some analytical clarity to the separation-of-powers aspect of this multifaceted constitutional debate by suggesting the usefulness of a familiar heuristic tool: Justice Jackson’s famous tripartite Youngstown framework. While at least one scholar has attempted a cursory application of Youngstown to both DACA and DAPA, the relative absence in the DACA/DAPA debate of this otherwise pervasive separation-of-powers precedent is somewhat surprising. The failure to rigorously apply Youngstown


36 See Dames & Moore v. Regan, 453 U.S. 654, 669 (1981) (applying Jackson’s Youngstown concurrence for majority of the Court); Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083 (2015) (“In considering claims of Presidential power this Court refers to Justice Jackson’s familiar tripartite framework from Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–38 (1952) (concurrence opinion)”). But see Gilbert, supra note 30, at 277–82 (applying Youngstown to DACA more effectively and rigorously than Margulies, Taking Care, supra note 34, at 124–26); Brief for Appellees, Texas v. United States, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238), 2015 WL 2157465, at *50 (“The Executive’s attempt to confer lawful presence by fiat is in Youngstown’s third category. . .”). The Appellants did not cite Youngstown in any of their appellate briefs before the Fifth Circuit.

Other scholars who have attempted to apply Youngstown to the problem of executive enforcement discretion have failed to consider whether the Constitution endows the Executive with a positive,
has contributed to some confusion in the academic discourse. By bringing the Youngstown framework to bear on the puzzle of executive enforcement discretion, this Article will provide a common vocabulary within which commentators can debate the constitutionality of presidential nonenforcement in particular contexts.

This Article argues that numerous constitutional provisions, including the Executive Power Clause, the Take Care Clause, and the Due Process Clause, combine to create an inherent executive prosecutorial discretion in civil inherent power of enforcement discretion. See Tom Campbell, Executive Action and Nonaction, 95 N.C. L. REV. 553, 557–58 (2017) (examining the questions of permissible executive action and inaction in terms of Youngstown’s framework, but failing to consider whether the executive enforcement discretion is inherent to the Constitution’s structure, and instead focusing on whether Congress and the President share power over particular substantive areas of law, such as war powers, or the President’s exclusive power to recognize foreign relations). This leads Campbell to mistakenly focus exclusively on “the structure of the law[s] written by Congress” in trying to derive a “principle . . . to distinguish permissible executive discretion” from impermissible exercises of that power. See id. at 570. This approach, however, wholly omits an important part of the analysis: whether the President may retain some inherent constitutional authority, in certain circumstances, to under-enforce Congress’s laws.

Peter Markowitz has made an important contribution in helping to fill this gap. He has helpfully identified the Take Care Clause, Executive Power Clause, and the Pardon Clause as the textual sources of the Executive’s enforcement discretion authority. See Peter L. Markowitz, Prosecutorial Discretion at its Zenith: The Power to Protect Liberty, 97 B.U. L. REV. 489, 514–21 (2017) [hereinafter Markowitz, Power to Protect Liberty]; see also Daniel Stepanicich, Comment, Presidential Inaction and the Constitutional Basis for Executive Nonenforcement Discretion, 18 U. PA. J. CONST. L. 1507, 1507–08 (2016) (“These two clauses together, the Vesting Clause and the Take Care Clause, grant the President significant authority to shape domestic policy through the enforcement—as well as the selective nonenforcement—of the laws.”). He further argues that the Constitution’s “bias” against liberty deprivation enhances the Executive’s power of enforcement discretion in certain contexts: “the dividing line between traditional administrative enforcement proceedings and those that can potentially result in a deprivation of physical liberty can offer a workable and well-founded constitutional limiting principle—with categorical prosecutorial discretion power being permissible only in the latter context.” Markowitz, Power to Protect Liberty, supra note 36, at 494. This Article supplements Markowitz’s useful analysis of constitutional text and structure, see infra Part III, and then further explains how this inherent power functions within the separation of powers by translating the question into the lexicon of Youngstown, see infra Part IV, and applying it to the case of President Obama’s deferred action policies, see infra Part V.

enforcement. This inherent power, however, is malleable and defeasible rather than fixed and absolute. Congress can either explicitly or implicitly confer executive enforcement discretion to the constitutional maximum (Youngstown Category 1). Likewise, Congress can explicitly or implicitly cabin executive enforcement discretion, reducing it to the constitutional minimum (Youngstown Category 3). When the Executive is faced with congressional silence, he acts in Youngstown Category 2. In the second category’s “zone of twilight,” executive enforcement discretion is limited to the President’s inherent constitutional powers. In the context of executive enforcement discretion, however, Category 2 presents an enigmatic constitutional puzzle, as the Take Care Clause simultaneously represents a source of inherent executive power and also a source

38 In the context of criminal prosecutions, the Pardon Clause further strengthens executive enforcement discretion. See U.S. CONST. art. II, § 2, cl. 1 ("[The President] shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment."). The Pardon Power is plenary and cannot be limited by Congress. See United States v. Klein, 80 U.S. 128, 141 (1871) ("President’s power of pardon ‘is not subject to legislation[,] ... that ‘Congress can neither limit the effect of [the President’s] pardon, nor exclude from its exercise any class of offenders.’"). Moreover, the Pardon Clause has been interpreted to endow the President with the power of amnesty, which allows him to categorically pardon certain groups. See Armstrong v. United States, 80 U.S. 154, 155 (1871) (recognizing presidential power to grant “universal amnesty and pardon for participation” in Civil War on behalf of Confederacy); see also PETER M. SHANE & HAROLD H. BRUFF, SEPARATION OF POWERS LAW 572 (3d ed. 2011) (stating that the pardon power includes “power to pardon specified classes or communities wholesale”) (citation omitted); William F. Duker, The Presidential Power to Pardon: A Constitutional History, 18 WM. & MARY L. REV. 475, 514–19 (1977) (discussing post-Civil War disagreement about whether pardon power included amnesty power before Court resolved the question in Armstrong and noting that framers probably considered amnesty power “incidental to” pardon power). The illimitability of the presidential power to grant pardon and amnesty seems to support broader executive discretion, at least in criminal enforcement, especially given that “the President has absolute authority to issue a pardon at any time after an unlawful act has occurred, even before a charge or trial.” See In re Aiken Cty., 725 F.3d 255, 263 (D.C. Cir. 2013) (citing Ex parte Grossman, 267 U.S. 87, 120 (1925) (emphasis in original)).

39 The concept of “defeasibility” is drawn from Price, who argues that the Constitution authorizes executive enforcement discretion, but Congress may restrict this authority by mandating enforcement in certain circumstances. Price, Enforcement Discretion, supra note 25, at 674–75.

40 See, e.g., David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 COLUM. L. REV. 265, 267 (2013); see also infra note 144 and accompanying text (defending the constitutionality of “big waiver,” whereby Congress delegates to executive agencies “the power to unmake law Congress has made rather than to make law Congress has not”). The constitutionality of “big waiver” would suggest that executive discretion in Category 1 may be essentially boundless, depending on the scope of congressional authorization.

41 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S 579, 637 (1952) (Jackson, J., concurring).
of executive duty, which provides an intrinsic limit on the scope of his enforcement discretion.\(^{42}\)

This Article demonstrates that the Constitution endows the Executive with inherent enforcement discretion, including the power to supervise and prioritize law enforcement activities. Therefore, I argue that in Category 2, the Take Care Clause does not preclude the Executive from exercising enforcement discretion, including the power to coordinate categorical enforcement priorities. Finally, even in Category 3, I argue that the President’s inherent power of enforcement discretion ensures that he always retains at least some discretion to decline enforcement in individual cases, especially in the criminal context. Furthermore, in light of the powers concomitant to his “constitutional duty to supervise,” including the power to coordinate and prioritize enforcement,\(^ {43}\) I argue that the President’s inherent enforcement discretion power may extend beyond individualized discretion to countenance the creation of categorical civil enforcement priorities, even in Category 3.

By translating the enforcement discretion debate into the lexicon of Youngstown, this Article synthesizes and evaluates several arguments for and against the constitutionality of DACA/DAPA. The application of the Youngstown framework reinforces the importance of statutory interpretation: depending on how Congress’s instructions, either explicit or implicit, are interpreted, DACA/DAPA might be in either Category 1, 2, or 3.\(^ {44}\) Ultimately, this Article concludes that the program represents a constitutionally permissible exercise of executive enforcement discretion, best located within Category 2 of Jackson’s triptych.\(^ {45}\) Part II briefly reviews the landscape of recent literature on

\(^{42}\) Price, Enforcement Discretion, supra note 25, at 688 (“At least insofar as ‘the Laws’ are acts of Congress, this take care duty implies a principle of legislative supremacy in lawmaking: the President’s duty is to ensure execution of Congress’s laws, not to make up the law on his own.”).


\(^{44}\) But see Texas v. United States, 809 F.3d 134, 186 (5th Cir. 2015) (holding DAPA contrary to mandate of INA); Margulies, Taking Care, supra note 34, at 122 (eliminating Category 1 for DACA); Margulies, Boundaries, supra note 35, at 1252–53 (eliminating Categories 1 and 2 for DAPA); Price, Enforcement Discretion, supra note 25, at 760 (claiming “no statute specifically authorizes the status—‘deferred action’”—conferred on immigrants under the policy”).

\(^{45}\) It is worth noting that Youngstown’s categorial framework, despite its heuristic utility, is not dispositive of the constitutional inquiry. Even if DACA/DAPA is properly placed in Category 3, where presidential authority is at its lowest ebb, the Executive’s action might still be authorized as an exercise of exclusive and preclusive power. Cf. Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2095–96 (placing Presidential contravention of Section 214(d) of the Foreign Relations Authorization Act in Category 3 but holding Presidential exclusive power over formal recognition of foreign sovereigns “disables Congress from acting”); Jack Goldsmith, Zivotofsky II as Precedent in the Executive Branch, 129 HARV. L. REV. 112, 114 (2015) (agreeing with Chief Justice Roberts, in dissent, that Zivotofsky upheld, “for the first time, a President’s direct defiance of an Act of Congress in the field of foreign affairs’’’); see generally David J. Barron & Martin S.
executive enforcement discretion, translating the different arguments into the lexicon of *Youngstown*. Part III synthesizes arguments from constitutional text to develop a theory of inherent executive enforcement discretion, couched in the *Youngstown* framework. In light of this theory of inherent executive discretion, Part IV then applies the *Youngstown* framework to DACA/DAPA.

II. DEBATING THE NATURE OF EXECUTIVE "CARE-TAKING"

The debate about the constitutionality of executive enforcement discretion centers on conflicting interpretations of the Take Care Clause.\(^{46}\) As one commentator has aptly noted, there is "little consensus" among scholars as to the historical meaning of the clause, although most scholars agree that the clause at least prohibits the suspension and dispensation powers exercised by English monarchs.\(^{47}\) Beyond this shared baseline, however, there is wide disagreement about the degree to which the Take Care Clause constrains executive enforcement discretion: some commentators have argued that the Take Care Clause absolutely precludes any discretionary nonenforcement,\(^{48}\) while others have argued that executive enforcement discretion is not only consistent with, but is also perhaps bolstered by, the Take Care Clause.\(^{49}\)

The breadth of viewpoints on the relationship between the Clause and executive enforcement discretion is partially traceable to the Supreme Court’s Janus-faced treatment of this constitutional provision as both a duty-imposing

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\(^{46}\) See, e.g., Complaint for Declaratory and Injunctive Relief, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-00254), 2014 WL 6806231, at *76 (alleging that DHS’s 2014 DAPA Memo violates Take Care Clause); Cruz, *supra* note 30, at 74; Delahunty & Yoo, *supra* note 24, at 855.

\(^{47}\) TODD GARVEY, *THE TAKE CARE CLAUSE AND EXECUTIVE DISCRETION IN THE ENFORCEMENT OF THE LAW* 4–5 n.25 (2014) (citing Price, *Enforcement Discretion*, *supra* note 25, at 693), https://fas.org/sgp/crs/misc/R43708.pdf; see also Price, *Enforcement Discretion*, *supra* note 25, at 675 (characterizing “the principle that American Presidents, unlike English kings, lack authority to suspend statutes or grant dispensations that prospectively excuse legal violations” as a “deeply rooted constitutional tradition”). “The ‘suspending power abrogated a statute across the board, whereas the dispensing power nullified it only as to those specifically granted exemptions.’” Delahunty & Yoo, *supra* note 24 n.135 (citations omitted).

\(^{48}\) Delahunty & Yoo, *supra* note 24, at 784 (“Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases.”) (emphasis in original). Delahunty and Yoo do acknowledge, however, that this duty is “defeasible,” by which they mean breaches of duty, though presumptively invalid, can be justified in certain circumstances. *Id.* at 785. They offer three limited justifications for executive breaches of duty: “unconstitutionality of the law, equity in individual cases, and resource limitations.” *Id.* at 786. The authors argue none of these three justifications applies to DACA. *Id.*

\(^{49}\) See Price, *Enforcement Discretion*, *supra* note 25, at 697 (“The Take Care Clause itself may also support an inference of executive enforcement discretion.”).
limit and a font of executive power. While cases like Kendall v. United States ex rel. Stokes emphasize the presidential duty to enforce the laws, the Court has also recently held that the President’s “take care” obligations necessarily contemplate implicit powers to oversee enforcement. In light of these inherently conflicting impulses within the Clause itself, it is unsurprising that commentators disagree about the existence and scope of the Executive’s enforcement discretion. This Section will describe the scholarly dissonance, and in the process will attempt to bring consonance, if not harmonious resolution, to the debate by translating the various positions into the common vocabulary of the familiar Youngstown framework.

A. “Take Care” as Binding Obligation

Professors Robert J. Delahunty and John C. Yoo have offered the most robust conception of the Take Care Clause as a duty-imposing constraint on executive power. In the context of attacking the legality of DACA, these authors argue that “the Constitution’s Take Care Clause imposes on the President a duty to enforce all constitutionally valid acts of Congress in all situations and cases.” As a necessary corollary to this position, Delahunty and Yoo claim “there is simply no general presidential nonenforcement power.” They reach their conclusion, in part, by appealing to original semantic understanding and drafting history at the Philadelphia Convention. Furthermore, Delahunty and Yoo expand on the consensus view that the Take Care Clause was intended to

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50 See GARVEY, supra note 47, at 3 ("The Take Care Clause would appear to stand for two, at times diametrically opposed propositions—one imposing a 'duty' upon the President and the other viewing the Clause as a source of Presidential 'power.'").

51 Kendall v. United States ex rel. Stokes, 37 U.S. 524, 525 (1838) ("To contend that the obligations imposed on the President to see the laws faithfully executed, implies a power to forbid their execution; is a novel construction of the constitution, and is entirely inadmissible."); see also GARVEY, supra note 47 n.16 (collecting cases where courts espouse view of presidential duty under Take Care Clause).

52 See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) (holding multilevel removal protections for subordinate executive officers "contravene[s] the President's 'constitutional obligation to ensure the faithful execution of the laws.'") (citation omitted); see also GARVEY, supra note 47 n.17 (collecting cases).

53 See generally Delahunty & Yoo, supra note 24.

54 Id. at 784.

55 Id.

56 Id. at 799 (examining Founding Era dictionary and concluding the Take Care Clause is "naturally read as an instruction or command to the President to put the laws into effect, or at least to see that they are put into effect, 'without failure' and 'exactly'").

57 Id. at 802 (quoting James Wilson, who introduced the original draft of the clause, as explaining that it means "the President has 'authority, not to make, or alter, or dispense with the laws, but to execute and act the laws, which [are] established'".)
preclude the dispensation and suspension powers previously exercised by the English Crown, inferring that a presidential nonenforcement power is thus constitutionally precluded.\textsuperscript{58}

Delahunty and Yoo temper their otherwise rigid conception of uncompromising executive enforcement duty by identifying several potential “defenses” which could “justify a breach of duty.”\textsuperscript{59} For example, they argue for a strong executive prerogative to decline to enforce unconstitutional laws.\textsuperscript{60} These authors similarly identify “equity in individual cases”\textsuperscript{61} and a lack of resources as potential defenses or excuses to an executive breach of enforcement duty.\textsuperscript{62} Finally, although the authors do not frame it as a “defense” to an executive “breach of duty,” they posit that the executive might retain a constitutional “prerogative” power, which “would authorize deviation from, or even outright violation of, the law” to address a “compelling public necessity.”\textsuperscript{63} Perhaps unsurprisingly,\textsuperscript{64} Delahunty and Yoo argue that “if such broad executive powers were to exist anywhere,” it would be in foreign, but not domestic affairs,\textsuperscript{65} and they claim that Supreme Court case law confirms this intuition.\textsuperscript{66} Notably, they identify \textit{Youngstown} as a case about “prerogative” power and

\footnotesize

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\item \textsuperscript{58} \textit{Id.} at 808; see also \textit{supra} note 47 and accompanying text.
\item \textsuperscript{59} Delahunty & Yoo, \textit{supra} note 24, at 835.
\item \textsuperscript{60} \textit{Id.} at 836.
\item \textsuperscript{61} \textit{Id.} at 841–45.
\item \textsuperscript{62} \textit{Id.} at 845 (stating that agencies can offer insufficient resources as “an excuse: it would be admitting to having failed in its duty but arguing that the responsibility is really that of Congress”).
\item \textsuperscript{63} \textit{Id.} at 808.
\item \textsuperscript{64} As a Deputy Assistant Attorney General during the Bush Administration, John C. Yoo notoriously “wrote a series of memoranda in support of the President’s unfettered ‘Commander-in-Chief’ authority during times of war.” Wadhia, \textit{supra} note 30 n.8. The most “infamous” of these memoranda is now known as the “torture memo,” in which Yoo argued for “the President’s authority to seize, detain, and interrogate enemy combatants.” \textit{Id.} Yoo has publically defended the consistency of his broad view of executive war powers with his more narrow view of executive power in the DACA context:

There is a world of difference between putting aside laws that interfere with an executive response to an attack on the country, as in Sept. 11, 2001, and ignoring laws to appeal to a constituency vital to re-election . . . . The former recognizes the president’s primary duty to protect the national security. The latter, unfortunately, represents a twisting of the Constitution’s fabric for partisan ends.

\item \textsuperscript{65} Delahunty & Yoo, \textit{supra} note 24, at 826.
\item \textsuperscript{66} \textit{Id.} at 828.
\end{itemize}
claim that DACA “was more clearly contrary to Congress’s will than President Truman’s seizure of the steel mills.”

To summarize their position in terms of Youngstown’s framework, Delahunty and Yoo seem to assume that the President acts in Category 3 whenever he exercises enforcement discretion. Through certain “defenses,” they carve out a space where prosecutorial discretion is constitutionally authorized in Category 3, namely: (1) when the Executive declines to enforce a law he believes is unconstitutional; and (2) when he declines to enforce a law in consideration of “equity in individual cases.” From their perspective, Category 2’s “zone of twilight, in which [the President] and Congress may have concurrent authority” is a null set in the enforcement discretion context: the President simply has no inherent “independent powers” to decline enforcement. Similarly, the Delahunty and Yoo position seems to ignore the possibility of nonenforcement in Category 1, where the President declines to enforce a law “pursuant to an express or implied authorization of Congress.” With respect to DACA, these authors (contestably) interpret the INA’s text to simply preclude anything more than individualized enforcement discretion. They concede, however, that a “de facto delegation” theory “provides the best defense . . . for the Administration’s nonenforcement decision,” and thus implicitly recognize the possibility that the President may sometimes act in Category 1, with at least implied congressional authorization, in declining to enforce laws.

B. “Take Care” as Defeasible and Limited Duty

Professor Zachary Price criticizes the Delahunty and Yoo approach as “too rigid” in light of “countervailing considerations that support a presumption of case-by-case enforcement discretion” and “the history of federal law-

67 Id. at 829, 835.
68 See supra text accompanying notes 60–61.
69 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).
70 Compare id., with supra text accompanying notes 54–55.
71 Youngstown, 343 U.S. at 635 (Jackson, J., concurring).
72 In a seminal article, Professors Adam B. Cox and Cristina M. Rodriguez coined the term “de facto delegation,” arguing that Congress’s “detailed” immigration “code has had the counterintuitive consequence of delegating tremendous authority to the President to set immigration screening policy by making a huge fraction of noncitizens deportable at the option of the Executive.” Adam B. Cox & Cristina M. Rodriguez, The President and Immigration Law, 119 YALE L.J. 458, 463 (2009). They theorize that Congress de facto delegated immigration authority in two ways: (1) through “radical expansion of the grounds of deportation[,] . . . render[ing] a large fraction of legal immigrants deportable”; and (2) through a “combination of stringent admissions restrictions . . . and lax border enforcement policy by the Executive,” giving the Executive “primary control over a large unauthorized population within the United States.” Id.
73 Delahunty & Yoo, supra note 24, at 851–53.
enforcement practice." Price thus offers an alternative constitutional framework, arguing for some notion of inherent executive nonenforcement authority. He identifies two competing constitutional principles that govern the scope of executive enforcement discretion. First, from the Take Care Clause, Price derives a principle of "legislative supremacy": "At least insofar as 'the Laws' are acts of Congress, this take care duty implies a principle of legislative supremacy in lawmaking: the President's duty is to ensure execution of Congress's laws, not to make up the law on his own." Yet unlike Delahunty and Yoo, Price accounts for other aspects of the Constitution's text and structure, such as the "separation of executive and legislative functions" and the executive's "exclusive responsibility for law enforcement" to derive a second, dueling principle of "executive enforcement discretion." These two principles, legislative supremacy and executive discretion, anchor Price's suggested constitutional framework for analyzing the permissibility of executive enforcement discretion.

He theorizes the existence of a limited, but constitutionally inherent, power of executive enforcement discretion, based on the executive discretion principle. He conceptualizes the enforcement discretion power and its limits as a set of "dual presumptions," rooted in the "countervailing principles" of legislative supremacy and executive discretion. First, executive discretion to "decline[] enforcement in particular cases" must be considered presumptively valid. Yet this discretion is limited by a second presumption, rooted in the principle of legislative supremacy: "Notwithstanding their case-by-case discretion, executive officials lack inherent authority either to prospectively license statutory violations or to categorically suspend enforcement of statutes for policy reasons." According to Price, "[t]hese two presumptions strike a balance that best resolves a deep conflict within the constitutional scheme of separated legislative and executive powers."

Although the Youngstown framework is all but absent from Price's framework, recourse to the familiar categorical heuristic is helpful in illustrating the interaction of these competing presumptions in practice. Price's key insight

74 Price, Enforcement Discretion, supra note 25, at 688–89.
75 Id. at 688.
76 Id.
77 Id. at 688, 696.
78 Id. at 704.
79 Id.
80 Id. (emphasis added).
81 Id. at 675.
82 Price cites Youngstown just once, for the proposition that "[t]he Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad." Id. at 690 n.62.
is that the executive presumptively retains some inherent enforcement discretion, but this "baseline nonenforcement authority is defeasible: Congress may restrict it by mandating enforcement in specified circumstances."\(^{83}\) In Price’s view, Congress can place executive enforcement discretion in Category 3 by "enact[ing] enforcement guidelines or even statutory mandates requiring enforcement in specified circumstances."\(^{84}\) By extension, unless an exercise of enforcement discretion contravenes the "expressed or implied will of Congress," the Executive acts within the second Youngstown category when he declines to enforce the law in individual cases, and his nonenforcement decisions are presumptively valid.\(^{85}\) Yet Price’s "countervailing presumption" also provides an upper limit on the President's inherent nonenforcement power in Category 2: "The executive branch thus exceeds its proper role, and enters the legislature’s domain, if without proper congressional authorization it uses enforcement discretion to categorically suspend enforcement or to license particular violations."\(^{86}\) Finally, when Price explains that the presumption of legislative supremacy is likewise defeasible, permitting "Congress to authorize at least some forms of executive suspending or dispensing authority," he theorizes the nearly limitless authority of Executive discretion in Category 1.\(^{87}\)

### III. EXECUTIVE ENFORCEMENT DISCRETION IN YOUNGSTOWN

As the above analysis of the academic literature has demonstrated, the Youngstown framework brings useful analytical clarity to the controversial issue of executive enforcement discretion by providing a common lexicon in which to debate, if not resolve, the constitutional question. Delahunt and Yoo’s restrictive approach to enforcement discretion denies the existence of Category 2 and allows for no inherent executive power to support discretion in Category 3, subject to narrow, specifically enumerated exceptions.\(^{88}\) Price’s account, in contrast, allows for a limited and defeasible inherent Presidential nonenforcement power: this baseline power can support some enforcement discretion in Category 2, which Congress can either expand or contract by statute.

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83 Id. at 675.
84 Id. at 707. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.").
85 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
86 Price, Enforcement Discretion, supra note 25, at 676.
87 Id. at 707. Cf. Youngstown, 343 U.S. at 638 (Jackson, J., concurring); Barron & Rakoff, supra note 40, at 313–15 (defending constitutionality of "big waiver" and distinguishing it from the unconstitutional line-item veto act).
88 See supra text accompanying notes 68–70.
This Section agrees with Price’s basic constitutional framework, which posits the existence of some inherent executive enforcement discretion that may span the *Youngstown* spectrum, depending on the statutory context. This Section supplements Price’s account and sharpens its contours, by mounting a textual and normative argument that the Executive always retains an irreducible and inherent constitutional minimum of enforcement discretion, even in Category 3. From this perspective, while Price’s presumption of legislative supremacy may be completely defeasible in Category 1, there is a constitutional floor on the defeasibility of the competing principle of enforcement discretion in Category 3. In other words, even if “the express or implied will of Congress” places particular exercises of executive discretion in Category 3, the Executive might still prevail on the force of his “conclusive and preclusive” powers of enforcement discretion.

While commentators seem to agree that the Take Care Clause provides at least some limit on executive enforcement discretion, the textual grounding for a positive theory of executive enforcement discretion is less well-developed. In a recent opinion for the Court of Appeals for the District of Columbia Circuit, Judge Kavanaugh has identified several constitutional provisions in Article II that combine to endow the Executive with enforcement discretion, “including the Executive Power Clause, the Take Care Clause, the Oath of Office Clause, and the Pardon Clause.” Moreover, in agreement with Price, Judge Kavanaugh

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89 It is worth noting that historical practice also favors a broad conception of executive enforcement discretion. Although historical executive practice alone “does not, by itself, create power,” *Texas v. United States*, 809 F.3d 134, 184 (5th Cir. 2015) (quoting Medellin v. Texas, 552 U.S. 491, 532 (2008)). “[T]he longstanding practice of the government’ can inform our determination of ‘what the law is.’” *Id.* at n.193 (citations omitted) (quoting NLRB v. Noel Canning, 134 S. Ct. 2550, 2560 (2014)). Because of space constraints and given that Price has already demonstrated that “[o]ver the course of American history, the basic trajectory of federal law has been towards increasing executive discretion, in both criminal and administrative law,” this paper declines to canvas historical practice in support of an inherent executive enforcement discretion power. Price, *Enforcement Discretion*, supra note 25, at 717; see also Garvey, supra note 47, at 11 (noting “long historical pedigree” of prosecutorial discretion and tracing it to the “Sixteenth Century English common law procedural mechanism” of *nolle prosequi*); Wadhia, *supra* note 30, at 60 (“[F]ar from being a new policy that undercuts statutory law, prosecutorial discretion actions like DACA have been pursued by other presidents and part of the immigration system for at least thirty-five years.”): Letter from Shoba Sivaprasad Wadhia, Clinical Professor of Law, Pa. State Sch. of Law, et. al., to President Barack Obama (Sept. 3, 2014), https://pennstatelaw.psu.edu/_file/Law-Professor-Letter.pdf.

90 *See supra* note 87.


92 *See supra* text accompanying notes 46, 54, and 76.

93 In re Aiken Cty., 725 F.3d 255, 262 (D.C. Cir. 2013); see also U.S. CONST. art. II, § 1, cl. 1 (Executive Power Clause); U.S. CONST. art. II, § 1, cl. 8 (Oath of Office Clause); U.S. CONST. art. II, § 2, cl. 1 (Pardon Clause); U.S. CONST. art. II, § 3, cl. 5 (Take Care Clause).
suggested that the Bill of Attainder Clause supports a structural inference of executive discretion in enforcement, perhaps especially on an individualized basis. Because Price has already explained how the Oath of Office Clause, the Pardon Clause, and the Bill of Attainder Clause support a presumption of Executive discretion, this Section focuses on the constitutional provisions to which Price dedicates little or no attention but which nonetheless support inherent executive enforcement discretion: the Executive Power Clause, the Take Care Clause, and the Due Process Clause.

A. The Executive Power Clause

Article II of the Constitution provides that “[t]he executive power shall be vested in a President of the United States of America.” Although the precise contours of “executive power” are unclear, the Supreme Court has long recognized that “[t]he vesting of the executive power in the President was essentially a grant of the power to execute the laws.” Whatever else this “grant of power” may entail, it must include, at the very least, the power to enforce the laws and to supervise law enforcement by executive subordinates. In fact,

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94 U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”).
95 In re Aiken Cty., 725 F.3d at 262; Price, Enforcement Discretion, supra note 25, at 697 (“By precluding laws that impose punishment without executive or judicial action, the Bill of Attainder Clause ensures that punitive legislation will carry some degree of generality, leaving to the Executive identification of individual violators for punishment.”).
96 Price, Enforcement Discretion, supra note 25, at 698 (The Oath Clause “suggests that proper performance of the executive function may require adherence to notions of justice, equity, and the public interest, even at the expense of complete enforcement of each and every statutory mandate.”).
97 Id. (noting the Pardon Clause “may also imply some degree of enforcement discretion, at least in the criminal context.”).
98 See supra note 95.
99 U.S. CONST. amend. V.
100 U.S. CONST. art. II, § 1, cl. 1.
102 See Andrias, supra note 43, at 1046 (“If the Vesting Clause bestows any affirmative power in the President, it must include the authority to supervise enforcement.”); see also Kate M. Manuel & Todd Garvey, Prosecutorial Discretion in Immigration Enforcement: Legal Issues n.46 (2013), file:///C:/Users/jprhea/Downloads/nps68-012114-23%20(2).pdf (“The executive branch has asserted that ‘because the essential core of the President’s constitutional responsibility is the duty to enforce the laws, the Executive Branch has exclusive authority to initiate and prosecute actions to enforce the laws adopted by Congress.’”) (citing U.S. Atty. General, Opinion Letter on Prosecution for Contempt of Congress of an Executive Branch Official
several scholars have characterized the “law enforcement” power as necessarily contained in even a “narrow ‘dictionary’ conception of Executive power.”

Although the Supreme Court has not commented directly on the nature of the Executive’s law enforcement power, Professor Kate Andrias has also derived from several cases, including the “removal cases,” the principle that “enforcement authority lies at the core of the President’s power.”

The Executive’s inherently-authorized enforcement discretion is a necessary incident of the law enforcement power vested by the Executive Power Clause. Supreme Court precedents have recognized the ineluctable connection between enforcement and discretion, noting that “the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.” Significantly, the Court has recognized that this necessary discretion extends beyond the sphere of criminal prosecutions to encompass civil enforcement as well. While some scholars have broadly concluded that such inherent executive enforcement discretion precludes only executive action “contra legem,” others have suggested the President may only constitutionally “use[] enforcement discretion and prioritization—including nonenforcement—to advance policy goals” if he can articulate a reasonable basis in statutory law.


See, e.g., Arizona v. United States, 557 U.S. 387, 396 (2012) (“Removal is a civil, not criminal, matter. A principal feature of the removal system is the broad discretion exercised by immigration officials.”); see also Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”) (citations omitted); Goldsmith & Manning, supra note 105, at 2294 (noting “similar principles” of discretion apply in “civil context”).
to the public and Congress.\textsuperscript{107} Either way, practicality\textsuperscript{108} and precedent compel recognition of inherent executive enforcement discretion, derived in part from the Executive Power Clause.\textsuperscript{109}

B. The Take Care Clause

Like the Executive Power Clause, the Take Care Clause also represents a textual source of inherent executive enforcement discretion. Recall that the Take Care Clause bears a Janus-faced relationship to Executive Power, simultaneously creating obligations and bestowing power.\textsuperscript{110} Price has acknowledged the Clause’s dual nature, noting that while “[a]s a general matter . . . this clause codifies a principle of executive subordination to law,” it may simultaneously also “support an inference of executive enforcement discretion.”\textsuperscript{111} He locates the generative force of the Take Care Clause in the word “faithfully,” which he reads to suggest (in both the Take Care Clause and the Oath Clause) “that proper performance of the executive function may require adherence to notions of justice, equity, and the public interest, even at the expense of complete enforcement of each and every statutory mandate.”\textsuperscript{112} While this inquiry into the meaning of faithful execution is a useful starting point, it is an incomplete account of the relationship between the Take Care Clause and the Executive’s inherent enforcement discretion power.

The Supreme Court has repeatedly interpreted the Take Care Clause as a font of substantive executive power. Most relevantly, in Heckler, the Court explicitly tied the notion of enforcement discretion to the Take Care Clause, analogizing agency non-enforcement discretion to prosecutorial discretion: both are the “special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully

\textsuperscript{107} Compare Goldsmith & Manning, supra note 105, at 2309 (“[T]he completion power does not permit the President to act contra legem.”), with Andrias, supra note 43, at 1039.

\textsuperscript{108} Andrias, supra note 43, at 1045 (“[E]ven when legislation circumscribes enforcement discretion, the Executive must continue to make countless policy determinations about how best to enforce other parts of the statutes or to prioritize among various statutory programs.”).

\textsuperscript{109} But see Delahunty & Yoo, supra note 24, at 799–800 (briefly attempting to rebut idea that Executive Power Clause vests any nonenforcement authority in Executive). Delahunty and Yoo’s argument relies on the questionable assumption that the Take Care Clause “dispels” any possibility that the Executive Power Clause confers independent enforcement discretion because the Take Care Clause “requir[es] the President to ensure that the laws are executed.” Id. at 800. This begs the question by assuming that discretionary enforcement is logically inconsistent with faithful execution. To the contrary, as Section III.B demonstrates, the Take Care Clause itself implicitly confers a degree of enforcement discretion power in the Executive.

\textsuperscript{110} See supra text accompanying notes 50–52.

\textsuperscript{111} Price, Enforcement Discretion, supra note 25, at 697.

\textsuperscript{112} Id. at 698.
executed." Moreover, relying on *Heckler v. Chaney*, the Executive Branch itself has tied its enforcement discretion power to the Take Care Clause, noting that ""faithful[]' execution of the law does not necessarily entail 'act[ing] against each technical violation of the statute' that an agency is charged with enforcing."  

The constitutional obligation to ensure faithful execution does, however, necessarily entail some power to control, coordinate, and prioritize enforcement. Consequently, the Supreme Court has recognized that the Take Care Clause implies a presidential power to supervise subordinate officers. As Professor Gillian Metzger has argued, the ""constitutional duty to supervise . . . indicates that presidential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots." Similarly, respect for the faithful execution duty seems to account for the Court's deference to the ""complicated balancing"" process inherent in executive agencies' ""proper ordering of [enforcement] priorities."" In this way, the Take Care Clause also supports an inference of inherent executive enforcement discretion, especially with respect to supervision, coordination and prioritization of law enforcement activities.

**C. The Due Process Clause**

Finally, looking beyond Article II, the Due Process Clause provides constitutional support for an inherent executive power to exercise enforcement discretion. Professors Nathan Chapman and Michael McConnell have

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116 See, e.g., Andrias, supra note 43, at 1037 ("By placing him at the head of the Executive Branch, the Constitution also positions the President to serve as coordinator and prioritizer of overlapping and sometimes conflicting enforcement regimes."); see also Metzger, supra note 43, at 1929 ("Bly openly stating a generally applicable policy and then instituting an administrative scheme to implement that policy, the President and DHS Secretaries Napolitano and Johnson were actually fulfilling their constitutional duties to supervise.").

117 Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); see generally Garvey, supra note 47, at 8–10.

118 Metzger, supra note 43, at 1929.

119 *Heckler*, 470 U.S. at 831–32.

120 See Andrias, supra note 43, at 1039.

121 This argument has received almost no attention in the literature on enforcement discretion. Price, for example, raises the point parenthetically, noting that "case-specific," legislatively-
persuasively argued that the original understanding of the due process right was grounded in "separation-of-powers" logic. They outline the evolution of the concept of "due process of law" over a "several-hundred year period," tracing its roots all the way back to the Magna Charta. The modern conception of separation of powers began with the application of due process against the Executive under Stuart-Era English law: "the Crown could deprive subjects of rights only through institutional coordination," under laws made by Parliament and applied to individual cases by the judiciary. A century or so later, American constitutional reform replaced the Stuart-era supremacy of the legislature "with a more definite separation of legislative, executive, and judicial powers, and the adoption of structural guarantees of judicial independence such as life tenure and stable (and sufficient) pay." According to Chapman and McConnell, the key advancement of American constitutionalism was the application of "the ancient idea of due process of law... to all government action, including acts of the legislature." These authors focus in particular upon the separation of the legislative and judicial power as an aspect of due process, preventing the legislative branch from "deciding individual cases" or "retrospectively divest[ing] a person of vested rights."

At a more general level, however, "[t]he basic idea of due process, both at the Founding and at the time of adoption of the Fourteenth Amendment, was that the law of the land required each branch of government to operate in a distinctive manner, at least when the effect was to deprive a person of liberty or property." From this perspective, the fact that the separation of powers precludes the legislature from enforcing the law is just as important to due process decisions "might well violate due process." Price, Enforcement Discretion, supra note 25, at 712 n.159. This paper thus contributes to the literature by developing an affirmative case for executive enforcement discretion as an aspect of constitutionally guaranteed due process of law.

# Footnotes


123 Id. at 1679–83 ("The individual-rights implications of Magna Charta are well appreciated, but not enough attention has been paid to their connection to the separation of powers.").

124 Id. at 1683–84; see also Nicholas Quinn Rosenkranz, The Objects of the Constitution, 63 Stan. L. Rev. 1005, 1042 (2011) ("[T]he object of the Due Process Clause is not Congress but the President."). Chapman and McConnell credit Sir Edward Coke in particular with application of due process as a "limit [on] the prerogative powers of the Crown, in defense both of courts and of an emerging parliamentary supremacy over the content of law." Chapman & McConnell, supra note 122, at 1684. The authors also note that Coke's views were a chief source of early American constitutionalism. Id.

125 Chapman & McConnell, supra note 122, at 1705.

126 Id. at 1717.

127 Id. at 1782.

128 Id. at 1781 (emphasis added).
process as the prohibition on executive lawmaking.129 Because due process of law "require[s] that government can deprive persons of rights only pursuant to a coordinated effort of separate institutions that make, execute, and adjudicate claims," the executive’s enforcement discretion is a core protection against government deprivations of individual rights without due process of law.130

Although this argument that the Due Process Clause supports an inference of executive discretion is somewhat novel,131 it finds resonance in judicial analysis of executive enforcement discretion. For example, Judge Kavanaugh has identified the "executive’s broad prosecutorial discretion" as a "key point of the Constitution’s separation of powers."132 He explicitly connects this "unilateral power" to exercise enforcement discretion to the enhancement of individual liberty133 and to the famous Madisonian insight that "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."134 He also suggests that there may be an irreducible minimum of constitutionally-required executive enforcement discretion that Congress cannot invade or limit.135 Although Judge Kavanaugh explicitly locates the enforcement discretion power in Article II,136 his reasoning also lends credence to the idea of "due process as separation of powers," supplying constitutional reinforcement for inherent executive enforcement discretion.137

129 Cf. id. at 1779–82 (describing understanding of tripartite separation at Founding as an aspect of due process and outlining powers of each branch).
130 Id. at 1672.
131 See supra note 121.
132 In re Aiken Cty., 725 F.3d 255, 264 (D.C. Cir. 2013).
133 The Supreme Court has also recognized the clear connection between prosecutorial discretion and individual liberty, albeit more obliquely, noting that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns." Arizona v. United States, 567 U.S. 387, 396 (2012).
134 In re Aiken Cty., 725 F.3d at 264 (quoting THE FEDERALIST NO. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999)).
135 Id. at 263 ("In light of the President’s Article II prosecutorial discretion, Congress may not mandate that the President prosecute a certain kind of offense or offender."); id. at 264 ("After enacting a statute, Congress may not mandate the prosecution of violators of that statute.").
136 Id. at 262–63.
137 It is also worth noting that the Due Process Clauses and Equal Protection Clauses of the Fifth and Fourteenth Amendment also act as a necessary limit on the exercise of executive discretion. See Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471, 491 (1999) (acknowledging "possibility of a rare case in which the alleged basis of discrimination is so outrageous that the foregoing considerations can be overcome"); United States v. Armstrong, 517 U.S. 456, 463 (1996) ("Our cases delineating the necessary elements to prove a claim of selective prosecution have taken great pains to explain that the standard is a demanding one."); GARVEY, supra note 47, at 13–14 (explaining exercises of discretion cannot violate individual constitutional rights, including equal protection, but that it is difficult to maintain a suit based on "selective prosecution"); Price, Enforcement Discretion, supra note 25, at 683 (noting courts have held that
IV. MAPPING YOUNGSTOWN ONTO EXECUTIVE ENFORCEMENT DISCRETION

The text and structure of the Constitution empower the Executive to exercise an inherent enforcement discretion power. The historical practice of the political branches serves to reinforce this textually-inferred power. Once one accepts the premise that the Constitution contemplates at least some inherent executive enforcement power to decline enforcement, the relevance of the Youngstown triptych becomes clear. Applying the Youngstown framework clarifies the proper relationship between Congress and President vis-à-vis permissible enforcement discretion and highlights the importance of statutory construction in analyzing exercises of enforcement discretion. This Section synthesizes arguments from constitutional text to develop a theory of inherent executive enforcement discretion, couched in the Youngstown framework. It systematically analyzes DACA/DAPA under each of Youngstown’s three categories.

In Youngstown’s first category, Presidential power to decline enforcement may well be boundless. In Category 1, “the President acts pursuant to an express or implied authorization of Congress.” Thus, “his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.” Some scholars, including Price, conceive of they “will not interfere with the Attorney General’s prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process.”; see also Price, Enforcement Discretion, supra note 25, at 710 (“[C]onstitutional requirements of due process and equal protection may prevent executive officials from exercising these [enforcement discretion] powers arbitrarily.”).

See supra notes 93–99 and accompanying text (identifying relevant constitutional provisions).

See supra note 89.

See, e.g., Love & Garg, supra note 25, at 1207 (“Jackson [in Youngstown] recognized that although the Constitution divided authority among the branches, it made this authority overlapping, thus creating interdependence.”); see also id. at 1213 (noting “that Congress tends to give discretion to the president in defined terms; statutory grants of power allow for a range of enforcement, which entail minimum requirements (the executive ‘shall’ do something) and maximum authority (the executive ‘shall not’ do more), as well as options in between (the president ‘may’ do what he wants, within the defined range)’); cf. Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2326 (2001) (“That Congress could bar the President from directing discretionary action does not mean that Congress has done so; whether it has is a matter of statutory construction.”). Notably, Love and Garg claim that Jackson’s Youngstown framework “did not address ... whether it is constitutional for a president to choose not to act pursuant to congressional authorization.” Love & Garg, supra note 25, at 1207. Although the facts of Youngstown itself of course dealt with unlawful Presidential action, this paper argues that when enforcement discretion is conceptualized as inherent executive power, the Youngstown framework is again instructive in determining the proper exercises of that power.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Id.
seemingly limitless executive enforcement discretion when licensed by Congress: "the Federal Constitution’s silence on the issue readily permits the conclusion that the laws the President must execute include laws authorizing executive suspensions or dispensations." Similarly, Judge David Barron and Professor Todd Rakoff have defended the constitutionality of "big waiver," whereby Congress delegates to executive agencies "the power to unmake law Congress has made rather than to make law Congress has not." Clinton v. City of New York, which invalidated the "line-item veto," indicates that there may be some upper limit on the permissibility of Congressional delegations of statutory waiver. Yet scholars have argued that "at least insofar as a waiver statute" can be distinguished from the formal separation of powers violation of the line-item veto act, "Clinton should not alter the conclusion that statutory delegation of [even] a suspending or dispensing power to the President is constitutionally permissible." The analysis is, of course, more challenging in Jackson’s latter two categories. The above arguments in favor of an inherent executive power of enforcement discretion prove the relevance of Jackson’s second category in this context. Category 2 applies "[w]hen the President acts in absence of either a congressional grant or denial of authority." In such situations, the President acts within a "zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." Thus, the Executive "can only rely upon his own independent powers," which notably include an enforcement discretion power. It is also significant that in Category 2, "congressional inertia, indifference or quiescence may sometimes... enable, if not invite, measures on independent presidential responsibility." Thus, "any actual test of power is likely to depend on the imperatives of events and

143 Price, Enforcement Discretion, supra note 25, at 709.
144 David J. Barron & Todd D. Rakoff, In Defense of Big Waiver, 113 COLUM. L. REV. 265, 267 (2013) [hereinafter Big Waiver]; see also Price, Enforcement Discretion, supra note 25, at 710–11.
146 Id. at 449.
147 Price, Enforcement Discretion, supra note 25, at 710–11. Barron and Rakoff also argue that Clinton v. City of New York does not preclude the constitutionality of "big waiver." Big Waiver, supra note 144, at 313–15. But see R. Craig Kitchen, Negative Lawmaking Delegations: Constitutional Structure and Delegations to the Executive of Discretionary Authority to Amend, Waive, and Cancel Statutory Text, 40 HASTINGS CONST. L.Q. 525, 526 (2013) ("[M]any, if not most, negative lawmaking delegations are unconstitutional because they undermine a key structural purpose of Article I, Section 7.").
148 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
149 Id.
150 Id.; see also supra Part III.
151 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).
contemporary imponderables.” 152 In other words, the permissibility of enforcement discretion will vary not only with the construction of particular statutes, but also with factual and political context. 153

Finally, in Category 3, when the President contravenes expressed or implied Congressional will, the Executive’s power is “at its lowest ebb” because “he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” 154 Only “conclusive and preclusive” Presidential exercises of power can be sustained in Youngstown’s third category. 155 In the enforcement discretion context, not only does the Executive retain inherent discretion sufficient to sustain his authority in Category 2, but he also possesses an irreducible, indefeasible core of discretion in enforcement, which can sustain at least some discretionary power in Category 3.

There seems to be a narrow consensus, even among scholars who characterize enforcement discretion as “defeasible by contrary congressional command,” that executive enforcement discretion must be conclusive and preclusive at least with respect to individual criminal prosecutions in light of the Pardon Clause. 156 While the pardon power applies only to criminal prosecution, the Bill of Attainder Clause indicates that Congress could not constitutionally invade executive enforcement discretion by requiring enforcement against a particular individual, even in the civil context. 157 The President’s “conclusive

152 Id.
153 Id.
154 Id.
155 Id. at 638; see, e.g., Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2083–95 (2015) (holding President’s formal recognition power is “exclusive”).
156 Goldsmith & Manning, supra note 105, at 2295; see id. at n.72 (questioning “whether Congress could, consistent with the constitutional separation of powers, subject the decision not to prosecute to judicial review for reasons other than selective prosecution”); Price, Enforcement Discretion, supra note 25, at 711 (acknowledging that “executive enforcement discretion must be indefeasible” in the “limited” context of declining to prosecute an individual the Executive believes to be factually innocent).
157 Price, Enforcement Discretion, supra note 25, at 711; cf. Robertson v. Seattle Audubon Soc’y, 503 U.S. 429, 438, 441 (1992) (distinguishing Klein and holding Northwest Timber Compromise only “compelled changes in law, not findings or results under old law” and therefore did not violate separation of powers); United States v. Klein, 80 U.S. 128, 146 (1871) (holding “legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it”). The Supreme Court revisited these issues in Bank Markazi v. Peterson, which presented the question whether 22 U.S.C. § 8772 violated the separation of powers. See Petition for Writ of Certiorari at 1–2, Bank Markazi v. Peterson, 136 S. Ct. 1310 (2015) (No. 14-770), 2014 WL 7463968, at *2–3. Section 8772 directed that assets in a particular case before the United States District Court for the Southern District of New York “shall be subject to execution” upon two findings of fact. See id. at i. The Supreme Court distinguished Klein and held that this law did “not offend ‘separation of powers principles . . . protecting the role of the independent Judiciary within the constitutional design.’” Bank Markazi v. Peterson, 136 S. Ct. 1310, 1324, 1329 (2016) (quoting Miller v. French, 530 U.S. 327, 350 (2000)).
and preclusive" enforcement discretion in Category 3, however, extends beyond the prohibition on Bills of Attainder. Though Congress can always "enact statutory guidelines for enforcement discretion," it is not clear that Congress could constitutionally compel prosecution under specific conditions.\(^{158}\) Such a congressional encroachment into the Executive's enforcement discretion might impermissibly impinge on the Executive's power, grounded in Article II, to "coordinate and prioritize enforcement.\(^{159}\)

Given the traditional judicial deference to executive exercises of enforcement discretion,\(^{160}\) it is unsurprising that courts have been relatively "silent when it comes to the constitutional implications of a president's decision not to enforce a law."\(^{161}\) If a court were to rule on the scope of permissible executive discretion in Category 3,\(^{162}\) the court should construe Congressional incursions into the executive's inherent enforcement discretion strictly. In light of the Article II concerns about the President's power and obligation to supervise, coordinate, and prioritize enforcement, coupled with the "due process as separation of powers" concerns about protecting individual liberty, courts should require that Congress speak clearly before they find executive enforcement discretion precluded in Category 3.\(^{163}\)

This is not to say that the Executive is inherently empowered to categorically, prospectively, and affirmatively refuse to enforce laws based on

\(^{158}\) Compare Price, Enforcement Discretion, supra note 25, at 712 ("Congress . . . might even specify conditions under which prosecution would be mandatory, provided the executive branch believed a provable legal violation occurred."); with In re Aiken Cty., 725 F.3d 255, 263 (D.C. Cir. 2013) ("In light of the President's Article II prosecutorial discretion, Congress may not mandate that the President prosecute a certain kind of offense or offender.") (emphasis omitted).

\(^{159}\) See Andrias, supra note 43, at 1037; Metzger, supra 43, at 1929 ("[P]residential efforts to direct nonenforcement on a categorical, prospective, and transparent basis can have strong constitutional roots."); see also Free Enter. Fund v. Public Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010) ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."); Heckler v. Chaney, 470 U.S. 821, 831–32 (1985) (discussing complicated balancing process in setting agency enforcement priorities).


\(^{161}\) Love & Garg, supra note 25, at 1207.

\(^{162}\) But see Price, Law Enforcement, supra note 25, at 1573 (proposing application of political question doctrine to executive enforcement discretion in light of the "practical and institutional challenges in [judicially] ensuring faithful execution of prohibitory statutes by enforcement officials").

\(^{163}\) Cf. Big Waiver, supra note 144, at 322 (discussing normative desirability of "clear statement rule for recognizing the existence of a big waiver authority").
policy preferences. Instead, it is simply to say that courts should not find that the Executive has “abdica[ed] its statutory responsibilities,” thus exceeding even its conclusive and preclusive enforcement discretion in Category 3, without at least a clear statement of Congress’s preferred enforcement priorities. This clear statement rule should apply even to category-wide enforcement prioritization decisions, especially where the Executive has articulated a “reasonable basis in law” for its categorical prioritization.

V. WHAT YOUNGSTOWN CAN TEACH US ABOUT DAPA AND DACA

Although Youngstown alone does not conclusively resolve the states’ Take Care Clause argument against the constitutionality of DAPA, it aids in elucidating and isolating the issues, ultimately demonstrating the tenuous nature of the states’ argument in Texas v. United States, as well as the recent allegations of unconstitutionality by state Attorneys General that prompted the revocation of DACA. First, despite the Fifth Circuit’s assertion in its substantive APA analysis that “DAPA is not authorized by statute,” it is not immediately clear that DAPA falls outside of even Category 1. In its substantive APA analysis, the Fifth Circuit majority relies primarily on the expressio unius est exclusio alterius canon to argue that the INA expressly precludes DAPA (thus placing the program in Category 3 as impliedly contrary to Congress's will). This reasoning is not particularly convincing, however, especially in light of the extensive history of deferred action practices and the background presumption

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164 See, e.g., Heckler, 470 U.S. at 833 n.4 (noting it might exceed agency discretion if “agency has ‘consciously and expressly adopted a general policy’ that is so extreme as to amount to an abdication of its statutory responsibilities”) (quoting Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973)); In re Aiken Cty., 725 F.3d 255, 260 (D.C. Cir. 2013) (“President and federal agencies may not ignore statutory mandates or prohibitions merely because of policy disagreement with Congress.”) (citing Lincoln v. Vigil, 508 U.S. 182, 193 (1993)); Big Waiver, supra note 144, at 274 (“The general rule regarding the unreviewability of enforcement discretion gives way, however, when an agency adopts an affirmative policy of not enforcing a statutory requirement.”); Price, Enforcement Discretion, supra note 25, at 760 (describing a categorical, prospective suspension of statute as presumptively invalid).

165 Heckler, 470 U.S. at 833 n.4.

166 See Andrias, supra note 43, at 1117.

167 See supra note 32 and accompanying text.

168 Texas v. United States, 809 F.3d 134, 184 (5th Cir. 2015); see also id. at 186 (“DAPA is foreclosed by Congress’s careful plan; the program is ‘manifestly contrary to the statute’ and therefore was properly enjoined.”).

169 Id. at 179 (noting that INA provides detailed and specific provisions for determining legal status, but that DAPA-eligible individuals are “entirely absent from those specific classes”); id. at 215–16 (King, J., dissenting) (characterizing majority analysis as application of expressio unius canon).
of *Chevron*\(^{170}\) deference to reasonable agency interpretations that do not *directly* contravene statutory instructions.\(^{171}\)

Furthermore, recall that under *Youngstown*, congressional authorization in Category 1 may be either “express or implied.”\(^{172}\) There is a strong argument Congress has “de facto” delegated the authority to implement DAPA to the Executive by passing a “detailed” immigration code that “mak[es] a huge fraction of noncitizens deportable at the option of the Executive.”\(^{173}\) Even before DACA and DAPA were implemented, Cox and Rodriguez argued that this de facto delegation gave the President the power, “without having to resort to the legislative process, to alter significantly the composition of the immigrant labor force, to permit immigrants with minor criminal convictions to stay rather than removing them, and so on.”\(^{174}\) Even Delahunty and Yoo, who argued that DACA was unconstitutional in 2012, acknowledge the force of this de facto delegation argument, positing that Congress may have “enabled, and indeed tempted” the Administration to under-enforce the immigration law, especially given the Congressional failure to adequately appropriate funds for enforcement.\(^{175}\)

DACA/DAPA, however, is most comfortably located within Category 2. The second category’s “zone of twilight” applies only in cases of congressional silence.\(^{176}\) In this particular situation, Congress was apparently silent on the permissibility of DACA/DAPA, insofar as “[t]here is no provision in the INA that prohibits the Administration from implementing programs like DACA.”\(^{177}\) From this perspective, the explicit grants of discretion in the INA are

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\(^{171}\) *Texas v. United States*, 809 F.3d 134, 216 (5th Cir. 2016) (King, J., dissenting) (“[I]n enacting these provisos, Congress was legislating against a backdrop of longstanding practice of federal immigration officials exercising ad hoc deferred action.”) (emphasis omitted); see also Goldsmith & Manning, *supra* note 105, at 2310 (noting the “highly contextual nature of the *expressio unius* canon’s applicability and scope” and explaining that *Chevron* requires “interpreters to ask whether a reasonable person reading the words in context would have understood the specification to be exclusive”). *But see* Margulies, *Taking Care, supra* note 34, at 111 (“The clash between DACA’s broad relief and the INA’s comprehensive scheme thus eliminates the President’s recourse to category one of the *Youngstown* typology.”).

\(^{172}\) *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

\(^{173}\) *Cox & Rodriguez, supra* note 72, at 463.

\(^{174}\) *Id.* at 464.

\(^{175}\) Delahunty & Yoo, *supra* note 24, at 852–53 (acknowledging that de facto delegation may be the Administration’s best defense of DACA, but proposing de facto delegation may violate nondelegation doctrine).

\(^{176}\) *Youngstown*, 343 U.S. at 637 (defining Category 2 as “absence of either a congressional grant or denial of authority”).

\(^{177}\) Wadhia, *supra* note 30, at 62.
“at the very least” consistent with the relevant factors\textsuperscript{178} in DACA/DAPA’s deferred action analysis.\textsuperscript{179} Thus, DACA/DAPA would seem to fit securely within Category 2.

There is an important counterargument, however, raised by both the Fifth Circuit and academic commentators, that Category 3, rather than Category 2, should apply. Although DACA/DAPA is not necessarily contrary to “expressed” congressional will, the failure of the proposed Development, Relief, and Education for Alien Minors Act (“DREAM Act”) might \textit{impliedly} prohibit DACA/DAPA, placing the Executive’s program in Category 3.\textsuperscript{180} In fact, \textit{Youngstown} itself presented a somewhat analogous situation:

\begin{quote}
[T]he use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment [i.e. outside Category 1]; \textit{prior to this controversy}, Congress had \textit{refused to adopt that method} of settling labor disputes. When the Taft-Hartley Act was under consideration in 1947, Congress rejected an amendment which would have authorized such governmental seizures in cases of emergency.\textsuperscript{181}
\end{quote}

In \textit{Youngstown}, “a decisive majority of five Justices,” including Jackson in his famed concurrence, “treated Congress’ silence as speech—its \textit{nonenactment of authorizing legislation} as a legally binding expression of \textit{intent to forbid} the seizure at issue.”\textsuperscript{182} Thus, Truman’s attempted steel seizure was scrutinized in Category 3, flouting an implied Congressional prohibition on the President’s action.

This treatment of nonenactment-as-implied-prohibition in \textit{Youngstown} is not, however, dispositive of the analysis here. First, as Professor Laurence Tribe has pointed out, the Court has not always treated congressional silence as implicit prohibition: in \textit{Dames \\& Moore v. Regan},\textsuperscript{183} the Court interpreted a similar instance of Congressional silence as “non-silence,” implicitly authorizing the Executive to suspend a private contractor’s claims against the Iranian

\begin{footnotes}
\item[178] See \textit{supra} note 7 (identifying these factors).
\item[179] Wadhia, \textit{supra} note 30 n.21 (citing Immigration Nationality Act § 240A, 8 U.S.C. § 1229b (2012)).
\item[180] Texas v. United States, 809 F.3d 134, 185 (5th Cir. 2015) (“DAPA is far from interstitial: Congress has repeatedly declined to enact the [DREAM Act], features of which closely resemble DACA and DAPA.”); Delahunty \\& Yoo, \textit{supra} note 24, at 784 (“[T]he Obama Administration effectively wrote into law ‘the DREAM Act,’ whose passage had failed numerous times.”).
\item[181] \textit{Youngstown}, 343 U.S. at 586 (emphasis added).
\end{footnotes}
Government. Second, and perhaps more importantly, while Congressional “silence or inaction” may sometimes provide relevant interpretive context, “[n]ot all silences may legitimately be read as part of statutory context[].” Specifically, it “seems incompatible with our constitutional structure[,]” which provides expressly defined processes for lawmaking, to “justify[] an interpretation of a prior enactment by pointing to what a subsequent Congress did not enact[].” Therefore, the negative implications drawn by the Fifth Circuit and others from the failure of the DREAM Act is inconsistent with Article I of the Constitution, which does not contemplate the non-enactment as legally binding. From this perspective, DACA is properly located within Youngstown Category 2, despite the failed enactment of the DREAM Act.

Although most commentators have failed to apply Youngstown to DAPA and DACA, at least one has made an attempt, but then misapplied Category 2. Peter Margulies argues that “[p]rosecutorial [d]iscretion [c]annot [s]upport DACA” because, “as historically interpreted[,]” prosecutorial discretion “provides little or no valid precedent for DACA[].” He argues that DACA is unsupportable in Category 2 because “DACA is more expansive than the typical discretionary regime [and] . . . therefore falls outside any course of dealing in which Congress has acquiesced.” His argument, however, fundamentally misapplies Category 2. First, Margulies apparently (and unjustifiably) requires a demonstration of repeated Congressional acquiescence before he would find

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184 Tribe, supra note 182, at 526–27.
185 Id. at 529–530.
186 Id. at 530. Tribe and others have referred to lawmaking procedures prescribed by the Constitution as “due process of lawmaking.” See, e.g., id. at 517.
187 Tribe, supra note 182, at 530.
188 Cf. Immigration Naturalization Serv. v. Chadha, 462 U.S. 919, 957 (1983) (holding all “exercise[s] of legislative power . . . [are] subject to the standards prescribed in Art[icle] I”). It is worth noting Tribe defends Youngstown’s result but for a different reason. He embraces Justice Douglas’s concurrence, which interpreted “Congress’ silence [to] bar[] the challenged action by President Truman not because it signal[ed] a desire by Congress that Truman act otherwise, but because the underlying constitutional rule [of no takings without just compensation] . . . makes the sort of thing Truman did void absent explicit prior consent by Congress.” Tribe, supra note 182, at 525.
189 See, e.g., Gilbert, supra note 30, at 279 (arguing DACA belongs in Category 2).
190 But see Gilbert, supra note 30, at 277–82 (applying Youngstown analysis, placing DACA in Category 2, and positing some inherent Presidential authority over immigration). This paper builds upon Gilbert’s more accurate foundation, which essentially limits its analysis of inherent authority to the President’s immigration powers. In contrast, Parts III and IV of this paper derive a general executive enforcement discretion power and apply it to DACA/DAPA.
191 Margulies, Taking Care, supra note 34, at 122. Margulies later incorporated by reference the same analysis to conclude that DAPA was also impermissible. See Margulies, Boundaries, supra note 35, at 1252–54.
192 Margulies, Taking Care, supra note 34, at 124.
Executive action justified in Category 2. Not only does this analysis frame the inquiry at an unnecessarily particularized level of generality (requiring a demonstrated course of conduct in the immigration context, specifically), but it also ignores the essential feature of Category 2: concurrent Congressional and Presidential authority. Margulies simply ignores the possibility that the President might possess an inherent nonenforcement power in Category 2, which Part III of this Article derived from constitutional text and structure.

A proper application of Category 2 would first recognize that Congress and the President possess concurrent power to determine the contours of permissible enforcement discretion. Moreover, in Category 2, the “de facto delegation” rationale retains significance, especially in light of Justice Jackson’s instruction that “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility.” In the case of DACA/DAPA, congressional gridlock partially explains the Executive’s reliance on enforcement discretion and prioritization to implement a sensible and workable immigration policy. Given the strong roots of the Executive’s inherent enforcement discretion power in Article II and due process as separation of powers, there is a compelling argument that DACA/DAPA is justified in the face of Congressional silence in Category 2,

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193 Margulies apparently derives this requirement from Jackson’s suggestion that “congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (emphasis added). Notably, this sentence is phrased in permissive, rather than mandatory, terms; quiescence might be sufficient to indicate independent executive authority, but it is certainly not necessary.

194 In fact, Margulies does not even acknowledge the possibility of inherent executive power until he reaches Category 3. See Margulies, Taking Care, supra note 34, at 124. His analysis of inherent powers, however, again frames the inquiry at an unjustifiably specific level of generality. He argues because “the President possesses no enumerated powers over immigration[,]” the Constitution cannot support DACA in Category 3. Id. at 126. Again, the inquiry is too particularized: Margulies fails to recognize the possibility that more general constitutional provisions, such as the Executive Power Clause, the Take Care Clause, the Pardon Clause, the Bill of Attainder Clause, and the Due Process Clause together support an inference of inherent executive enforcement discretion. See supra Part III; see also In re Aiken Cty., 725 F.3d. 255, 262–63 (D.C. Cir. 2015).

195 Youngstown, 343 U.S. at 637 (Jackson, J., concurring).

196 Id. (emphasis added); Cox & Rodriguez, supra note 72, at 463–64; see also Gilbert, supra note 30, at 256 (arguing “DACA was a justifiable assertion of Executive authority in the face of gridlock in Congress”).

197 See Price, Enforcement Discretion, supra note 25, at 674 (relying on enforcement discretion in part because of congressional gridlock); Delahunty & Yoo, supra note 24, at 784 (“[B]oth of us favor a speedier path to citizenship for illegal aliens who were brought here as children and are enrolled in school or serve in the United States Armed Forces.”).
especially in light of the Administration’s “reasonable . . . basis” for its publicly-articulated enforcement priorities and Congress’s inertia.198

Finally, assuming arguendo that Congress has in fact impliedly prohibited the degree of enforcement discretion contemplated in DACA/DAPA, the Executive’s program could still be defended in Category 3. Although “neither DACA’s advocates nor members of the Obama Administration appear to have relied on this type of ‘inherent authority’ argument to justify DACA,”199 there are several colorable arguments. First, as Professor Lauren Gilbert has suggested, the President might retain some inherent authority to “regulate aspects of immigration, particularly those touching on foreign affairs” in light of the inherent executive foreign affairs power identified by the Court in United States v. Curtiss-Wright Export Corp.200 Notably, the Court has affirmed repeatedly “that the regulation of immigration implicates the foreign affairs power.”201

Moreover, this Article has theorized a generalized inherent executive power of enforcement discretion, stemming from Article II and the concept of “due process as separation of powers.”202 Part III also suggested that this power is, at least in some sense, irreducible and indefeasible.203 In Category 3, where Presidential power is at its “lowest ebb,” it is obviously difficult to defend any exercise of Presidential power.204 The enforcement discretion argument in Category 3 loses much of its force outside of the context of individualized prosecution, where the Pardon Clause grants the President tremendous unilateral power.205 DACA/DAPA, however, is an exercise of discretion on a prospective, categorical basis in the context of civil removal proceedings. Therefore, perhaps the strongest Category 3 argument in defense of DACA/DAPA relies on the Executive’s supervisory powers under Article II, which encompass an authority

198 Cf. Andrias, supra note 43, at 1039. But see Price, Enforcement Discretion, supra note 25, at 758–60 (arguing that DACA exceeds permissible bounds of executive enforcement discretion because it contradicts the statutory policy of the INA).

199 Gilbert, supra note 30, at 281.

200 United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (describing the President as “the sole organ of the federal government in the field of foreign relations”); Gilbert, supra note 30, at 281. But see Zivotofsky ex rel. Zivotofsky v. Kerry, 135 S. Ct. 2076, 2090 (2015) (explaining “Curtiss-Wright did not hold that the President is free from Congress’s lawmaking power in the field of international relations” and intimating Curtiss-Wright was a Category 1 case); Gilbert, supra note 30, at 281 (noting Curtiss-Wright “stands on shaky ground” and has been subject to numerous academic critiques); Shane & Bruff, supra note 38, at 593 (noting Curtiss-Wright is “ubiquitously cited” for “ambiguous claims of [executive foreign] affairs powers[,]” but that most of its commentary on foreign affairs power appears to be dicta).

201 Gilbert, supra note 30, at 280 n.142 (collecting cases).

202 See supra Part III.

203 See supra text accompanying notes 156–57.

204 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

205 See, e.g., In re Aiken Cty., 725 F.3d 255, 263–64 (D.C. Cir. 2013).
to coordinate and prioritize enforcement.\textsuperscript{206} On this view, DACA/DAPA might be able to survive even in Category 3, as long as the Executive can reasonably defend it as a prioritization program rather than systematic under-enforcement of the law, which might be contrary to congressional will as expressed through increased immigration enforcement appropriations.\textsuperscript{207} Finally, temporarily putting aside questions of justiciability,\textsuperscript{208} the above-mentioned clear statement rule against constraints on executive enforcement discretion would favor upholding DACA/DAPA, where the only evidence of contrary congressional will is increased appropriations\textsuperscript{209} and negative implications drawn from the INA.\textsuperscript{210}

VI. CONCLUSION

The Executive’s discretion to decline to enforce the law is an under-theorized area of separation-of-powers jurisprudence. The Obama Administration’s publically salient exercises of discretion, from DACA/DAPA to the abstention from prosecution of certain marijuana crimes, have brought renewed scholarly attention to the issue. Moreover, a spate of lawsuits against the Obama Administration, especially in the immigration context, has drawn the courts into the foray as well. The Fifth Circuit’s decision upholding the preliminary injunction against DACA did not reach the states’ constitutional

\textsuperscript{206} See, e.g., Andrias, supra note 43, at 1045 (“[E]ven when legislation circumscribes enforcement discretion, the Executive must continue to make countless policy determinations about how best to enforce other parts of the statutes or to prioritize among various statutory programs.”); Metzger, supra note 43, at 1929 (characterizing DACA and DAPA as “fulfilling [DHS Secretaries’] constitutional duties to supervise”); see also David A. Martin, A Lawful Step for the Immigration System, WASH. POST (June 24, 2012), http://articles.washingtonpost.com/2012-06-24/opinions/35460047_1_deportation-policy-record-deportations-removals (arguing DACA is lawful, even in light of Congressional enforcement mandates through appropriations, because “the administration has pledged to stay at the level of removals that corresponds to appropriations, even while keeping Dreamers off the deportation list”).

\textsuperscript{207} See Martin, supra note 206. Cf. Prakash, Nonenforcement Power, supra note 30, at 116 (“The President may be guilty of having the wrong enforcement priorities, but he has not violated his faithful execution duty.”).

\textsuperscript{208} See, e.g., Price, Law Enforcement, supra note 25, at 1575.

\textsuperscript{209} Cf. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 190 (1978) (“We recognize that both substantive enactments and appropriations measures are ‘Acts of Congress, ’ but the latter have the limited and specific purpose of providing funds for authorized programs.”). This is not to say that the Executive could refuse to enforce the INA to the full extent that Congress has chosen to fund it. See Martin, supra note 206. Instead, it is to argue that as long as DACA/DAPA is framed as an enforcement prioritization decision, the program is permissible, provided that the immigration laws are otherwise enforced overall to the fullest extent possible given congressional appropriations. See id.

\textsuperscript{210} See supra notes 168–71 and accompanying text.
arguments, and thus the precise contours of the Executive’s constitutional discretion to decline enforcement remain unclear after an equally-divided Supreme Court affirmed that decision.

This Article brings a modicum of clarity to the debate by drawing upon Justice Jackson’s famed Youngstown concurrence. First, Youngstown provides a common framework that can accommodate the various positions on executive enforcement discretion, from Delahunty and Yoo’s duty-bound Executive, to Price’s more flexible dual-presumption model. Second, this Article independently contributes a theory of an inherent power of executive enforcement discretion, grounded in several provisions of the Constitution, including Article II and the Due Process Clause. With this strong constitutional grounding, the Executive’s inherent enforcement powers can support exercises of discretion in Category 2 and perhaps even Category 3, especially in the context of individualized enforcement actions. Finally, this Article demonstrates the utility of the Youngstown framework in the context of enforcement discretion by applying its categories systematically to the DACA/DAPA debate, ultimately concluding that the program is defensible as an exercise of inherent discretion in Category 2. Given the judicial reluctance to interfere with exercises of executive discretion, the Fifth Circuit’s recent DAPA decision stands out as somewhat of an outlier. Regardless of one’s political affiliation, perhaps one positive consequence of the states’ challenges will be a more sophisticated debate about the permissibility of executive enforcement discretion. Hopefully, this Article provides a step in the right direction.