Taking Care of the Rule of Law

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Abstract

The project of squaring the rule of law with executive governance is coming to a head. Hardly a week passes without commentators summoning the rule of law to pass judgment on the legitimacy or desirability of some executive action. But the more we talk about the rule of law, the further it seems to slip away. Rather than look to the rule of law for answers, this Article shines critical light on what the rule of law ideal cannot tell us. Moreover, the Article explains why even well-intended efforts to square the rule of law with trends in executive governance can be counterproductive. To anchor these points, the Article presents comparative case studies of President Obama's and President Trump's signature immigration policies and the rule of law debates surrounding them. The Obama-Trump juxtaposition offers a portrait of some disquieting trends, not only for presidential administration, but also in how we think and talk about the rule of law ideal. This Article intervenes with some prescriptions moving forward—including away from rule of law talk, and towards doctrines and institutional arrangements that could more effectively check presidential power.

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INTRODUCTION

The "rule of law" is a stretchy jurisprudential concept. It means "different things to different people."[1] At its core, the rule of law requires adherence to validly enacted law.[2] Broader conceptions require more, including the availability of judicial review, procedural regularity, and internal features of law (for instance, that it be prospective, transparent, stable, and so on).[3] Thicker still, some rule of law concep-

1 RONALD A. CASS, THE RULE OF LAW IN AMERICA 1 (2001); *accord* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 1 (1997) ("The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before.").

2 For an articulation of this conception, see FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72–73 (1944).

3 *See infra* Section I.A.

tions demand moral justice, equality, or other substantive norms.[4] Context also matters. For instance, different rule of law features may be emphasized or marginalized, depending on whether the ideal is conjured to evaluate an entire legal system, institutions within it, or particular government actions.[5]

In the presidential context, one might equate rule of law concerns with the constitutional duty to "take Care that the Laws be faithfully executed."[6] In turn, that duty might include presidential adherence to substantive and procedural law,[7] a presidential "duty to supervise" executive officials,[8] as well as nonarbitrary[9] and good-faith[10] implementation of federal law. In the closely aligned administrative context, one might add executive reason-giving and deliberation to this list.[11]

Even in the abstract, the foregoing rule of law conceptions are hotly contested. More my focus here, however, is how these concepts translate in action. The rule of law ideal is not self-executing; it gets hashed out and operationalized on the ground. To that end, academ-

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4 *See* JOSEPH RAZ, *The Rule of Law and Its Virtue*, *in* THE AUTHORITY OF THE LAW 210 (1979) (distinguishing between formal and substantive theories of the rule of law). For leading treatments of the rule of law that include substantive norms of morality and justice, see, for example, RONALD DWORKIN, A MATTER OF PRINCIPLE 11–12 (1985); JOHN RAWLS, A THEORY OF JUSTICE 235–43 (1971). *See also infra* Section I.A (providing a more detailed discussion of the rule of law's conceptual variance).

5 *See infra* Section I.B, Part III.

6 U.S. CONST. art. II, § 3.

7 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646 (1952) (Jackson, J., concurring) (linking the Take Care Clause to the axiom that "ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules"); *id.* at 633 (Douglas, J., concurring) ("[T]he power to execute the laws starts and ends with the laws Congress has enacted."); *see also* Myers v. United States, 272 U.S. 52, 177 (1926) (Holmes, J., dissenting) ("The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.").

8 *See, e.g.*, Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1849–58 (2015) (discussing the importance of systemic administration and the President's duty of oversight).

9 *See, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 463–64 (2003).

10 *See, e.g.*, Randy Barnett, *The President's Duty of Good Faith Performance*, WASH. POST: VOLOKH CONSPIRACY (Jan. 12, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/12/the-presidents-duty-of-good-faith-performance/?utm_term=.A6def81e9879; *see also* Mila Sohoni, *Crackdowns*, 103 VA. L. REV. 31, 40 (2017) (arguing that "[t]o 'faithfully' enforce the law means to enforce the law . . . in the way that serves the best reading of the statute, the public interest, and constitutional and rule-of-law values").

11 *See, e.g.*, Randy J. Kozel & Jeffrey A. Pojanowski, *Administrative Change*, 59 UCLA L. REV. 112, 150 (2011) ("Candid reason-giving by agencies promotes the rule of law by allowing the governed to 'make sense of' the existing legal regime and participate in its future development." (quoting Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 35 (2008))).

ics, politicians, jurists, and lay persons often employ the rule of law as an evaluative tool.[12] They start with some rule of law conception in mind, match it against some aspect of government, and pass judgment on the legitimacy or desirability of the tested government feature. This Article flips the script. Rather than look to the rule of law for answers, this Article shines critical light on what the rule of law ideal *cannot* tell us about executive governance.[13] Moreover, the Article explains why even well-intended efforts to square the rule of law with recent executive trends can leave us *worse off* from the exercise. Indeed, the more we chase the rule of law, the further it seems to slip away.

To anchor these points, this Article offers comparative case studies of the Obama and Trump Administrations' respective immigration policies and the rule of law debates surrounding them. Despite notable differences, the Obama-Trump juxtaposition offers a stunning glimpse of some disquieting trends—not only for executive governance, but also in how commentators think and talk about the rule of law.

Faced with an obstinate legislature, President Obama unapologetically announced that he would no longer "wait for Congress" for immigration reform.[14] President Trump hardly waited for his own cabinet to be seated before issuing a "travel ban" that wreaked chaos at our borders.[15] Whereas the Obama Administration was deeply criticized for underenforcing key sections of the immigration code,[16] the Trump Administration is now criticized for hyper-enforcing the same provisions and more.[17] At the margins, statutorily required administrative

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12 *See* Fallon, *supra* note 1, at 43; Waldron, *supra* note 11, at 12 (describing the rule of law as "an evaluative ideal").

13 *See infra* Parts II–IV (mapping how commentators have applied the rule of law to evaluate the Obama and Trump administrations' respective immigration policies).

14 President Barack Obama, Remarks by the President on the Economy and Housing (Oct. 24, 2011), https://obamawhitehouse.archives.gov/the-press-office/2011/10/24/remarks-president-economy-and-housing ("So I'm here to say to all of you[,] . . . we can't wait for an increasingly dysfunctional Congress to do its job. Where they won't act, I will."); *see* President Barack Obama, Remarks by the President in Address to the Nation on Immigration (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/remarks-president-address-nation-immigration.

15 *See infra* Part IV (discussing Trump's initiatives and the litigation fallout). On the chaos, see Ted Hesson & Jennifer Scholtes, *Confusion over Trump's Travel Ban Deepens*, POLITICO (Jan. 30, 2017, 8:50 PM), http://www.politico.com/story/2017/01/trump-immigration-travel-ban-chaos-234410 (reporting that "[t]he roll out of Trump's order 'was as chaotic on the inside as it looked on the outside,'" and that a career Department of Homeland Security ("DHS") official remarked that "'nobody knew anything' before the White House announced the policy").

16 *See infra* Section II.C.

17 *See infra* Part IV.

procedures may temper the extremities of presidential power.[18] Yet, both the Obama and Trump Administrations chose to bypass these procedures on matters of enormous national significance.[19] All the while, both Administrations have insisted that the judiciary is powerless to intervene.[20]

Is this the rule of law? Have both Presidents advanced the rule of law or undermined it? If one President has, but not the other, which one and why? Hardly a week passes without commentators weighing in on those sorts of questions.[21] But they are not the right questions. This Article offers some prescriptions moving forward, including away from rule of law talk, and toward doctrines and institutional arrangements that could more effectively check presidential power.[22]

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18 *See, e.g.*, 5 U.S.C. §§ 551–559 (2012); *see also* Bressman, *supra* note 9, at 490. Indeed, such procedures may be the administrative state's greatest claim to legitimacy, in light of Congress's sweeping delegations of authority to executive officials. *See generally* David S. Rubenstein, *"Relative Checks": Towards Optimal Control of Administrative Power*, 51 WM. & MARY L. REV. 2169 (2010) (contextualizing and evaluating the presidential control model alongside congressional and judicial control models).

19 *See* 5 U.S.C. § 553 (generally requiring that administrative rules undergo notice-and-comment procedures before being promulgated in final form); *see also* Section II.B, Part IV (discussing Obama's and Trump's respective immigration policies).

20 In its attempt to fend off Texas's legal challenges to the Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA") program, the Obama Administration argued that the State lacked standing and that the government's enforcement policies were otherwise nonjusticiable. *See* Brief for the Appellants at 18–33, United States v. Texas, 809 F.3d 134 (5th Cir. 2015) (No. 15-40238). Now, in litigation challenging President Trump's immigration policies, his Administration is likewise challenging standing where it can, and otherwise arguing that "the power to expel or exclude aliens [is] a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 12, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (per curiam) (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); *see also* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 581–88 (4th Cir.) (discussing and rejecting an array of justiciability challenges raised by the Trump Administration), *vacated as moot*, 138 S. Ct. 353 (2017).

21 *See* Parts II–IV (collecting examples that capture the major lines of argument). For your weekly fix, google "rule of law," troll social media, and tune in to Fox News and MSNBC.

22 For contrasting normative views of presidential power, compare Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1728–30 (1996), and BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC 4 (2010) (describing a powerful presidency as "a serious threat to our constitutional tradition"), with ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC 15 (2010) (arguing that "law does little to constrain the modern executive, . . . whereas politics and public opinion do constrain the modern executive"), and WILLIAM G. HOWELL & TERRY M. MOE, RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY (2016) (advancing reform agenda that would further empower Presidents relative to Congress).

One can believe that the rule of law ideal matters (as I do), and yet also believe that talking about it is unhelpful and potentially costly.[23] To my mind, the rule of law ideal may still have meaning and value, but not at the level of specificity or in the ways employed in today's debates over presidential action. As an evaluative tool, the ideal arguably works better to assess the overall health of a legal system.[24] But whether a presidential initiative violates the rule of law arguably does not matter because, at that retail level, neither the question nor the answers matter. As the Obama-Trump case studies hope to illustrate, rule of law talk too often and easily gets politicized when it is directed at particular presidential policies and action. Although the rule of law ideal is flush with neutral principles—stability, transparency, procedural regularity, etc.—these abstract values can quickly lose their shape when tested in the crucible of reality.

Of perhaps most concern, justifying presidential action in rule of law terms can indirectly reify the power structures behind those actions.[25] If we are satisfied with those enabling structures, then nothing more needs to be said. But if sentiments about those structures suddenly change when the President does, that should sound an alarm.

Paradoxically, our historic zeal for the rule of law has fed the condition that rule of law champions now rail against—namely, the merger of law and politics in the office of the President. During the Progressive and New Deal eras, the rule of law ideal accommodated, if not encouraged, the "rise and rise" of the administrative state.[26] Constitutional norms were relaxed, conceptions of "law" changed,

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23 *See infra* Section V.A.

24 A few global organizations have created rule of law indices that purport to measure and score legal systems around the world. *See* Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 LAW & SOC. INQUIRY 100 (2017) (discussing and critically evaluating these indices). Although heavily criticized, the index from the World Justice Project ("WJP") is among the most comprehensive. *See id.* at 101, 108. For what it is worth, in 2016, the United States was ranked 18 out of 113 countries in overall rule of law performance. *See Rule of Law Index 2016*, WORLD JUST. PROJECT, http://data.worldjusticeproject.org/#groups/USA [https://perma.cc/5X2A-D6M2] (last visited Dec. 23, 2017).

25 *See* Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953, 1958–59 (2015) (noting that rule of law arguments centered on accountability and transparency "are designed to confer legitimacy on [presidential actions] without regard to whether they have been authorized by positive law").

26 For seminal accounts of this transformation, see Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994); Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975); and Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987). *See also* FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) ("The rise of administrative bodies . . . has deranged our three-branch legal theories . . . .").

and the "rule of law" followed suit.[27] In large measure, this metamorphosis was sold on the bureaucratic ideal of apolitical expertise.[28] Later, concerns over agency capture, the rise of high-consequence rulemakings, and a sprawling bureaucracy brought politics and the "unitary executive" back into play.[29] In that new sociopolitical context, the rule of law became a reason to centralize executive governance in the White House.[30]

Over the past two decades, "presidential administration" has dominated the administrative landscape.[31] Under this model, the President develops a comprehensive policy agenda, leans on administrative agencies for implementation, takes credit for the policies, and generates popular support through public statements and media campaigns.[32] Seen in a positive light, presidential administration arguably offers coordinated, energized, transparent, and politically accountable executive decisionmaking.[33]

The normative case for presidential administration, however, has always presupposed the law's capacity to constrain presidential ambition. This law-as-constraint premise is both vital and contingent: without law's constraint, presidential administration can fly off the rails,

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27 *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870–1960, at 3–4 (1992) (explaining that the New Deal Progressive attack on Classical Legal Thought "represented a genuine paradigm shift"; a "fundamental reexamination of the core of ideas that constituted the 'rule of law'").

28 *See* JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 75–76, 154–55 (Yale Univ. Press 1938).

29 *See, e.g.*, Bressman, *supra* note 9, at 469–91 (discussing the evolution and progression of legitimating theories of administrative governance, culminating in the presidential control model). *See generally* Peter L. Strauss, *Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007) (linking the rise of presidential administration to a resurgence of the "unitary executive" theory, and challenging the idea that the President can decide (rather than oversee) matters delegated by statute to agency officials).

30 *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2349, 2368–69 (2001) (coining the term "presidential administration," and offering a normative defense tethered to rule of law concerns and values).

31 *See id.*; *see also* Lisa Heinzerling, *A Pen, a Phone, and the U.S. Code*, 103 GEO. L.J. ONLINE 59, 60, 65 (2014) (noting that "presidential administration" has "caught hold" and "won the day" in academic and political circles). Although the model of presidential administration has dominated as a descriptive matter, it has long been critiqued on normative grounds. *See, e.g.*, Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47, 59–62 (2006); Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 227 (1998) (arguing that "new presidentialism" is "a profoundly anti-regulatory phenomenon"); Peter L. Strauss, *Presidential Rulemaking*, 72 CHI.-KENT L. REV. 965, 967, 983 (1997). For more recent critiques and concerns over presidential administration, see *infra* note 34.

32 *See* Kagan, *supra* note 30, at 2277.

33 *See generally id.*

and arguably has with each new administration.[34] If our quest for the rule of law has not precipitated this condition, neither has the rule of law prevented it. We need not completely give up on the rule of law ideal. But we must, at a minimum, stop placing faith in our Presidents to deliver it.

This Article proceeds in five parts. Part I sketches the jurisprudential contours of the rule of law, and provides an account that understands the ideal as a dynamic construct.[35] The rule of law's meaning has changed in the past, and it can change again. Indeed, the recent flare-up of rule of law talk might be a marker of government in transition—a coming to grips with something new.[36] If nothing else, the rule of law's stretchiness raises the intriguing (and worrisome) possibility that the ideal may be morphing in real-time to accommodate—rather than to resist—certain trends in executive governance.

After laying this foundation, Part II provides an account of the Obama Administration's signature deferred-action programs. Popularly known as Deferred Action for Childhood Arrivals ("DACA") and Deferred Action for Parents of Americans ("DAPA"), these programs sought to confer temporary legal reprieve and work authorization to approximately half of the estimated eleven million undocumented persons in the United States.[37]

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34 The dangers of presidential administration were always present; recent experience has simply foregrounded those dangers in more obvious and ominous ways. For updated, and mostly critical accounts of presidential administration, see PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 12, 175–77 (2009); Cary Coglianese, *The Emptiness of Decisional Limits: Reconceiving Presidential Control of the Administrative State*, 69 ADMIN. L. REV. 43 (2017); Heinzerling, *supra* note 31; Jerry L. Mashaw & David Berke, *Presidential Administration in a Regime of Separated Powers: An Analysis of Recent American Experience*, 35 YALE J. ON REG. (forthcoming 2018); Kathryn A. Watts, *Controlling Presidential Control*, 114 MICH. L. REV. 683 (2016); and Daniel A. Farber, Presidential Administration Under Trump (Aug. 8, 2017) (unpublished manuscript), https://ssrn.com/abstract=3015591.

35 For an excellent account of the rule of law's historical pedigree, which traces at least back to Aristotle, see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004). *See also* Arthur H. Garrison, *The Traditions and History of the Meaning of the Rule of Law*, 12 GEO. J.L. & PUB. POL'Y 565, 580–99 (2014).

36 For suggestions that a new era of administrative governance may already be upon us, see Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1140, 1177 (2014) (explaining that "the actual workings of the administrative state have increasingly diverged from the assumptions animating the APA and classic judicial decisions that followed," and that "the current situation is somewhat dismaying for those who still believe in the 'rule of law' values"); Merrill, *supra* note 25, at 1958 ("In the twenty-first century, we may or may not be on the threshold of a new era in administrative law, in which the positivist tradition is significantly displaced by a dominant process tradition.").

37 *See* Press Release, Migration Policy Inst., MPI: As Many as 3.7 Million Unauthorized Immigrants Could Get Relief from Deportation Under Anticipated New Deferred Action Pro-

Part III examines the rule of law debates surrounding President Obama's deferred-action initiatives.[38] In short, critics portray DACA/DAPA as doubly problematic for the rule of law: first, because these policies condone lawbreaking by immigrants; second, because these policies entail lawbreaking by executive officials.[39] But supporters of DACA/DAPA offer a counternarrative. Foremost, supporters argue that these programs promote the rule of law values of transparency, predictability, and uniformity in immigration enforcement. On this positive account, DACA/DAPA reduces arbitrary and discriminatory enforcement discretion, which have long plagued the immigration system.[40] To my mind, neither of these dueling narratives are satisfying.[41] Yet my purpose here is not to salvage them, much less to choose the winning side. Rather, this Article repurposes these debates to expose why appeals to the rule of law are generally unhelpful, if not also counterproductive.

Given the rule of law's conceptual sweep, it is no wonder that rule of law talk so often talks past itself.[42] For instance, if the rule of

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gram (Nov. 19, 2014), http://www.migrationpolicy.org/news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new. One study reported that the Obama Administration's enforcement policies, which extend beyond DACA and DAPA, could have benefitted as many as eighty-seven percent of the unauthorized immigrants in the United States. *See* Julia Preston, *Most Undocumented Immigrants Will Stay Under Obama's New Policies, Report Says*, N.Y. TIMES (July 23, 2015), https://www.nytimes.com/2015/07/23/us/politics/most-undocumented-immigrants-will-stay-under-obamas-new-policies-report-says.html.

38 For representative samples, compare HIROSHI MOTOMURA, IMMIGRATION OUTSIDE THE LAW 205 (2014) (supporting Obama's immigration policies on rule of law grounds), Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 110–13, 224 (2015) (same), and Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISC. 58, 65 (2015) (same), with Josh Blackman, *The Constitutionality of DAPA Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015) (critiquing Obama's policies on rule of law grounds), and Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63, 65, 107–11 (2015) (same).

39 *See infra* Section II.C.

40 *See infra* Section III.B.

41 *Cf.* Fallon, *supra* note 1, at 56 (observing that "prominent participants in Rule-of-Law debates commonly offer arguments that appeal to different ideal types in different contexts"). Others have made a similar point in the context of executive nonenforcement policies, including in immigration. *See, e.g.*, MOTOMURA, *supra* note 38, at 185–92, 205 (acknowledging that rule of law evaluations can lead in different directions, and supporting Obama's immigration policies on rule of law grounds); Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235, 237 (2016) (suggesting that rule of law arguments surrounding executive nonenforcement of statutes do little, if anything, to advance the discussion).

42 *See infra* Parts II, III; *see also* Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1493 (2010) (arguing that the rule of law is not a useful evaluative or analytic concept, owing in part to its definitional variance, and lack of consensus about the rule

law entails maximal enforcement of the immigration code (as President Trump has suggested),[43] then immigrant advocates will invoke other rule of law conceptions. Alternatively, if the rule of law envisages unilateral executive action to grant temporary legal reprieve to millions of undocumented immigrants (per President Obama),[44] then critics will likewise balk.

It is a mistake, however, to think that the rule of law's definitional variance is the only analytical wedge. As illustrated through the case studies, commentators have failed to grapple with the rule of law's insoluble framing problems. By zooming in or out, evaluators adjust the analytical frame and fill it with different law, different facts, and different speculations. Yet there is no meta-principle that dictates the appropriate level of generality or relevant inputs for a rule of law analysis. Until these framing and filling problems are resolved, arguments that the rule of law forbids or supports any particular presidential policy will invariably prove too little, too much, or nothing at all. That is not to say that the rule of law ideal does not matter. It can matter, including for the wrong reasons.

Part IV pivots to the Trump Administration. Making good on his campaign pledge to restore the rule of law,[45] President Trump has rescinded Obama's signature deferred-action programs,[46] banned the

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of law's underlying values); Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137, 151 (2002) (describing rule of law as an essentially contested concept, which inherently defies analytical consensus).

43 *See* Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13,768, 82 Fed. Reg. 8799, 8800 (Jan. 25, 2017) (listing a set of enforcement priorities, and announcing that "all" illegally present immigrants are in violation of the law and subject to removal); *see also infra* Section IV.B (discussing the Trump Administration's enforcement policies, including the repeal of the Obama Administration's signature deferred-action programs).

44 *See* Memorandum from Jeh Charles Johnson, Sec'y, Dep't of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al. (Nov. 20, 2014), http://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf [hereinafter DAPA Memo]; Memorandum from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs & Border Prot., et al. (June 15, 2012), http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf [hereinafter DACA Memo]. For rule of law commentary surrounding these programs, see *infra* Parts II, III.

45 *See* Donald Trump, Donald Trump's Contract with the American Voter, https://assets.donaldjtrump.com/_landings/contract/O-TRU-102316-Contractv02.pdf [https://perma.cc/HSC7-HUJK] (last visited Dec. 23, 2017) [hereinafter Trump, *Contract*] (pledging five immigration initiatives "to restore security and the constitutional rule of law"); Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 22, 2015, 3:51 PM), https://twitter.com/realdonaldtrump/status/590981376666685440 ("No amnesty. Protect the rule of law! Let's Make America Great Again[.]").

46 *See* Memorandum from John Kelly, Sec'y, Dep't of Homeland Sec., to Kevin McAleenan, Acting Comm'r, U.S. Customs and Border Prot., et al. (Feb. 20, 2017) [hereinafter

admission of noncitizens from certain countries,[47] attempted to cut federal funding to so-called "sanctuary cities,"[48] and more. Trump, like Obama, thinks the rule of law is on his side.[49] But now that the tables are turned, so too have many of the arguments.[50]

Part V concludes with some prescriptions. First, I suggest that if the rule of law ideal matters, then it must be employed more scrupulously. In a favorable light, the rule of law ideal may provide a useful framework or focal point for airing competing views about the uses and abuses of government power.[51] To meaningfully serve that dia-

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Enforcement Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf (repealing DAPA); Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca (phasing out DACA and calling for its repeal).

47 President Trump's original travel ban applied to seven countries. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter EO 13769]. As revised, it extended to six. *See* Protecting the Nation from Foreign Terrorist Entry into the United States, Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017) [hereinafter EO 13780]. On June 26, 2017, the Supreme Court granted certiorari to review the Ninth and Fourth Circuits' preliminary injunctions, and partially lifted the lower courts' nationwide stays of the second travel ban. *See* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *cert. granted*, 137 S. Ct. 2080 (June 26, 2017) (No. 16-1436). On September 24, 2017, Trump replaced the revised travel ban with a third proclamation, Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) [hereinafter Proclamation]. Shortly after, the Supreme Court dismissed the legal challenges over EO 13780 as moot. Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (No. 16-1436). As of this writing, legal challenges over the Proclamation are working their way through the lower courts.

48 For a discussion of sanctuary laws, see Ingrid V. Eagly, *Immigrant Protective Policies in Criminal Justice*, 95 Tex. L. Rev. 245 (2016) (providing a descriptive and empirical account of recent subfederal law enforcement policies relating to immigrants); Pratheepan Gulasekaram & Rose Cuison Villazor, *Sanctuary Networks* (Santa Clara Univ. Legal Studies Research Papers Series, No. 14-17, 2017), https://ssrn.com/abstract=3038943 (providing an updated and comprehensive account of the sanctuary movement).

49 *Compare* Press Release, White House Office of the Press Sec'y, President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration (Sept. 5, 2017), https://www.whitehouse.gov/the-press-office/2017/09/05/president-donald-j-trump-restores-responsibility-and-rule-law [https://perma.cc/SZE3-X2AW], *with* Barack Obama, Law Day, U.S.A., 2015, Proclamation No. 9265, 80 Fed. Reg. 25,579 (Apr. 30, 2015) ("Throughout the world, the rule of law is central to the promise of a safe, free, and just society. Respect for and adherence to the rule of law is the premise upon which the United States was founded, and it has been a cornerstone of my Presidency.").

50 *See generally* Parts III, IV.

51 *See* Fallon, *supra* note 1, at 41 (noting that rule of law arguments may usefully call attention to virtues and vices in the operation of government); *see also* Rodriguez et al., *supra* note 42, at 1458 ("Rule of law is an attractive ideal, but its attractiveness may stem mainly from its imprecision, which allows each of us to project our own sense of the ideal government onto the phrase 'rule of law.'").

logic function, however, the rule of law ideal will need some rehabilitation.[52] Pushing that project forward begins by pushing back.

To that end, this Article identifies and rejects a popular rule of law conception circulating in the literature. I call it the "relative rule of law."[53] Essentially, this construct infuses the rule of law with a rule of relativity. It correctly appreciates that we can never fully meet the rule of law ideal. And, from that starting position, it sets a different baseline: executive practices and arrangements that move the legal system in the right direction can earn a rule of law ribbon. To be sure, the relative rule of law is well-intended—to improve executive governance where we can. Even on its own terms, however, the relative rule of law cannot deliver on its promise. We want our government to perform "better," and we want "rule of law." But, as I hope to impress here, those can be rivalrous desires. The Obama-Trump transition crystalizes this in ways that cautionary hypotheticals could not.

Fortunately, there are other options. Among them, a number of constitutional and administrative law doctrines could be tailored to modulate the excesses of presidential power. The merger of law and politics in the office of the White House is a major threat to the rule of law (however defined).[54] Rule of law talk channels that anxiety but will never cure it. Judicial review and doctrinal nudges might.

I. "RULE OF LAW"

The rule of law is a historic ideal, which has been imagined and reimagined over time.[55] This Part sketches those jurisprudential contours. Moreover, it offers an account that understands the rule of law as a dynamic construct, evolving over time to accommodate shifting

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52 *See* Fallon, *supra* note 1, at 6 (recognizing that "most judgments of consistency and inconsistency with the Rule of Law should be regarded as relatively ad hoc and conclusory," but not giving up on the rule of law project). Quite possibly, it is too late to salvage the rule of law ideal. *See* Judith N. Shklar, *Political Theory and the Rule of Law*, *in* THE RULE OF LAW: IDEAL OR IDEOLOGY 1, 1 (Allan C. Hutchinson & Patrick Monahan eds., 1987) ("[T]he phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use.").

53 *See infra* Section III.A.

54 The collapsing of law and politics is precisely what animated the constitutional Framers to create an independent judiciary, so as to keep political decisions within legal bounds. *See* THE FEDERALIST NO. 78, at 391–97 (Alexander Hamilton) (Ian Shapiro ed., 2009); *see also* CASS, *supra* note 1, at 12 (noting that "[t]he concentration of power . . . is inimical to the rule of law").

55 *See, e.g.*, TAMANAHA, *supra* note 35 (tracing the history of the rule of law ideal, across generations and societies); *see also Ideal*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ideal [https://perma.cc/Z2G6-V8QF] (last visited Dec. 23, 2017) (defining "ideal" as "existing as a mental image or in fancy or imagination only").

sociopolitical attitudes.[56] This dynamic has its virtues. Most notably, it avoids having to choose wholesale between the rule of law ideal and modern government. Instead, we can choose which aspects of each to insist upon, and which to trade away for the other. Later parts of the Article will return to these oft-overlooked dynamics, which are arguably underwriting today's rule of law debates over presidential action.

This Article gives attention to both academic and lay appeals to the rule of law. When academics employ the rule of law as an evaluative tool, they sometimes account for the rule of law's jurisprudential thicket. Lay persons and politicians are less apt to know or care about that complexity. Still, academic and nonacademic appeals to the rule of law often have overlapping ambitions: to shape narratives, if not also public outcomes. Without street-level rule of law talk, ivory-tower analysis would be interesting but too detached to have much practical impact.[57] Meanwhile, street-level usage speaks to a wide audience, but lacks the analytic gum that academics provide. Thus, each complements the other. In any event, drawing hard lines between academic and nonacademic appeals to the rule of law would be rather arbitrary, as the lines between them are fluid.[58] To bracket one in favor of the other would miss an important aspect of how the rule of law ideal translates in action—which is a central focus of this Article.

A. In Theory

At its core, the rule of law ideal requires government officials to exercise power pursuant to previously defined legal authorities, rather than pursuant to idiosyncratic preference or arbitrary whim.[59] Advance notice of the law's requirements is a paramount feature of the rule of law, which allows private parties to plan their affairs and hold

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56 *See infra* Section I.B; *see also supra* notes 26–30 and accompanying text.

57 *See* Waldron, *supra* note 42, at 159–64 (discussing "street usage" of the rule of law, and noting that the "ordinary user may be puzzled and dismayed by the fact that other people seem to be citing 'the Rule of Law' as though it meant something else altogether").

58 Academics make fleeting reference to the rule of law in media outlets and litigation briefs. *See, e.g.*, *infra* notes 245, 247 (amicus briefs). Meanwhile, politicians write law review articles discussing the rule of law. *See, e.g.*, Cruz, *supra* note 38 (critiquing Obama's deferred-action policies on rule of law grounds); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 814 n.11 (2017) (noting that "our entire way of life in America depends on the rule of law").

59 *See* HAYEK, *supra* note 2, at 80; *see also* JERRY L. MASHAW, GREED, CHAOS, AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 139 (1997) (observing that the rule of law requires legal commands to "flow from collective agreement rather than from the exercise of discretion or preference by those persons who happen to be in positions of authority").

government officials accountable to law.[60] The idiom—a government of law, not men—tries to capture this view.[61] Of course, the idiom cannot be taken literally. Instead, it captures the idea that the medium of law should govern those who make, enforce, and interpret the law.[62]

Beyond that, most modern rule of law conceptions attach requirements to the form and quality of the law itself[63]: for instance, that law be clear,[64] stable,[65] and transparent.[66] Regarding transparency, the hope is for substantive and procedural transparency. Whereas the former speaks to what the law is, the latter is more concerned with the public's ability to "know that an issue is being considered, to be involved in the decisionmaking process, to know who else is involved and in what ways, and to understand how a final decision is reached."[67]

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60 As Friedrich Hayek succinctly explains, the rule of law "means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." HAYEK, *supra* note 2, at 72.

61 For famous statements of this dichotomy, see, for example, MASS. CONST. pt. I, art. XXX ("[T]o the end it may be a government of laws and not of men."); Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803); JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA AND A SYSTEM OF POLITICS 8 (J.G.A. Pocock ed., Cambridge Univ. Press 1992) (1656) ("[G]overnment . . . is the empire of laws and not of men.").

62 *See* Waldron, *supra* note 42, at 156–57.

63 For one of several canonical (and representative) treatments, see LON L. FULLER, THE MORALITY OF LAW 33–94 (rev. ed. 1969). According to Fuller, laws should be (1) general, (2) publicly promulgated, (3) prospective, (4) intelligible, (5) consistent, (6) practicable, (7) not too frequently changeable, and (8) actually congruent with the behavior of the officials of a regime. *Id.* at 39. For a useful summary of accounts, like Fuller's, that make rule of law demands on the features of law itself, see Waldron, *supra* note 42, at 155–56.

64 Although clarity can emerge by other means, this element generally favors rules over standards, plain meanings over systemic inferences, direct applications rather than arguments, and ex ante clarity rather than labored interpretations. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–87 (1989) (favoring general rules as opposed to balancing modes of analysis or "totality of the circumstances"). *But cf.* Lawrence B. Solum, *A Law of Rules: A Critique and Reconstruction of Justice Scalia's View of the Rule of Law*, 1 APA NEWSL. ON PHIL. & L. 105, 110 (2002) (arguing that social practice can inform the application of broad standards, making their application as predictable, if not more predictable, than rules in certain contexts).

65 *See* Scalia, *supra* note 64, at 1179 ("Predictability, or as [Legal Realist] Llewellyn put it, 'reckonability,' is a needful characteristic of any law worthy of the name." (footnote omitted) (quoting KARL N. LLEWELLYN, THE COMMON LAW TRADITION 17 (1960))). The idea, or hope, is that rules that are fixed and "announced beforehand . . . make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." *See* CASS, *supra* note 1, at 7–12 (describing the qualities of "principled predictability").

66 *See* FULLER, *supra* note 63, at 33–94; HAYEK, *supra* note 2, at 75–76.

67 Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delega-*

When present, these features of law imbue the rule of law with a certain degree of fairness. But, under most modern rule of law conceptions, fairness also depends on the equitable administration of justice.[68] This requirement, in turn, is generally believed to require "procedural due process,"[69] the availability of an independent judiciary,[70] and the government's adherence to procedural requirements for creating and changing law.[71]

The foregoing accounts represent the outer bounds of "formal" (or "thin") rule of law conceptions. Collectively, they make partially overlapping but discrete demands: first, that government action is authorized by law; second, that the laws of a legal system have certain features (transparency, stability, etc.); third, that the creation and implementation of the law be procedurally regularized and fairly applied. Absent from these criteria, however, are demands on the substance of the law itself. Consequently, formal rule of law conceptions have been critiqued for their compatibility with despotic regimes.[72]

"Substantive" (or "thick") rule of law conceptions rush to fill this void.[73] These conceptions demand more than rule by law; they require rule by "good law."[74] Of course, what qualifies as good law is contestable. But it is most commonly associated in the literature with moral justice, equality, and natural law.[75]

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tion, and Agencies at the Edge of Federal Power, 57 DUKE L.J. 1933, 1949 (2008); *see* SHANE, *supra* note 34, at 12 (arguing that "a critical function of the law in operation . . . is to make manifest the range of interests and concerns . . . when key decisions are made").

68 *See* RAWLS, *supra* note 4, at 235; *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972) ("[T]he rule of law implies equality and justice in its application.").

69 *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (observing that "it is procedure that marks much of the difference between rule by law and rule by fiat"); *see also* Waldron, *supra* note 11, at 40–41; Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, *in* GETTING TO THE RULE OF LAW 18 (James E. Fleming ed., 2011) (providing account of procedure as a fundamental rule of law value).

70 *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 181–205 (10th ed. 1959) (providing a classic account for the view that judicial review by independent courts is a necessary ingredient for rule of law, especially in the context of administrative governance).

71 *See generally* Waldron, *supra* note 69.

72 *See* CASS, *supra* note 1, 15–16 (summarizing the critique); TAMANAHA, *supra* note 35, at 95–96 (same).

73 *See* TAMANAHA, *supra* note 35, at 91–113 (providing an extended treatment of formal and substantive rule of law conceptions).

74 *See* CASS, *supra* note 1, at 13–15; RAZ, *supra* note 4, at 224; TAMANAHA, *supra* note 35, at 91–113.

75 For leading treatments of the rule of law that include substantive norms of morality and justice, see, for example, DWORKIN, *supra* note 4, at 11–12; RAWLS, *supra* note 4, at 235–43.

In Western popular culture, substantive rule of law conceptions enjoy wide support.[76] In legal philosophy circles, however, substantive rule of law conceptions are generally disfavored.[77] A principal objection to substantive conceptions is that, in heterogeneous societies, disagreement abounds over what the law ought to be, which muddies an already muddled view of what the rule of law ought to entail.[78] A related objection is that when the rule of law is taken to mean the rule of good law, the concept becomes synonymous with those substantive values, such that the rule of law loses independent analytical value.[79]

Emphatically, this Article takes no sides in these classic debates.[80] Instead, what matters is the scope and depth of the debates. Profound disagreement persists over which features are necessary to meet the rule of law ideal, which features are sufficient, and their relative weights. Even more fundamentally, disagreement abounds over the values that the rule of law is supposed to serve.[81]

As Jeremy Waldron explains:

> Some theorists associate the [ideal] with respect for fairness and human dignity; others associate it with the provision for an environment hospitable to freedom; still others see it as purely instrumental value, having to do with the effective pursuit of whatever other goals one is trying to use law to promote.[82]

Owing to these complexities, Professor Waldron describes the rule of law as an "essentially contested concept," which inherently produces competing interpretations.[83]

B. In Action

Despite the foregoing complexities, the perception remains that the rule of law ideal can help us to understand, critique, and shape the

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76 *See, e.g.*, TAMANAHA, *supra* note 35, at 111 ("While formal legality is the dominant understanding of the rule of law among legal theorists, th[e] thick substantive rule of law . . . likely approximates the common sense of the rule of law within Western societies (assuming a common understanding exits).").

77 *See id.*

78 *See* RAZ, *supra* note 4, at 211, 226–28; Fallon, *supra* note 1, at 21–23.

79 *See* RAZ, *supra* note 4, at 211.

80 For more on these debates, see *supra* notes 72–79 (collecting sources).

81 *See* Waldron, *supra* note 42.

82 *Id.* at 158 (footnotes omitted).

83 *Id.* at 141–44. For earlier suggestions along these lines, upon which Professor Waldron builds, see Fallon, *supra* note 1, at 6; and Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 781 (1989). On "essentially contested concepts," more generally, see W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167, 167–98 (1956).

government we have.[84] From law journals to social media, rule of law tropes are invoked to "condemn particular decisions, practices, rules, or legal systems as unacceptably distant from the ideal."[85] At other times, the ideal is invoked to "justify particular decisions, practices, rules, or legal systems as sufficiently close to be admirable, or at least acceptable."[86] Whether these are fruitful analytic exercises is not my immediate concern. For now, I simply draw attention to the structure of the analytical model itself: aspects of government are evaluated and judged against the benchmark of the rule of law ideal (however defined).

Less commonly, and more subtly, this analytical structure sometimes inverts. As pertinent here, those inversions can occur when conceptions of the rule of law come face-to-face with government practices that are deemed necessary or overwhelmingly desirable. In those instances, the rule of law ideal does not do the testing—rather, it gets tested against the government we have or wish to have.

To deal with the tension, evaluators can frankly acknowledge that the rule of law must give way to more pressing values.[87] Rather than concede that point, however, evaluators more often try to square the rule of law with the demands of modern government.[88] This latter ap-

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84 *See* Fallon, *supra* note 1, at 43 (noting that the rule of law is commonly employed as an evaluative tool for testing government action and institutional arrangements); *see also* Parts II–IV (cataloguing how the rule of law has been pressed into service in debates over immigration and administrative governance).

85 Fallon, *supra* note 1, at 43.

86 *Id.*

87 *See, e.g.*, RAZ, *supra* note 4, at 228 (arguing that the rule of law is just one of the virtues of a legal system and must be balanced against claims advanced on behalf of other values); Adam Shinar, *One Rule to Rule Them All? Rules of Law Against the Rule of Law*, THEORY & PRAC. LEGIS. (forthcoming 2017) (manuscript at 7), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2980757 (explaining "that the rule of law is important, but . . . . [t]here might be times where, in order to accomplish particular social goals, the rule of law must give way to other values").

88 Attempts to square administrative governance with the rule of law have a long pedigree. For extended treatments, see generally HORWITZ, *supra* note 27, at 213–46; and TAMANAHA, *supra* note 35. There are also several recent contributions. *See, e.g.*, Ronald A. Cass, *Staying Agency Rules: Constitutional Structure and Rule of Law in the Administrative State*, 69 ADMIN. L. REV. 225 (2017); Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1262 (2017) ("[I]n a culture that prizes the rule of law as ours does, it is difficult to ground an account of administrative legitimacy without an account of how well administrative agencies embody rule-of-law values. Recognizing internal administration as a form of law allows such an evaluation." (footnote omitted)); Peter M. Shane, Chevron *Deference, the Rule of Law, and Presidential Influence in the Administrative State*, 83 FORDHAM L. REV. 679, 681 (2014) (advancing a conception of the rule of law in the administrative state that comprises five central premises surrounding the exercise of government power: the insistence on politically legitimate authorization, the observance of human rights, accountability to legal constraint, the expectation

proach reflects the dual impulse to have modern forms of governance *and* the rule of law.

To that end, evaluators can shift attention and weight to certain rule of law values (e.g., transparency and stability), while marginalizing or downplaying others (e.g., adherence to positive law). Moreover, through framing adjustments, evaluators may try to capture an acceptable mix of rule of law features that, in the aggregate, legitimize otherwise problematic government policies and institutional arrangements. For example, broad and ambiguous congressional delegations of authority may upset the rule of law's demands for clarity and advance notice.[89] Yet, so long as agencies provide the missing legal content and are sufficiently kept in check, the rule of law benchmark may yet be satisfied. Under this squaring tactic, key features of modern government may, in isolation, violate the rule of law. But adjacent features of the legal system are captured in the analytic frame to mitigate or offset any perceived rule of law deficit.

As the foregoing suggests, the relationship between the rule of law and modern government is dynamic and complex. When invoked, rule of law tropes may usefully put pressure on government actors to remedy or mitigate some diagnosed problem. Conversely, rule of law indictments of government practices that are deemed necessary or highly favored can return pressure to the rule of law ideal, nudging it toward expectations in line with the practicalities of modern governance.

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To be sure, there may be value—psychological, theoretical, or otherwise—in squaring the rule of law with the government we have or wish to have. Yet therein lies an important reason, among others, why lodging faith in the rule of law as an evaluative tool or limiting principle is a risky gambit: the rule of law is sometimes the variable,

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of legal justification, and the availability of remedies for government-imposed injury); Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985, 1986–88 (2015) (developing "an account of the rule of law's demands of administrative government," and drawing on Peter Strauss's work as a foundation). For arguments that the rule of law is incompatible with administrative governance, see, for example, PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 5–7, 12–13 (2014) (challenging legality of administrative state based on historical ideals of rule of law); HAYEK, *supra* note 2, at 72–87 (arguing government regulation draws society away from rule of law as traditionally understood); and Richard A. Epstein, *The Perilous Position of the Rule of Law and the Administrative State*, 36 HARV. J.L. & PUB. POL'Y 5 (2013).

89 *See supra* notes 60, 63–66 and accompanying text.

even when posturing as the unflappable control. The balance of this Article develops these themes, through comparative studies of Obama's and Trump's signature immigration policies, and the rule of law imbroglio surrounding them.

II. Testing the Rule of Law: Obama's Deferred-Action Initiatives

Upon taking office, the Obama Administration inherited a mound of unsettled immigration business. What to do about the undocumented population was a cornerstone issue that deeply divided the nation. The so-called "dreamers," who arrived in the United States as children, received special legislative consideration.[90] Despite bipartisan support, however, proposals to confer a pathway to citizenship for this population did not clear the legislative gauntlet.[91]

Meanwhile, federalism was knocking from all quarters. In the wake of congressional gridlock, states and cities were taking unprecedented action to regulate their local immigration populations—most notoriously in Arizona, but also throughout the country.[92] Whereas "restrictionist" states (such as Arizona and Alabama) took harsh measures to encourage undocumented immigrants to self-deport,[93] "integrationist" states (such as California and New York) took measures to assimilate undocumented immigrants into their communities.[94]

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90 *See, e.g.*, The Development, Relief, and Education for Alien Minors (DREAM) Act of 2010, S. 3992, 111th Cong. (2010).

91 *See* Shoba Sivaprasad Wadhia, Beyond Deportation: The Role of Prosecutorial Discretion in Immigration Cases 88–89 (2015) (discussing unsuccessful efforts to pass the DREAM Act); *see also* Amended Complaint at 18–19, Crane v. Napolitano, 920 F. Supp. 2d 724 (N.D. Tex. 2013) (No. 3:12-cv-03247-O) (collecting cites for two dozen bills in which the DREAM Act, in various forms, had been proposed).

92 Pratheepan Gulasekaram & S. Karthick Ramakrishnan, The New Immigration Federalism 57–86 (2015) (surveying unprecedented uptick in state and local laws pertaining to noncitizens).

93 *See, e.g.*, S. 1070, 49th Leg., 2d Reg. Sess. § 1 (Ariz. 2010) ("The legislature declares that the intent of this act is to make attrition through enforcement the public policy . . . . to discourage and deter the unlawful entry and presence of aliens . . . ."). Portions of S.B. 1070, as it was popularly known, were invalidated by the Supreme Court in *Arizona v. United States*, 567 U.S. 387, 407–10 (2012), but other sections of the bill survived.

94 Examples of restrictionist laws include those giving state and local officials a role in detection, arrest, and detention of noncitizens on the basis of federal immigration violations. Restrictionist laws also make it difficult or impossible for undocumented immigrants to rent housing, find work, or attend public schools. Examples of integrationist measures, by contrast, include sanctuary or noncooperation laws, which limit state and local officers from identifying and apprehending individuals for immigration violations, and laws that provide public benefits to unauthorized immigrants, such as in-state college tuition or municipal identification cards. *See* Gulasekaram & Ramakrishnan, *supra* note 92, at 61, 66; David S. Rubenstein, *Black-Box*

Amidst this swirling legal and political uncertainty, attempts at comprehensive immigration reform repeatedly stalled in Congress.[95]

A. Brokering a Broken System

Early into his second term, President Obama announced that he would no longer "wait for Congress."[96] In June 2012, that ambition sprang to life with the DACA program.[97] Though signed by Department of Homeland Security ("DHS") Secretary Janet Napolitano, Obama fully backed the program in a ceremonial speech from the Rose Garden.[98] Under DACA, individuals who arrived in the United States as children and who met other requirements could apply for deferred action and work authorization for renewable two-year periods.[99] Deferred action is a type of limbo status; it suspends unlawful presence, but does not confer lawful status.[100] An estimated 1.5 million undocumented immigrants were eligible for the program.[101] Be-

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Immigration Federalism, 114 MICH. L. REV. 983, 988 (2016) (describing restrictionist laws and their integrationist foils).

95 *See* RUTH ELLEN WASEM, CONG. RESEARCH SERV., R42980, BRIEF HISTORY OF COMPREHENSIVE IMMIGRATION REFORM EFFORTS IN THE 109TH AND 110TH CONGRESSES TO INFORM POLICY DISCUSSIONS IN THE 113TH CONGRESS 1 (2013), http://fas.org/sgp/crs/homesec/R42980.pdf [https://perma.cc/V2CV-H76Q]; Jaime Fuller, *Americans Are Ready for Immigration Reform. They Are Just Not Ready Enough*, WASH. POST (July 14, 2014), http://www.washingtonpost.com/blogs/the-fix/wp/2014/07/14/americans-are-ready-for-immigration-reform-they-are-just-not-ready-enough.

96 *See supra* note 14 and accompanying text.

97 *See* Press Release, White House Office of the Press Sec'y, Remarks by the President on Immigration (June 15, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/06/15/remarks-president-immigration ("Effective immediately, the Department of Homeland Security is taking steps to lift the shadow of deportation from these young people.").

98 *See* The Obama White House, *President Obama Speaks on Department of Homeland Security Immigration Announcement*, YOUTUBE (June 15, 2012), https://www.youtube.com/watch?v=6RXSlMu5EDI.

99 *See* DACA Memo, *supra* note 44. Later, in 2014, DHS announced an expansion of DACA, removing the age cap of thirty-one years, permitting applications from individuals who entered before January 2010, and extending the deferred action period from two years to three years. *See* DAPA Memo, *supra* note 44. This extended program—known as DACA Plus—was enjoined in court and never put into effect. *See* Texas v. United States, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015).

100 *See* Jennifer M. Chacón, *Producing Liminal Legality*, 92 DENV. U. L. REV. 709, 713–15 (2015); Letter from Professor Hiroshi Motomura et al., to President Barack Obama (May 28, 2012), https://www.law.uh.edu/ihelg/documents/ExecutiveAuthorityForDREAMRelief28May2012withSignatures.pdf [https://perma.cc/N5SW-G8H6] (letter signed by almost 100 law professors and delivered to the White House only days prior to DACA's announcement).

101 *See* Jens Manuel Krogstad, *Key Facts About Immigrants Eligible for Deportation Relief Under Obama's Expanded Executive Actions*, PEW RES. CTR. (Jan. 19, 2016), http://www.pewresearch.org/fact-tank/2016/01/19/key-facts-immigrants-obama-action/.

tween 2012 and 2017, approximately 800,000 individuals were granted DACA benefits.[102]

Legal challenges to DACA in federal court were dismissed for lack of Article III standing.[103] Any congressional attempt to override DACA would have faced a presidential veto.[104] And when states like Arizona tried to resist DACA by denying driver's licenses to the program's beneficiaries,[105] private lawsuits backed by government amicus briefs successfully enjoined these state efforts.[106]

With Congress still hopelessly gridlocked, President Obama upped the ante in November 2014 with a series of measures to "help make our immigration system more fair and more just."[107] The package included an expanded version of DACA, but a new deferred-action program—DAPA—headlined the initiative.[108] Under DAPA, the undocumented parents of U.S. citizens or lawful permanent residents would be eligible for deferred action if certain requirements were met.[109] Like DACA beneficiaries, DAPA beneficiaries would be con-

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102 *See* U.S. Citizenship & Immigration Servs., Consideration of Deferred Action for Childhood Arrivals, by Fiscal Year, Quarter, Intake, Biometrics and Case Status: Fiscal Year 2012–2017 (June 30) (2017), https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2017_qtr3.pdf.

103 *See, e.g.*, Arpaio v. Obama, 797 F.3d 11, 25 (D.C. Cir. 2015); Crane v. Johnson, 783 F.3d 244, 252–55 (5th Cir. 2015).

104 *See* Elise Foley, *House GOP Votes to Block Protections for Undocumented Immigrants*, Huffington Post (Jan. 15, 2015), http://www.huffingtonpost.com/2015/01/14/house–republicans–dhs–immigration_n_6470288.html (reporting that the "White House issued a formal veto threat for . . . anything that goes against [its] executive actions on immigration").

105 *See* Ariz. Exec. Order No. 2012-06 (Aug. 15, 2012) (directing state agencies to take necessary steps to "prevent [DACA] recipients from obtaining eligibility . . . for any . . . state identification, including a driver's license").

106 *See* Complaint at 21–24, Ariz. Dream Act Coal. v. Brewer, 945 F. Supp. 2d 1049 (D. Ariz. Nov. 29, 2012) (No. 2:12CV02546), 2012 WL 5952174 (arguing the Governor's executive order denying driver's licenses to DACA beneficiaries violates the Supremacy and Equal Protection Clauses). After the Ninth Circuit granted a preliminary injunction in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1069 (9th Cir. 2014), the case wound its way through the lower courts for years. Recently, the Ninth Circuit held that the Arizona driver's license policy was preempted. *See* Ariz. Dream Act Coal. v. Brewer, 818 F.3d 901, 920 (9th Cir. 2016), *reh'g denied, amended by* 855 F.3d 957 (9th Cir. 2017). For an extended treatment of the case, see Alan M. Vester, Note, *Hybrid Immigration Preemption*, 56 Washburn L.J. 633 (2017).

107 President Barack Obama, Address to the Nation on Immigration Reform (Nov. 20, 2014), https://www.gpo.gov/fdsys/pkg/DCPD-201400877/pdf/DCPD-201400877.pdf.

108 Under DACA, beneficiaries were originally granted two-year legal reprieves. When DAPA was announced, however, DACA was extended to three-year renewable reprieves and slightly expanded the class of eligible applicants. *See* DAPA Memo, *supra* note 44, at 3–4.

109 *See id.* (explaining that to qualify for DAPA, the parent must (1) have resided continuously in the United States since before January 2010; (2) not be an enforcement priority under

sidered "lawfully present in the United States"[110] for renewable periods and eligible for work authorization.[111] The government estimated that four million undocumented immigrants might qualify for DAPA, which, together with the expanded DACA program, represented approximately half of the estimated 11 million undocumented population.[112]

Government representatives from Texas and twenty-five other conservative states quickly filed suit to enjoin DAPA in federal court.[113] The complaint framed the case as one "about the rule of law."[114] Moreover, the complaint alleged that DAPA violated the Constitution's requirement that the President "take Care that the Laws be faithfully executed,"[115] was unauthorized under the Immigration and Nationality Act ("INA"),[116] and violated the Administrative Procedure Act ("APA")[117] for not undergoing notice-and-comment rulemaking procedures.[118]

The district court enjoined DAPA, but on relatively narrow grounds.[119] As a threshold matter, the court found that Texas had standing to sue.[120] That opened the way for judicial review of DAPA in ways that DACA had eluded. On the merits, the district court held

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simultaneously issued DHS guidance; and (3) "present no other factors that, in the exercise of discretion, makes the grant of deferred action inappropriate").

110 *Id.* at 2.

111 *Id.* at 3–4.

112 *See* Press Release, White House Office of the Press Sec'y, Fact Sheet: Immigration Accountability Executive Action (Nov. 20, 2014), https://obamawhitehouse.archives.gov/the-press-office/2014/11/20/fact-sheet-immigration-accountability-executive-action; Migration Policy Inst., *supra* note 37 ("MPI estimates the anticipated new deferred action program and expanded DACA initiative could benefit as many as 5.2 million people—nearly half of the 11.4 million unauthorized immigrants living in the United States . . . .").

113 *See* Supplement to the Amended Complaint for Declaratory & Injunctive Relief, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254).

114 Complaint for Declaratory & Injunctive Relief at 3, *Texas*, 86 F. Supp. 3d 591 (No. 1:14-cv-254).

115 U.S. CONST. art. II, § 3.

116 8 U.S.C. §§ 1182, 1225, 1227 (2012).

117 5 U.S.C. §§ 553, 706 (2012).

118 Complaint for Declaratory & Injunctive Relief, *supra* note 114, at 26–29.

119 *See Texas*, 86 F. Supp. 3d at 677–78. Another district court, addressing the issue from the odd procedural posture of a criminal sentencing of a foreign national, found that DAPA was inconsistent with the INA. *See* United States v. Juarez-Escobar, 25 F. Supp. 3d 774, 785–86 (W.D. Pa. 2014). However, that finding has been disputed by another federal court, questioning whether the issue should even have been raised in that case. *See* Arpaio v. Obama, 27 F. Supp. 3d 185, 208 n.12 (D.D.C. 2014) (disputing the *Juarez-Escobar* decision on jurisdictional grounds).

120 *See Texas*, 86 F. Supp. 3d at 643–44.

that DAPA was procedurally defective under the APA.[121] The Fifth Circuit affirmed those holdings on appeal, and further held that DAPA violated the INA.[122] But both lower courts left the constitutional question undecided.

The Supreme Court granted certiorari, and specifically requested briefing on whether DAPA violated the Constitution's Take Care Clause.[123] An answer to that question would have filled a conspicuous void in the Court's jurisprudence.[124] The case also raised a longstanding and pressing administrative law question: whether and under what circumstances an agency's enforcement policies must undergo notice-and-comment rulemaking procedures.[125] While the case was pending, Justice Antonin Scalia's unexpected death left the Court a member short.[126]

In June 2016, the Supreme Court released its long-awaited decision, which read in full: "The judgment [of the Fifth Circuit] is affirmed by an equally divided Court."[127] Without clear direction from the Supreme Court on what the *law* required, surrogate *rule of law* arguments were left ample room to breathe.

B. DACA/DAPA as Rule of Law Case Study

The DACA/DAPA controversy is a choice study for the rule of law—not only for immigration, but for questions of executive governance more generally. First, DACA/DAPA is emblematic of a growing and potentially worrisome phenomenon: presidential nonenforcement of congressional statutes.[128] Parallel questions surfaced in connection

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121 *See id.* at 677.

122 *See* Texas v. United States, 809 F.3d 134, 146, 186 (5th Cir. 2015).

123 *See id.*, *cert. granted*, 136 S. Ct. 906 (2016).

124 *See* Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. PA. L. REV. 1835, 1838 (2016) (observing that the Supreme Court's "decisions rely heavily on the Take Care Clause but almost never interpret it, at least not in any conventional way").

125 *See infra* notes 300–05 and accompanying text (outlining the contours of this debate). For an excellent survey of the literature and relevant case law, see Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. (forthcoming 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2958267.

126 *See* Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html.

127 United States v. Texas, 136 S. Ct. 2271, 2272 (2016) (per curiam). Although the Supreme Court's per curiam decision in *Texas* did not expressly provide the bases for its split, the four Justices upholding the lower court's preliminary injunction could only have reached that result if they also found that Texas demonstrated the threshold requirement of Article III standing. (Conversely, the four votes that would have overturned the lower court might have done so on standing grounds, on the merits, or both.)

128 Beyond immigration circles, DACA and DAPA are commonly cited as exemplars of

with President Obama's decisions to waive or not enforce other parts of the U.S. Code, including the Controlled Substances Act, Affordable Care Act ("ACA"), and No Child Left Behind.[129] Early signs suggest that the trend will continue under the Trump Administration. Immediately upon taking office, Trump announced that he would forego enforcement of the ACA's individual mandate and key provisions of environmental law.[130] In all of these nonenforcement contexts, Congress's "laws on the books" are pitted against the "law in action," which raises complex questions for the rule of law.[131]

Second, nonenforcement programs like DACA/DAPA may not be judicially reviewable, whether for lack of standing, statutory restrictions, or prudential reasons. The issue of justiciability was litigated to a 4–4 stalemate in *United States v. Texas*.[132] Now, in contexts where law is being enforced, rather than unenforced, justiciability is-

executive branch nonenforcement of statutes. *See, e.g.*, Merrill, *supra* note 25, at 1974; Leigh Osofsky, *The Case for Categorical Nonenforcement*, 69 TAX L. REV. 73, 76 (2015); Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 759–60 (2014).

129 *See, e.g.*, Memorandum from James M. Col, Deputy Attorney Gen. to All United States Attorneys 2 (Aug. 29, 2013), https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf (marijuana nonenforcement policy in states that have legalized medical and recreational use); Letter from Arne Duncan, U.S. Sec'y of Educ., to Chief State School Officers (Sept. 23, 2011), https://www2.ed.gov/policy/gen/guid/secletter/110923.html (waivers for states that have not complied with No Child Left Behind Act); Letter from Gary Cohen, Dir., Ctr. for Consumer Info. & Ins. Oversight, to Ins. Comm'rs (Nov. 14, 2013) https://www.cms.gov/CCIIO/Resources/Letters/Downloads/commissioner-letter-11-14-2013.pdf. For a full-throttled critique of the Obama Administration's nonenforcement policies, see DAVID E. BERNSTEIN, LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW 94, 140, 142 (2015); Ted Cruz, *Foreword* to BERNSTEIN, *supra*, at vii, vii–xvii. *See also* Josh Blackman, *Gridlock*, 130 HARV. L. REV. 241 (2016). For a measured defense of Obama's initiatives, at least with respect to waivers, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 281, 311 (2013). For defenses on Obama's nonenforcement immigration policies, see *infra* Section II.B.

130 *See* Brett Hartl, *Trump Orders Massive Rollback of Environmental Protections*, COMMON DREAMS (Jan. 30, 2017, 3:30 PM), http://www.commondreams.org/newswire/2017/01/30/trump-orders-massive-rollback-environmental-protections [https://perma.cc/8MQJ-EPMR]; Jason Lange & Toni Clarke, *Trump May Not Enforce Individual Health Insurance Mandate*, REUTERS (Jan. 22, 2017), https://www.yahoo.com/news/americans-wont-lose-coverage-health-law-reform-trump-150013365.html.

131 *See infra* Sections III.B, V.B (working through some of these problems); *see also* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1045 (2013) ("The law on the books is different from the law in action, and enforcement is a vital part of law's identity as law."); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 15 (1910) (arguing that the distinctions between the rules that purport to govern and that in fact govern are "very real" and "very deep").

132 136 S. Ct. 2271, 2272 (2016) (per curiam); *see supra* notes 113–22 and accompanying text (discussing the case through the lower courts); *see also* Brief for the Appellants at 20–22, United States v. Texas, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) (Obama Administration arguing that the states challenging DAPA lacked standing and that the case was otherwise nonjusticiable).

sues have resurfaced in litigation challenging Trump's immigration initiatives.[133] In both settings, the absence of judicial review may, itself, offend the rule of law.[134] Moreover, absent judicial review, states and private parties may be more inclined to take immigration matters into their own hands, posing additional threats to the rule of law.[135] And, without judicial review, the legitimacy of executive programs will be decided in the court of public opinion. In that event, rule of law talk in mass media outlets may matter quite a lot, depending on how seriously it is taken.

Third, rule of law values may clash with other system values—like equity, proportionality, and case-by-case adaptability—which do not fit as comfortably within conventional rule of law conceptions.[136] DACA/DAPA makes tradeoffs among these oft-competing values. But those choices are hardly preordained. Indeed, the Trump Administration is making them differently.[137] Given the range of choices available, the relevant question here is not which choices are politically preferable. Rather, the question is whether the rule of law ideal has anything useful to say about the President's role in making those choices, and the legal processes required to make them.

C. Does DACA/DAPA Violate the Rule of Law?

"Yes" and "no" answers to whether DACA/DAPA violates the rule of law are readily available. The sheer volume of rule of law talk orbiting DACA/DAPA suggests that the ideal matters a great deal to a

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133 *See, e.g.*, Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (No. 16-1436); *see also* Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (per curiam).

134 *See generally* DICEY, *supra* note 70, at 181–205 (arguing that judicial review by independent courts is a necessary ingredient for rule of law, especially in the context of administrative governance); Erwin Chemerinsky, *Upholding the Rule of Law*, AM. PROSPECT (Feb. 10, 2017), http://prospect.org/article/upholding-rule-law [https://perma.cc/4B69-4QZ6] ("In ruling against President Trump's travel ban, the United States Court of Appeals for the Ninth Circuit reaffirmed a fundamental aspect of the rule of law: No one, not even the president, is above the law.").

135 *See* David S. Rubenstein, *Self-Help Structuralism*, 95 B.U. L. REV. 1619, 1653–55 (2015) (describing how states have resorted to constitutional "self-help," taking immigration and other matters into their own hands).

136 *See* Norman Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. REV. 1, 3 (1971) (describing a "competing tension between the need in prosecutorial decision-making for certainty, consistency, and an absence of arbitrariness on the one hand, and the need for flexibility, sensitivity, and adaptability on the other"). For an account that fits equity within a rule of law frame, see LAWRENCE B. SOLUM, *Equity and the Rule of Law*, *in* THE RULE OF LAW: NOMOS XXXVI 120 (Ian Shapiro ed., 1994).

137 *See infra* Part IV (discussing some of Trump's immigration initiatives).

great many people. Critics and supporters disagree with each other's *analyses*. But they coalesce around the premise that the rule of law *matters*. The positive and negative rule of law evaluations of DACA/DAPA take stronger and weaker forms. Stronger versions resolutely conclude that DACA/DAPA violates or promotes the rule of law. Weaker versions advance similar arguments, but more for the purposes of complicating and contesting rival rule of law claims.

Below, I cull from both the stronger and weaker accounts without differentiation, simply to capture the lines of argumentation. Moreover, I organize the opposing viewpoints around the following questions: (1) the institutional question of *who decides*; (2) the substantive question of *what* was decided; and (3) the procedural question of *how* decisions were made.[138] This triplet draws the lines of argumentation into sharper relief. As importantly, this organizational approach helps to untangle some of the knotty relationships between constitutional law, administrative law, and the rule of law, which too often get lost in translation.

1. Who Decides

Critics of DACA/DAPA concede that the Executive has broad prosecutorial discretion to make case-by-case decisions over which individuals to deport.[139] But, they argue, the broad-scale decisions made by DACA/DAPA belong to Congress, not to the Executive. Consequently, critics argue, DACA/DAPA violates the Article II Take Care Clause, separation-of-powers principles, or both.[140] These constitutional objections partly depend on, and merge with, critics' argument that DACA/DAPA exceeds statutory authority.[141] Congress long ago decided that undocumented immigrants are removable from the coun-

138 For a similar approach, see Hiroshi Motomura, *The President's Dilemma: Executive Authority, Enforcement, and the Rule of Law in Immigration Law*, 55 WASHBURN L.J. 1, 2 (2015) (framing rule of law questions about DACA/DAPA in terms of "*who* exercises the discretion that is inevitable in the current system, and *how*, if at all, that discretion is supervised").

139 *See, e.g.*, Plaintiffs' Motion for Preliminary Injunction and Memorandum in Support at 10, Texas v. United States, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (No. 1:14-cv-254) ("It is well-settled that a federal agency can make a '*single-shot* non-enforcement decision . . . in the context of an individual case' . . . . But it is equally well-settled that the President cannot adopt a 'general policy' of non-enforcement." (citation omitted)).

140 *See, e.g.*, *id.* at 1 ("The President has turned the Constitution on its head by suggesting that he has legislative powers and that Congress has veto powers that must be exercised to thwart his executive actions.").

141 *See, e.g.*, Brief of the CATO Institute and Prof. Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees at 10, *Texas*, 787 F.3d 733 (No. 15-40238) ("[DAPA] conflicts with five decades of congressional policy as embodied in the Immigration and Naturalization Act . . . .").

try and are generally barred from employment.[142] According to critics, DACA/DAPA upsets these legislative choices.[143]

But supporters of DACA/DAPA offer a different perspective. The first point of departure centers on the Take Care Clause. On some occasions, the Court has cited the Take Care Clause for the proposition that the President cannot suspend or supersede Congress's laws, which tends to support the critics' account.[144] At other times, however, the Court has cited the Take Care Clause as the fount of inherent prosecutorial discretion.[145] Placing emphasis on the latter view, supporters argue that Obama's deferred-action initiatives are merely top-down enforcement policies, not "law."[146]

Supporters of DACA/DAPA also emphasize the Executive's resource constraints.[147] Given that the Executive has nowhere near the necessary funds to perfectly enforce Congress's immigration laws, nothing in the Constitution or applicable statutes prohibits the Executive from making categorical decisions about where to focus its resources.[148] In addition, some supporters argue that Congress impliedly

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142 *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(A)–(B) (2012) (removability); *id.* § 1324(h)(3) (work authorization).

143 *See* Brief of the CATO Institute and Prof. Jeremy Rabkin as Amici Curiae in Support of Plaintiffs-Appellees, *supra* note 141, at 33 ("DAPA's sweeping expansion of deferred action . . . undermines Congress's comprehensive framework."); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183, 1886 (2015).

144 *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 613 (1838) (rejecting the notion that "the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution").

145 *See, e.g.*, United States v. Armstrong, 517 U.S. 456, 464 (1996) (concluding that the Attorney General and U.S. Attorneys have wide prosecutorial discretion "because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. CONST. art. II, § 3)); Heckler v. Chaney, 470 U.S. 821, 832 (1985) ("[A]n agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'" (quoting U.S. CONST. art. II, § 3)).

146 *See, e.g.*, Kalhan, *supra* note 38, at 65–66.

147 *See, e.g.*, MOTOMURA, *supra* note 38, at 21; Memorandum from Karl R. Thompson, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the President 1 (Nov. 19, 2014), https://www.justice.gov/file/179206/download [hereinafter OLC Memo].

148 *See, e.g.*, Motomura, *supra* note 138, at 19–20 ("Because Congress' commitment of enforcement resources is insufficient[,] . . . the discretion that federal employees exercise to enforce—or not enforce—the law in any given setting, or against any given person, is practically more important than the letter of the law."); *see also, e.g.*, Written Testimony of Stephen H. Legomsky Before the United States House of Representatives Comm. on the Judiciary 15 (Feb.

consented to deferred-action policies undertaken by past administrations of both political parties[149]—although it is not always clear whether supporters intend this as a political argument, statutory argument, constitutional gloss, or some combination thereof.

Moreover, some supporters of DACA/DAPA gesture to the idea that the President has inherent immigration power under the Constitution.[150] The question was presented, somewhat obliquely, during the *Texas* oral argument in the Supreme Court. In response to questions of whether DAPA inverted the conventional congressional-executive lawmaking model,[151] Solicitor General Donald Verrilli replied: "I don't think [the lawmaking relationship is] upside down. I think it's different . . . in recognition of the . . . unique nature of immigration policy."[152]

Along similar lines, Professors Adam Cox and Cristina Rodríguez have advanced a "two-principals" model, under which both Congress and the President are lawmaking principals of immigration policy.[153] Moreover, they argue, the rule of law provides "limiting principles" for testing the legitimacy of presidential enforcement policies.[154] Applying these ideas to DACA/DAPA, Cox and Rodríguez conclude that President Obama's deferred-action initiatives are not only defensible,

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25, 2015), https://judiciary.house.gov/wp-content/uploads/2016/02/Legomsky-Testimony.pdf ("[N]othing in these new policies will prevent the President from continuing to enforce the immigration laws to the full extent that the resources Congress has given him will allow. As long as he does so, it is impossible to claim that his actions are tantamount to eliminating all limits.").

149 *See* WADHIA, *supra* note 91, at 54–87; Letter from Shoba Sivaprasad Wadhia, Stephen H. Legomsky, Hiroshi Motomura, Jill E. Family et al. (March 13, 2015), www.pennstatelaw.psu.edu/lawprofltrlawsuit [https://perma.cc/WE65-J48H]; American Immigration Council, Executive Grants of Temporary Immigration Relief, 1956–Present (Oct. 2014), https://www.americanimmigrationcouncil.org/research/executive-grants-temporary-immigration-relief-1956-present [https://perma.cc/AG9P-GTB2]; Drew Desilver, *Executive Actions on Immigration Have a Long History*, PEW RES. CTR. (Nov. 21, 2014), http://www.pewresearch.org/fact-tank/2014/11/21/executive-actions-on-immigration-have-long-history/.

150 *See* David S. Rubenstein & Pratheepan Gulasekaram, *Immigration Exceptionalism*, 111 NW. U. L. REV. 583 (2017) (providing a comprehensive treatment of the literature and doctrines of "immigration exceptionalism"); *see also id.* at 623–26 (discussing arguments by supporters of DACA/DAPA that may rely, in part, on the notion of exceptional presidential authority over immigration regulation).

151 *See, e.g.*, Transcript of Oral Argument at 23–24, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) (per curiam), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/15-674_b97d.pdf.

152 *Id.* at 24.

153 *See* Cox & Rodríguez, *supra* note 38, at 110–11, 159–73.

154 *Id.* at 111–13, 175, 208–14, 224; *see also id.* at 192–93 ("The move to a more rule-bound and centralized regime provided the rule-of-law benefits associated with promoting consistency in official decision making, amplifying political control and, most importantly, instituting accountability over the enforcement power.").

but desirable compared to the enforcement regime that preceded these programs.[155]

2. What Was Decided

Somewhat related to the institutional question of who decides, is the substantive matter of what President Obama decided. Here again, critics and supporters of DACA/DAPA disagree because they arrive at the question from different rule of law perches.

First, critics argue that these programs reward lawbreaking, encourage more of it, and are unfair to those who comply with immigration law.[156] Further, critics claim that DACA/DAPA essentially require federal immigration officials to ignore, and thus violate, Congress's laws.[157] More generally, critics look beyond the field of immigration regulation. If DACA/DAPA is permitted, the argument runs, future Presidents will be less likely to respect constitutional and statutory limits in general, and the public will be inclined to see all laws as subject to unilateral presidential revision.[158]

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155 *Id.* at 112–113, 224.

156 *See, e.g.*, Press Release, House Comm. on the Judiciary, Collateral Damage: President's Unilateral Actions Punish Legal Immigrants (Dec. 4, 2014), https://judiciary.house.gov/press-release/collateral-damage-president-s-unilateral-actions-punish-legal-immigrants/ (quoting House Judiciary Committee Chairman Goodlatte saying "[t]he President's actions provide little incentive to follow our immigration laws and will undoubtedly encourage more illegal immigration"); *see also, e.g.*, Carson Holloway, *Illegal Immigration and the Rule of Law*, PUB. DISCOURSE (Dec. 1, 2010), http://www.thepublicdiscourse.com/2010/12/2109/ (noting that opponents of amnesty believe it makes "a mockery of justice and law by rewarding lawbreaking"); Cari Kelly, *The DACA Magnet*, HERITAGE ACTION FOR AM. (July 18, 2014), http://heritageaction.com/2014/07/daca-magnet/ ("[T]he President's blatant refusal to enforce the law has, as anticipated, resulted in the more than 50,000 unlawful immigrants flooding the border.").

157 *See, e.g.*, Press Release, House Comm. on the Judiciary, Texas Republicans Support ICE Agents Suing Administration over Amnesty Program (Aug. 23, 2012), https://carter.house.gov/press-releases/texas-republicans-support-ice-agents-suing-administration-over-amnesty-program/ (quoting then–House Judiciary Committee Chairman Smith saying "[t]he Obama administration's amnesty program not only rewards lawbreakers, it also forces ICE agents to violate federal law"); *see also* Crane v. Napolitano, 920 F. Supp. 2d 724, 730–31 (N.D. Tex. 2013) (lawsuit commenced by federal immigration agents, challenging DACA on the ground that it required enforcement officials to violate federal law). *But see* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach's Latest Crusade*, 122 YALE L.J. ONLINE 167, 184 (2012) (arguing that the lawsuit filed by ICE field agents challenging DACA is without merit).

158 *See, e.g.*, *Unconstitutionality of Obama's Executive Actions on Immigration: Hearing Before the House Comm. on the Judiciary*, 114th Cong. 6 (2015) (statement of Rep. Gowdy, Member, House Comm. on the Judiciary), https://judiciary.house.gov/wp-content/uploads/2016/02/114-3_93526.pdf ("If this President's unilateral extraconstitutional acts are not stopped, future Presidents, you may rest assured, will expand that power of the executive branch, thereby threatening the constitutional equilibrium.").

Supporters of DACA/DAPA, however, complicate this account by stressing two related contextual factors: (1) vast congressional delegation of discretionary executive power, and (2) intolerable levels of arbitrary immigration enforcement.[159]

Regarding delegation, supporting accounts argue that Congress not only *expressly* delegates immigration authority, but *de facto* delegates as well.[160] De facto delegation is not the product of any particular statute. Rather, it emerges from the conflation of increasingly stringent immigration laws, economic draws into the country, and the executive branch's inability to effectively police the border. The result is an enormous unauthorized population, and, arguably, a tacit invitation for the Executive to shape immigration policy through decisions about which subgroups of undocumented immigrants to target for removal.[161]

This descriptive account sets the stage for the second contextual factor that supporters emphasize: arbitrary immigration enforcement.[162] Well before DACA's rollout, DHS already had enforcement priorities that were contained in internal agency memoranda but shielded from public view.[163] Signed by upper-level officials, these memoranda directed field agents across the country to focus attention

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159 *See id.* at 22, 204; Cox & Rodríguez, *supra* note 38, at 135–42; Michael Kagan, *Binding the Enforcers: The Administrative Law Struggle Behind President Obama's Immigration Actions*, 50 U. RICH. L. REV. 665, 666–68 (2016); Kalhan, *supra* note 38, at 76–78; Ahilan Arulanantham, *The President's Relief Program as a Response to Insurrection*, BALKINIZATION (Nov. 25, 2014), https://balkin.blogspot.com/2014/11/the-presidents-relief-program-as.html [https://perma.cc/83X6-MCP6].

160 *See* Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law*, 119 YALE L.J. 458, 476–78, 485 (2009) (explaining that "the intricate rule-like provisions of the immigration code, which on their face appear to limit executive discretion, actually have had the effect of delegating tremendous authority to the President to set the screening rules for immigrants—that is, to decide on the composition of the immigrant community"); *see also* MOTOMURA, *supra* note 38, at 21–22, 53.

161 *See* Cox & Rodríguez, *supra* note 160, at 463–65, 511–14; *see also* MOTOMURA, *supra* note 38, at 53 ("[T]he uncertainty that selective discretion creates for unauthorized migrants is an essential part of the system itself.").

162 *See, e.g.*, MOTOMURA, *supra* note 38, at 192 ("The immigration law system, especially its reliance on vast discretion, jeopardizes the rule of law when it creates a large unauthorized population, then leaves it to unpredictable and inconsistent decision-making to identify who will be caught in the immigration enforcement apparatus.").

163 In 2007, the Bush Administration rebuffed a recommendation by the USCIS Ombudsman to make deferred-action policies public. *See* Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 262–63 (2010). For a historically based and rich discussion of these enforcement memoranda, see WADHIA, *supra* note 91, at 94–102. As Wadhia recounts, U.S. federal immigration agencies have had enforcement policies—including deferred-action policies—for many decades. *See id.* at 14–32 (building on the path-breaking work of Leon Wildes, *The Nonpriority Program of the Immigration and Naturali-*

and resources on particular types of undocumented immigrants (e.g., those with criminal records and repeat immigration violators) and to deprioritize enforcement against others (e.g., those who entered unlawfully as children or for humanitarian reasons).[164] These pre-DACA memoranda stated that enforcement decisions were to be made on a case-by-case basis, and contained boilerplate language disclaiming any public rights or government obligations under the policies.[165]

Under pressure from immigrant advocates, President Obama made these memoranda publicly available in 2011.[166] This transparency, in turn, enabled immigrant advocates to piece together what was long known anecdotally: DHS's enforcement policies were being enforced unevenly, sporadically, and arbitrarily.[167] Indeed, many immigration enforcement agents openly disapproved of these policies and honored them in the breach.[168]

For political reasons, this account of arbitrary enforcement and internal insurrection was *not* the story that President Obama relayed when he announced DACA.[169] According to supporters, however, this *is* the real story—and, for them, the context that matters for any responsible rule of law evaluation.[170] More specifically, they argue that DACA/DAPA advances certain rule of law features—transparency,

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zation Service Goes Public: The Litigative Use of the Freedom of Information Act, 14 SAN DIEGO L. REV. 42 (1976)).

164 *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All Field Office Dirs. et al. 5 (June 17, 2011), http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf [https://perma.cc/D5VN-EZUZ].

165 *Id.* at 6 ("[T]his memorandum, which may be modified, superseded, or rescinded at any time without notice, is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law by any party in any administrative, civil, or criminal matter.").

166 *See* WADHIA, *supra* note 91, at 94–96.

167 *See id.* at 102–04; Kagan, *supra* note 159, at 684 (noting that the Obama Administration's release of pre-DACA enforcement policy memoranda led to "considerable frustration as they promised a more lenient approach than immigrant activists saw in the field").

168 *See* Marjorie S. Zatz & Nancy Rodriguez, *The Limits of Discretion: Challenges and Dilemmas of Prosecutorial Discretion in Immigration Enforcement*, 39 LAW & SOC. INQUIRY 666, 677–78 (2014); *see also* Arulanantham, *supra* note 159 ("[T]he new administrative relief program arises out of a historical context of defiance—some would say insurrection—by ICE enforcement agents and attorneys who essentially refused to implement prior directives on prosecutorial priorities.").

169 *Cf.* Arulanantham, *supra* note 159 ("For obvious reasons, the Administration has not discussed the failure of the Morton memos in any of its recent public statements—they tell a story of an agency at war with its political leadership.").

170 *See, e.g.*, MOTOMURA, *supra* note 38, at 204–05 (explaining the need for President Obama to adopt formal deferred-action programs as a response to the reluctance or resistance of immigration enforcement personnel in the field to carry out the President's enforcement priorities and prosecutorial discretion guidelines); Cox & Rodríguez, *supra* note 38, at 113 ("Only with

predictability, and uniformity in immigration enforcement decisions.[171] As put by Professors Cox and Rodríguez, DACA/DAPA "choose[s] rules over standards, centralization over decentralization, and transparency over secrecy."[172] These design choices, they argue, are the antidote to arbitrary enforcement decisions.[173] Further, Professor Hiroshi Motomura explains, the rule of law is advanced insofar as the centralized, rule-like structure of the programs reduces the specter of racial discrimination in immigration enforcement.[174]

Supporters of DACA/DAPA also reject critics' speculation that these programs would result in more immigration lawbreaking. Rather, supporters argue, DACA/DAPA would free up government resources to focus on *other* subgroups of undocumented immigrants, such as those who have committed crimes, and to enforce *other* provisions of the immigration code.[175] Furthermore, supporters provide reasons to believe that DACA/DAPA could reduce overall levels of lawbreaking. In that vein, Professor Amanda Frost argues that the rule of law is promoted "by reducing ongoing violations of labor, employment, housing, and criminal laws to which undocumented noncitizens are frequently subjected."[176] And, she points out, those forms of lawbreaking not only harm undocumented immigrants, "but also the legal immigrants and U.S. citizens" in their communities.[177]

3. How Decisions Were Made

Finally, critics object to DACA/DAPA on rule of law process grounds. Although the substance of DACA/DAPA was made public, the decisionmaking process was not. Indeed, for all but a few elite insiders, DACA and DAPA came as shocks to the general public.[178] Approximately a year before DACA was announced, DHS Secretary

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this context can we make sense of the motivations for, and the legality of, the President's deportation relief programs.").

171 *See* Cox & Rodríguez, *supra* note 38, at 112, 142; Kalhan, *supra* note 38, at 87–88.

172 *See* Cox & Rodríguez, *supra* note 38, at 174.

173 *See id.*

174 MOTOMURA, *supra* note 38, at 204–05; Motomura, *supra* note 138, at 27.

175 *See, e.g.*, Cox & Rodríguez, *supra* note 38, at 143 n.116.

176 Amanda Frost, *When Two Wrongs Make a Right: Deferred Action and the Rule of Law*, 55 WASHBURN L.J. 101, 102 (2015).

177 *Id.*

178 The program, however, may not have come as a surprise to certain immigrant advocates actively lobbying the White House for such a program. *See* WADHIA, *supra* note 91, at 105 (discussing some of these efforts, including a hand-delivered letter prepared by the highly acclaimed immigration scholar, Hiroshi Motomura, and signed by almost 100 other law professors, just prior to DACA's publication).

Janet Napolitano testified in Congress that the agency had no plans to grant deferred action to large groups of people.[179] And, in less formal public settings, President Obama personally renounced executive authority to unilaterally grant legal reprieve to undocumented immigrants.[180]

Thus, when President Obama later announced that he had "changed the law,"[181] the critics' process objections merged with their objections over who decides. After all, it is significantly easier for the Executive to change the law administratively than it is for Congress to do so legislatively. Moreover, it is exponentially easier for the Executive to affect policy changes via "guidance" memoranda than through the APA's notice-and-comment rulemaking procedures.

Under notice-and-comment procedures, the agency must provide advance notice of its proposed rulemaking in the Federal Register and offer interested parties the opportunity to submit written comments in response.[182] Moreover, to enable meaningful public comments, courts have required the agency to make its intentions clearly known in the notice of rulemaking.[183] Finally, although the APA textually requires that a final regulation be accompanied by "a concise general statement of [the regulation's] basis and purpose,"[184] courts generally require the agency to respond to all significant comments received,[185] and to explain its decisions rather thoroughly.[186]

Some supporters of DACA/DAPA concede that more public debate and deliberation might have been *preferable*. Still, they insist that

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179 *See Testimony of Secretary Janet Napolitano Before the United States Senate Committee on the Judiciary, "Department of Homeland Security Oversight,"* U.S. DEP'T HOMELAND SECURITY (Mar. 9, 2011), https://www.dhs.gov/news/2011/03/09/testimony-secretary-janet-napolitano-united-states-senate-committee-judiciary [https://perma.cc/RN6X-742R].

180 *See* Michael A. Olivas, *Dreams Deferred: Deferred Action, Prosecutorial Discretion and the Vexing Case(s) of DREAM Act Students*, 21 WM. & MARY BILL RTS. J. 463, 472–73 (2012) (describing the Administration's earlier position on its lack of authority to grant DREAM Act–type relief absent congressional action).

181 *See* The Obama White House, *President Obama Speaks in Chicago About His Action on Immigration*, YOUTUBE (Nov. 25, 2014), https://www.youtube.com/watch?v=WW_IBIWLPOo (video of Obama's speech).

182 *See* 5 U.S.C. § 553(b)–(c) (2012).

183 *See, e.g.*, Nat. Res. Def. Council v. EPA, 279 F.3d 1180, 1187–88 (9th Cir. 2002).

184 5 U.S.C. § 553(c).

185 *See, e.g.*, Reytblatt v. U.S. Nuclear Regulatory Comm'n, 105 F.3d 715, 722 (D.C. Cir. 1997); *see also* Am. Mining Cong. v. EPA, 907 F.2d 1179, 1188 (D.C. Cir. 1990) (requiring agency to respond to "comments which, if true . . . would require a change in [the] agency's proposed rule" (first alteration in original) (quoting ACLU v. FCC, 823 F.3d 1554, 1581 (D.C. Cir. 1987))).

186 *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42–43 (1983) (requiring agencies to articulate the reasoning behind their decisions).

notice-and-comment procedures were not *required* as a matter of administrative law, and offer rule of law reasons why.[187] Essentially, supporters worry that if notice-and-comment procedures were required, then agencies would simply choose not to have macro-level policies, or have such policies but not announce them, as was the case pre-DACA.[188]

Again, these process considerations, and their implications, harken back to the questions of what is decided and by whom. Eliminating procedural friction smooths the way for the Executive's policy. Legislative or notice-and-comment procedures would almost certainly have stymied the Obama Administration's efforts. And, under that scenario, the rule of law boons championed by DACA/DAPA supporters would almost certainly not materialize.

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To the stylized question of whether DACA/DAPA violates the rule of law, the "yes" and "no" viewpoints have ample footing. Neither is obviously wrong. Precisely for that reason, an alternative answer—"it depends"—clearly outperforms them both. *That* the answer depends hardly needs explication beyond what has already been said. Still, a closer look at *how* and *why* it depends can open new lines of thinking, and perhaps eliminate others.

III. IT DEPENDS

Rule of law talk almost invariably ends with agreement to disagree. The impasse is generally attributed to the rule of law's definitional thicket.[189] To a significant extent, that is certainly true. As this Part lays bare, however, definitional variance is not all that separates critics and supporters. As primed above, and teased out below, evalu-

187 *See* Cox & Rodríguez, *supra* note 38, at 216–19; Kagan, *supra* note 159, at 712–14; Shoba Sivaprasad Wadhia, *The President and Deportation: DACA, DAPA, and the Sources and Limits of Executive Authority—Response to Hiroshi Motomura*, 55 WASHBURN L.J. 189, 195–96 & nn.35–37 (2015). More specifically, they argue that DACA and DAPA were "general statements of policy," exempt from the APA's notice-and-comment procedures, not "legislative rules," which must undergo them. *See* 5 U.S.C. § 533(b)–(c).

188 *See, e.g.*, Cox & Rodríguez, *supra* note 38, at 218. This pragmatic concern is a familiar one to administrative law: given that agencies often have a choice to not make policy on an issue, the worry is that agencies will elect not to enact policy if more procedures are required.

189 *See, e.g.*, MOTOMURA, *supra* note 38, at 187 ("In debating legalization—and unauthorized migration generally—both sides appeal to [the rule of law] idea but give it different meanings."); Frost, *supra* note 176, at 102; Price, *supra* note 41, at 237 ("[R]ule-of-law arguments based on transparency and clarity are thus answerable in rule-of-law terms and cannot by themselves provide adequate justification for particular policies.").

ators are caught in a web of insoluble differences over the relevant law, the relevant facts, and speculative projections into the future. Above all else, evaluators differ on the rule of law tradeoffs worth making for the immigration system, or for the operation of modern government more generally.

To set expectations, my aim here is not toward consensus. Whereas Part II was interested in what the rule of law might tell us about DACA/DAPA's legitimacy, the discussion below spotlights what the rule of law cannot tell us, and the reasons for those limitations.

A. Competing Conceptions

In many cases, the speaker's understanding of the rule of law may not correspond with the audience's understanding. And, even when their conceptions align, speakers and audiences may differ on what the rule of law entails as applied to a particular situation.

As a general matter, DACA/DAPA critics seem to rely most heavily on formal rule of law conceptions, which, above all else, emphasize adherence to validly enacted substantive and procedural law.[190] Measured against that baseline, DACA/DAPA arguably falls short. By contrast, supporters place considerably more emphasis on the rule of law's proceduralist values of advance notice, consistency, and transparency (even as they seem to marginalize other rule of law features, such as reasoned deliberation and stability available through notice-and-comment rulemaking).[191] Meanwhile, other supporting accounts draw upon substantive rule of law conceptions. Recall, for example, how Professor Motomura defends DACA/DAPA on the grounds that macro-level enforcement policies may reduce racial discrimination in immigration enforcement.[192]

Apart from the foregoing variability, some evaluators imbue the rule of law with a rule of relativity—what I refer to here as the "relative rule of law." Under more conventional rule of law evaluations, the question is whether DACA/DAPA satisfies some rule of law conception or its subsidiary criteria. By contrast, analysis under the *rela-*

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190 *See supra* notes 27, 59 and accompanying text (collecting sources).

191 *See supra* note 11 and accompanying text (noting that reasoned deliberation is a prime rule of law justification for administrative governance); *see also* Kagan, *supra* note 159, at 696 (arguing that while "reasonable" deliberation is an appropriate model in contexts where "Congress has specified that it wants regulatory policy to be set by technical expertise rather than by political considerations . . . [,] these arguments are not convincing in the immigration enforcement context").

192 *See supra* note 174 and accompanying text.

tive rule of law speaks to a different question: whether DACA/DAPA moves the rule of law needle in the right direction relative to the status quo.[193]

Thus, for example, Professor Motomura emphasizes how "public guidelines and an application-based system . . . made implementation more transparent than" the pre-DACA system, and thus "moved toward a rational system for exercising prosecutorial discretion."[194] Similarly, Professors Cox and Rodríguez praise DACA/DAPA's "move to a more rule-bound and centralized regime."[195] Likewise, Professor Anil Kalhan argues that DACA/DAPA promotes "important rule of law values such as consistency, transparency, accountability, and nonarbitrariness," in ways that outperform the pre-DACA/DAPA enforcement scheme.[196] Others have argued to similar effect.[197]

Part V revisits the relative rule of law with my critiques and concerns. For now, I simply flag the relative rule of law as an additional departure point in today's immigration debates. If the question is whether DACA/DAPA violates or promotes the rule of law, then the answer may depend on whether the evaluator responds via the *relative* rule of law.

B. Competing Frames

In addition, rule of law evaluators choose different analytic frames, and highlight different features within their selected frames. Several framing and filling adjustments are available, which may conveniently or frustratingly be utilized in combination. The analytic variables may be loosely taxonomized as (1) the *law* that matters, (2) the *facts* that matter, and (3) the *speculation* that matters. Furthermore, each of these variables have subsidiary dimensions. When conjoined with the rule of law's definitional variances, the analytical possibilities are innumerable. I offer some examples below simply to illustrate the complexity. But the takeaway is rather straightforward: because there

193 The idea has a lineage. *See, e.g.*, Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217, 235 (1955) ("[T]he relevant question is not, has [the rule of law] been achieved, but, is it conscientiously and systematically pursued.").

194 Motomura, *supra* note 138, at 27; *see also* Hiroshi Motomura, Opinion, *The Dream Act Could Bring the Rule of Law Back to Immigration Policy*, L.A. TIMES (Dec. 7, 2017), http://www.latimes.com/opinion/op-ed/la-oe-motomura-dream-act-20171207-story.html.

195 Cox & Rodríguez, *supra* note 38, at 192.

196 Kalhan, *supra* note 38, at 85.

197 *See, e.g.*, Arulanantham, *supra* note 159; Kagan, *supra* note 159, at 712–14; Wadhia, *supra* note 187, at 189, 195 nn.35–37.

are so many outs, rule of law arguments are impossible to pin down or box in.

1. The Law that Matters

There are at least three subsidiary dimensions of the law that matter. First is the contrast between "law on the books" and "law in action." Both are fair game for rule of law evaluations. DACA/DAPA critics are less apt to consider the law in action relevant to a rule of law analysis. By contrast, DACA/DAPA supporters believe that the law in action is crucial for understanding the legitimacy of these programs.

Second, even within "law on the books," there are different laws to capture and interpret at the constitutional, statutory, and administrative levels. The litigation over DACA/DAPA is quite revealing of how unsettled the law is, within and across these staged dimensions.[198] Yet, if the law itself is unsettled, that is a very shaky foundation from which to argue that DACA/DAPA violates *or* complies with the rule of law. After all, if a rule of law analysis depends on what the law is, and there are no clear answers for that root question, then any rule of law assessments must be caveated to that significant extent. What is more, debates over whether the forgoing legal questions are even justiciable suggest that all this legalistic talk is much ado about nothing. Without judicial review, questions about what the *law requires* will distill, in any practical sense, into what *politics decides*.[199]

Third, immigration law is not the only law that matters. Recall the critics' concern that DACA/DAPA devalues the meaning and significance of law, which they argue can infect other regulatory domains.[200] Meanwhile, supporters of DACA/DAPA also expand the frame to capture non-immigration law, arguing that Obama's deferred-action initiatives can bring undocumented immigrants out of the shadows, and thus reduce lawbreaking in labor law, housing law, civil rights law, and criminal law.[201]

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198 *See supra* Section II.A (describing the legal issues and judicial results in the litigation).

199 On law as a focal point for collective judgments about presidential conduct, see Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1410–12 (2012) (reviewing POSNER & VERMEULE, *supra* note 22).

200 *See supra* notes 157–58 and accompanying text.

201 *See supra* notes 176–77 and accompanying text.

2. *The Facts that Matter*

For the relevant facts, rule of law evaluators can take a real-time snapshot of the world they see today, or expand the time horizon to capture more of the past (1 year, 5 years, 10 years, 100 years, etc.). For example, writing in support of DACA/DAPA, Professor Motomura argues that "it is difficult to evaluate [Obama's] executive actions without understanding how unauthorized migration to the United States has evolved over the past century into a system marked by vast discretion."[202] That history, however, extends well beyond the critics' temporal frame. For them, the handful of years leading up to DACA is the most relevant, when Congress considered and rejected several DREAM Act proposals.[203]

Even within the time frames selected, critics and supporters differ on which facts to focus on, and how to interpret those facts. Especially in a "post-truth" era, where perceptions dominate over facts, rule of law arguments that turn on contestable facts and framings will never convince non-believers.[204]

3. *The Speculation that Matters*

Last, but not least, is the specter of imagination. Rule of law evaluators project their hopes and fears about what the world would look like *if* government officials do such and so, refrain from this or that, etc. Moreover, as with the facts that matter, the speculation that matters operates on the time dimension. Looking ahead, the short term matters, but so does the long term. Absent a rule of law principle instructing how far to scope into the future, evaluators may adjust the forward-looking frame as they see fit, and fill it with the speculation of their choosing. If and when their projections are proven or disproven, that new information becomes part of the facts that matter (or do not matter, depending on perspective).

By and large, DACA/DAPA supporters took a short view (or significantly discounted a longer view). In the short run, congressional gridlock and unilateral presidential action offered an opportunity for favorable changes in on-the-ground policy. Taking a longer view, however, would have captured the possibility of a less immigrant-friendly

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202 Motomura, *supra* note 138, at 2.

203 *See supra* notes 90–91 and accompanying text.

204 *See Post-truth*, Oxford Dictionaries, https://en.oxforddictionaries.com/definition/post-truth [https://perma.cc/R7QC-P527] (last visited Dec. 24, 2017) (defining "post-truth" as "[r]elating to or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief").

President using the same levers of power to other ends vis-à-vis immigrant interests. Ultimately, because we do not know what the future holds, any present-day rule of law assessment is necessarily contingent and contestable.

C. Competing Judgments

It gets worse. Beyond the conceptual and framing problems discussed above, there is ample room for disagreement *within* particular rule of law conceptions, and even at the more granular level of particularized rule of law features. Thus, even when critics and supporters are shining the same apples, reflections often come off differently. In what follows, I offer some examples using DACA/DAPA, and the conventionally recognized rule of law criteria of (1) stability, (2) clarity, and (3) transparency. Analysis of other rule of law criteria would expose similar variance and elasticity. But I highlight these rule of law criteria for two reasons.

First, all sides of the DACA/DAPA debate consider these rule of law criteria to be relevant. Second, these rule of law criteria, in particular, are highly pliable and relativistic.[205] For rule of law purposes, how stable is stable enough? How clear is clear enough? How transparent is transparent enough? There are no ready answers to these questions, which is yet another reason why rule of law evaluations will never convince others who do not already share the same normative predispositions. Whereas the discussion below focuses on DACA/DAPA, Part IV revisits these analytical snags in the rule of law debates surrounding Trump's immigration policies.

1. Stability

Arguably, DACA/DAPA offers somewhat more stability than the ad hoc, case-by-case enforcement regime that it replaced.[206] At the same time, however, these programs are inherently unstable and unpredictable: they were created by executive fiat and can die by the same means (as played out during the first year of Trump's presidency).[207]

Putting aside whether notice-and-comment rulemaking was required for DACA/DAPA, there is no dispute that the Obama Admin-

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205 *See* Waldron, *supra* note 42, at 154 (noting that these and other rule of law considerations are matters of degree).

206 *See supra* notes 162–68 and accompanying text.

207 *See infra* Section IV.B.

istration could have opted to undergo those procedures.[208] Because it did not, DACA/DAPA was tethered to presidential politics from the very start. That instability was presumably too much to bear for the approximately 700,000 potential DACA beneficiaries who did not apply.[209] And, for the approximately 800,000 who did apply, the lack of stability is now haunting. Their DACA applications give the Trump Administration access to information that might (or might not) be used to track and deport DACA beneficiaries and their undocumented family members.[210]

2. Clarity

Without an analytical baseline for clarity against which to judge, the most we can do is parse the deferred-action programs for what they did and did not convey. To begin, it will be useful to recall the structure of DACA/DAPA: applicants must meet certain eligibility requirements and receive a favorable grant of discretion.[211] The structure itself is fairly clear—which could not as easily be said for the internal guidance memoranda that preceded DACA.[212]

Despite the clarity of structure, however, the Obama Administration's DACA/DAPA Memos are conspicuously silent on how the agency would exercise its case-by-case discretion.[213] This lack of clarity was entirely intentional, which only makes it more concerning.

As a practical matter, the Obama Administration had to brace itself against foreseeable legal challenges (as occurred).[214] The more the programs looked like executive law*making*, the more they looked like executive law*breaking*, whether under the Constitution, INA, or

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208 As a general matter, agencies can provide more procedures than the APA requires.

209 *Cf.* Krogstad, *supra* note 101 (providing statistical estimates of the number of immigrants eligible for relief under various executive actions).

210 *Cf.* Zachary S. Price, *Reliance on Nonenforcement*, 58 WM. & MARY L. REV. 937 (2017) (arguing that the use of this information for enforcement purposes would amount to unconstitutional entrapment under the Due Process Clause). As of this writing, it is not clear whether or to what extent the information provided by DACA applicants to DHS will be shared with that department's interior enforcement division. Nor is it clear whether due process rights would be triggered, given that DACA expressly did not create rights enforceable against the government.

211 *See* DACA Memo, *supra* note 44; DAPA Memo, *supra* note 44.

212 *See supra* notes 162–65 and accompanying text.

213 *See* DACA Memo, *supra* note 44; DAPA Memo, *supra* note 44; *cf.* Amici Curiae Brief of Am. Immigration Council et al. in Support of Appellant United States Seeking Reversal of Preliminary Injunction at 19–20, Texas v. United States, 787 F.3d 733 (5th Cir. 2015) (No. 15-40238) (explaining that several individuals who met the eligibility requirements were nevertheless denied DACA protection on discretionary grounds).

214 *See supra* notes 113–27 and accompanying text (discussing litigation).

APA.[215] To parry legal objections, the inclusion of case-by-case discretion as a program feature allowed the Obama Administration to claim that DACA/DAPA was not law. Indeed, an Office of Legal Counsel ("OLC") memorandum defending the legality of DAPA opined that "individualized, case-by-case review helps avoid potential concerns that, in establishing such eligibility criteria, the Executive is attempting to rewrite the law."[216]

Finally, the DACA/DAPA Memos state that the program beneficiaries will be deemed to be "lawfully present."[217] That term was so unclear, and so misunderstood, that during the *Texas* oral argument, Solicitor General Verrilli invited the Justices to simply "put a red pencil through" the phrase "lawfully present" where it appeared in the DAPA Memo.[218] The suggestion was made rather casually, as if the term had no meaning (which it did, but was entirely unclear to immigration outsiders),[219] and as if the term had no legal significance (which it did, but apparently not enough for the government to lose the case over).[220]

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215 *See* Kagan, *supra* note 159, at 670 ("It is precisely because the Obama policies are so clear and transparent that questions have been raised about whether they should have been subject to a notice-and-comment process.").

216 *See* OLC Memo, *supra* note 147, at 23. The OLC defended the program on a mix of legal, historical, and pragmatic reasons. *Id.* Analysts have sharply debated the OLC's reasoning and conclusions, including on rule of law grounds. *Compare* Cox & Rodríguez, *supra* note 38, at 46, 74–75 (critiquing the OLC's reasoning, but defending DAPA on other grounds, including under the rule of law), *with* Price, *supra* note 41, at 243, 254 (defending the OLC's general approach, which was tethered to certain separation-of-powers principles, but critiquing the OLC's conclusions on the merits, including on rule of law grounds). For additional, and mostly critical commentary of the OLC's analysis, see, for example, Patricia L. Bellia, *Faithful Execution and Enforcement Discretion*, 164 U. PA. L. REV. 1753 (2016); Margulies, *supra* note 143; and David A. Martin, *Concerns About a Troubling Presidential Precedent and OLC's Review of Its Validity*, BALKINIZATION (Nov. 25, 2014, 9:30 AM), http://www.balkin.blogspot.com/2014/11/concerns-about-troubling-presidential.html [https://perma.cc/BR3G-M7MS], describing DAPA as "setting a dangerous precedent that will be used by future Presidents to undercut other regulatory regimes."

217 *See* DAPA Memo, *supra* note 44, at 2.

218 *See* Transcript of Oral Argument, *supra* note 151, at 32.

219 Under the INA and agency regulations, "lawful presence" triggers social security benefits, tolls a noncitizen's unlawful presence for purposes of future inadmissibility bars, and is a prerequisite to lawful employment. *See* Brief for the Petitioners, United States v. Texas, 136 S. Ct. 2271 (2016) (No. 15-674) (per curiam); *see also* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1120 (2015) (explaining the "paradoxical middle ground between legality and illegality," and exploring the impact that living in nonstatus has on immigrants in the United States); Sara N. Kominers, *Caught in the Gap Between Status and No-Status: Lawful Presence Then and Now*, 17 RUTGERS RACE & L. REV. 57, 57 (2016) ("The ambiguity of lawful presence has never been more prominent than it is today, in the wake of [DACA/DAPA].").

220 *See* Transcript of Oral Argument, *supra* note 151, at 32. After inviting the Court to strike the term with a red pencil, the Solicitor General continued: "I understand the—the issues

3. Transparency

Supporters of DACA/DAPA tout these programs for their transparency—which in turn, provided a line of accountability directly to the White House. To be sure, the existence of these programs was transparent. What was not transparent—at least to the general public—was the decisionmaking process and motivations behind these programs. Again, whether this lack of transparency matters, and how much, depends on which rule of law conception is utilized. In the administrative context, however, most if not all modern rule of law conceptions put a premium on decisionmaking processes and reason-giving, in large part to compensate or offset other rule of law critiques that besiege administrative governance.[221]

* * *

More could easily be added to the foregoing discussion. But that would only belabor the point, over which I think there can be no doubt. Because participants in these rule of law debates have so many outs—by changing the framing, and filling it with the law, facts, and speculation of their choosing—neither side can be proven wrong. For all the same reasons, however, neither side will convince the other.

Still, a fair question remains: Even if rule of law talk is unhelpful, what is the possible harm in it? Recent experiences under the Trump Administration help to bring this question, and my qualified response, into sharper focus.[222]

IV. THE RULE OF LAW STRIKES BACK—TRUMP ADMINISTRATION

> *No amnesty. Protect the rule of law! Let's Make America Great Again*
>
> —Donald J. Trump[223]

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that it's caused. But its legal significance is a technical legal significance with respect to eligibility for Social Security benefits and for this tolling provision, and that really . . . [is] the tail on the dog and the flea on the tail of the dog." *Id.*

221 *See supra* note 11 and accompanying text; *infra* note 303 and accompanying text; *see also* Barron & Rakoff, *supra* note 129, at 327 ("A fundamental requirement of administrative law . . . is the agency's duty to explain the decisions it makes."); Ming H. Chen, *Administrator-in-Chief: The President and Executive Action in Immigration Law*, 69 ADMIN. L. REV. 347 (2017) (positing that the extent to which the President enhances the procedural legitimacy of agency actions strengthens the legacy of the policies when the substance of the policies is challenged).

222 *See infra* Sections V.A, V.B.

223 Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 22, 2015, 3:51 PM), https://twitter.com/realdonaldtrump/status/590981376666685440 (running for president).

President Trump's historic march to the White House was predicated, in large part, on his campaign rhetoric to reclaim immigration "rule of law."[224] He first shouldered his way through a crowded pack of Republican contenders with his promise to build a wall along the U.S.-Mexico border.[225] Encouraged by his rise in the polls, Trump later proclaimed that the United States should ban Muslim immigrants from entering the country.[226] That generated a second spike in his primary ratings.[227] And from there, there was no Republican candidate that could catch him.

Later, as part of his general election campaign, Trump unveiled his "Contract with the American Voter."[228] The Contract announced Trump's intentions to take "actions to restore security and the constitutional rule of law," which included: cancelling "every unconstitutional executive action, memorandum and order issued by President Obama"; cancelling "all federal funding to sanctuary cities"; "removing the more than two million criminal illegal immigrants from the country"; and suspending "immigration from terror-prone regions where vetting cannot safely occur."[229]

Now, as President, Trump is trying to make good on his campaign promises. To keep the discussion manageable, I will briefly discuss only a few of these initiatives and the rule of law hum surrounding them. By now, the general themes should jump off the page: commentators disagree about what the rule of law means, both in theory and in action. Further, they disagree about the law that matters, the facts that matter, and the speculation that matters.[230]

I will not rehash these points, or provide any extended treatments of the rule of law arguments pouring in from all sides. Instead, events during the first year of the Trump Administration usefully extend the

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224 *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (July 28, 2015, 4:20 PM), https://twitter.com/realdonaldtrump/status/626140315116830721 ("A nation WITHOUT BORDERS is not a nation at all. We must have a wall. The rule of law matters.").

225 *See id.*; Seth McLaughlin, *Donald Trump's Comments Spark Poll Surge, Put 2016 Republican Hopefuls on the Spot*, WASH. TIMES (July 2, 2015), http://www.washingtontimes.com/news/2015/jul/2/donald-trump-comments-spark-poll-surge-put-2016-re/.

226 *See* Russell Berman, *Donald Trump's Call to Ban Muslim Immigrants*, ATLANTIC (Dec. 7, 2015), http://www.theatlantic.com/politics/archive/2015/12/donald-trumps-call-to-ban-muslim-immigrants/419298/; Pema Levy, *Trump Soars to New Heights in Poll After Proposing Muslim Ban*, MOTHER JONES (Dec. 14, 2015, 6:19 PM), http://www.motherjones.com/mojo/2015/12/donald-trump-proposes-ban-muslims-soars-new-heights-poll.

227 *See* Levy, *supra* note 226.

228 *See* Trump, *Contract*, *supra* note 45.

229 *Id.*

230 *See supra* Part III.

time horizon; they show how much can change when the rule of law baton is passed from one President to the next.

In a handwritten note that Obama left for Trump on inauguration day, the outgoing President wrote: "We are just temporary occupants of this office. . . . [G]uardians of those democratic institutions and traditions—like rule of law, separation of powers, equal protection and civil liberties—that our forebears fought and bled for."[231]

Days later, President Trump signed the travel ban.[232]

A. Travel Ban

Trump's original travel ban temporarily suspended the admission of aliens from seven predominantly Muslim countries.[233] After being stymied in federal court, the Trump Administration revised the travel ban to cover six countries.[234] As of this writing, the travel ban is in its third iteration, covering eight countries (two of which are not predominantly Muslim).[235]

The President's claimed source of authority for the travel ban is primarily statutory, although government lawyers have also suggested a degree of inherent executive authority to boot.[236]

Section 212(f) of the INA provides in relevant part:

> Whenever the President finds that the entry of . . . any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation . . . suspend [their] entry . . . or impose on [their] entry . . . any restrictions he may deem to be appropriate.[237]

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231 Kevin Liptak, *Read the Inauguration Day Letter Obama Left for Trump*, CNN (Sept. 5, 2017, 2:25 PM), http://www.cnn.com/2017/09/03/politics/obama-trump-letter-inauguration-day/index.html. Incidentally, the contents of this letter were first made publicly available on the same day the Trump Administration announced DACA's repeal. *See id.*

232 *See* EO 13769, *supra* note 47.

233 *See id.*

234 *See* EO 13780, *supra* note 47.

235 *See* Proclamation, *supra* note 47.

236 *See, e.g.*, Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 4, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105) (per curiam); EO 13780, *supra* note 47, at 13209 (claiming that the travel ban was an exercise of President Trump's statutory and constitutional authority). The Ninth Circuit has recently rejected the Trump Administration's claim to inherent constitutional authority in connection with the travel ban. Hawaii v. Trump, No. 17-17168, 2017 WL 6554184, at *21 (9th Cir. Dec. 22, 2017) ("We conclude that the President lacks independent constitutional authority to issue the Proclamation, as control over the entry of aliens is a power within the exclusive province of Congress."), *petition for cert. filed*, No. 17-965 (U.S. Jan. 5, 2018).

237 8 U.S.C. § 1182(f) (2012).

On its face, the statute confers sweeping authority to the President. Neither its text nor any Supreme Court decision suggest any meaningful limits.

In both its original and revised forms, the travel ban arguably violates several constitutional provisions—most notably, the prohibition on religious establishment, guarantees of equal protection, due process, and the right of association.[238] Moreover, challengers argue, the President exceeded the statutory authority conferred under INA section 212(f), which they claim is limited by other statutory provisions and Congress's statutory scheme as a whole.[239] And, it is alleged, the use of an Executive Order, rather than notice-and-comment rulemaking procedures or individualized admission determinations, violates the APA.[240]

If some of this sounds familiar, that is part of the point. Like DACA/DAPA, the travel ban is an unprecedented exercise of presidential authority—if not in kind, then at least by degree.[241] Moreover, like DACA/DAPA, each iteration of the travel ban offered case-by-case waiver provisions, ostensibly to ward off certain legal challenges and to account for equities that categorical classifications miss.[242] What is more, there is no question that Trump has taken political ownership of the travel ban, in much the same way that Obama did for DACA/DAPA.

Both the original travel ban and the subsequently revised, "watered down, politically correct version," spurred a new wave of rule of law talk.[243] Amicus briefs in the nationwide litigation were

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238 *See* First Amended Complaint for Declaratory & Injunctive Relief at 18, Washington v. Trump, No. 2:17-cv-00141-JLR (W.D. Wash. Feb. 1, 2017).

239 *See, e.g.*, Brief of Amici Curiae Professors of Federal Courts Jurisprudence, Constitutional Law, and Immigration Law in Support of Respondents at 11, Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080 (2017) (Nos. 16-1436, 16-1540) ("Although the President claims that [section 1182(f)] delegates unfettered discretion to the Executive to suspend entry for whole classes of aliens based on any criteria whatsoever, canons of statutory construction as well as the statute's interpretive history counsel against such an expansive reading."); States' Response to Emergency Motion Under Circuit Rule 27-3 for Administrative Stay and Motion for Stay Pending Appeal at 21–23, Washington v. Trump, 847 F.3d 1151.

240 *See* First Amended Complaint for Declaratory & Injunctive Relief, *supra* note 238, at 16–17.

241 *See* Brief for Respondents at 12–13, Trump v. Hawaii, 2017 WL 4782860 (U.S. 2017) (No. 16-1540) (distinguishing the travel ban from other presidential uses of INA section 212(f)); *see also supra* note 149 and accompanying text (discussing DACA/DAPA, relative to previous administrations' exercises of deferred action).

242 *See* EO 13769, *supra* note 47, § 5(d); EO 13780, *supra* note 47, § 3(c); Proclamation, *supra* note 47, § 3(c).

243 Donald J. Trump (@realDonaldTrump), TWITTER (June 5, 2017, 5:29 AM), https://twit-

quick to cite the rule of law. In the Ninth Circuit, for example, a brief submitted by members of Congress emphasized that "[t]he United States is a nation built on immigration" as well as one "built on the rule of law."[244] In the Eastern District of Michigan, prominent law professors submitted a brief that invoked the rule of law as a reason why judicial review was necessary, despite the Trump Administration's claim to plenary immigration authority.[245]

Judge Wynn, who wrote a concurring opinion to preliminarily enjoin the original travel ban in the Fourth Circuit, delphically noted: "[W]hether the President will be able to 'free himself from the stigma' of his own self-inflicted statements lies in determining whether the Executive Order complies with the rule of law."[246] In the Supreme Court, more constitutional law professors filed an amicus brief, stating that "the rule of law may suffer" if the Court were to ignore Trump's own characterization of the travel ban as a "Muslim Ban."[247] Separately, the American Bar Association argued that the Government's position that President Trump's executive authority is unreviewable by the Supreme Court "cannot be reconciled with this Court's precedent and with the rule of law."[248]

As many had anticipated, litigation over the second travel ban became moot when it expired and was replaced by President Trump with a third travel ban in Fall 2017.[249] As of this writing, legal challenges to that version are winding through the lower courts and likely

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ter.com/realdonaldtrump/status/871675245043888128?lang=EN ("The Justice Dept. should have stayed with the original Travel Ban, not the watered down, politically correct version they submitted to S.C.").

244 Brief of 165 Members of Congress as Amici Curiae in Support of Plaintiffs-Appellees at 1, Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017), http://cdn.ca9.uscourts.gov/datastore/general/2017/04/21/17-15589%20Members%20of%20Congress%20Amicus.pdf [https://perma.cc/BD4W-ESUE].

245 *See* Brief of Amici Curiae Constitutional Law Professors in Support of Plaintiffs' Opposition to Defendants' Motion to Dismiss at 4, Arab Am. Civil Rights League v. Trump, No. 2:17-cv-10310-VAR-SDD (E.D. Mich. May 23, 2017) ("Even in the face of text seeming to constrain judicial review, the courts have shouldered the responsibility of ensuring that America's rule of law applies to actions of American officials.").

246 Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 612 n.1 (4th Cir.) (Wynn, J., concurring), *vacated as moot*, 138 S. Ct. 353 (2017) (No. 16-1436) (citation omitted).

247 *See* Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents at 4, Trump v. Int'l Refugee Assistance Project, 2017 WL 4518553 (U.S. Aug. 24, 2017) (Nos. 16-1436, 16-1540).

248 Brief Amicus Curiae of the American Bar Association in Support of Respondents and Affirmance at 4, Trump v. Int'l Refugee Assistance Project, 2017 WL 4518553 (U.S. Sept. 18, 2017) (Nos. 16-1436, 16-1540).

249 Proclamation, *supra* note 47; *see* Int'l Refugee Assistance Project v. Trump, 857 F.3d 554 (4th Cir.), *vacated as moot*, 138 S. Ct. 353 (2017) (No. 16-1436).

headed back to the Supreme Court.[250] All the while, commentators in the media have vigorously clashed over whether President Trump's use of executive power advanced or undermined the rule of law.[251]

B. DACA/DAPA Repeal

In February 2017, then–DHS Secretary John Kelly issued an internal "guidance" memorandum that formally ended the DAPA program.[252] It also instructs DHS personnel to prioritize the removal of "[c]riminal aliens," because they "have demonstrated their disregard for the rule of law and pose a threat to persons residing in the United States."[253] This memorandum, however, left the fate of DACA undecided.

On September 5, 2017, President Trump announced DACA's repeal in a tweet.[254] More formally, Attorney General Jeff Sessions wrote a letter to the Acting DHS Secretary, advising her to "rescind [the DACA Memo]."[255] Sessions emphasized that "[p]roper enforcement of our immigration laws is . . . critical to the national interest and

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250 *See, e.g.*, Hawaii v. Trump, No. 17-17168, 2017 WL 6554184 (9th Cir. Dec. 22, 2017) (preliminarily enjoining § 2 of Trump's Proclamation), *petition for cert. filed*, No. 17-965 (U.S. Jan. 5, 2018).

251 *Compare* Mahmoud Serewel, *President Trump, the Rule of Law, and the Separation of Powers*, HUFFINGTON POST (Feb. 23, 2017), http://www.huffingtonpost.com/entry/president-trump-the-rule-of-law-and-the-separation_us_58aefa4de4b0ea6ee3d03651 (criticizing Trump's initiatives), *with* Andrew C. McCarthy, *Trump's Immigration Guidance: The Rule of Law Returns*, PJ MEDIA (Feb. 22, 2017), https://pjmedia.com/andrewmccarthy/2017/02/22/trumps-immigration-guidance-the-rule-of-law-returns/ (defending Trump's enforcement policies, and arguing that they can be summed up with one sentence: "Henceforth, the United States shall be governed by the laws of the United States.").

252 *See* Enforcement Memo, *supra* note 46.

253 *Id.* at 3.

254 *See* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 7:04 AM), https://twitter.com/realDonaldTrump/status/905038986883850240 ("Congress, get ready to do your job - DACA!"); *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 5, 2017, 7:38 PM), https://twitter.com/realDonaldTrump/status/905228667336499200 ("Congress now has 6 months to legalize DACA (something the Obama Administration was unable to do). If they can't, I will revisit this issue!").

255 Letter from Jefferson B. Sessions III, Attorney Gen. of the United States, to Elaine Duke, Acting Sec'y, U.S. Dep't of Homeland Sec. (Sept. 4, 2017), https://www.justice.gov/opa/speech/file/994651/download [hereinafter Sessions Memo]. In turn, Acting Secretary Duke issued a memorandum announcing that the "DACA program should be terminated." *See* Memorandum from Elaine C. Duke, Acting Sec'y, U.S. Dep't of Homeland Sec., to James W. McCament, Acting Dir., U.S. Citizenship & Immigration Servs., et al. (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/3YGF-WBVE]. That memorandum also provided that DHS will "execute a wind-down of the [DACA] program" and, in particular, "will provide a limited window in which it will adjudicate certain requests for DACA and associated applications meeting certain parameters." *Id.*

to the restoration of the rule of law in our country."[256] In prepared remarks that same day, Sessions further pounded on the rule of law:

> No greater good can be done for the overall health and well-being of our Republic, than preserving and strengthening the impartial rule of law. . . . Simply put, if we are to further our goal of strengthening the constitutional order and the rule of law in America, the Department of Justice cannot defend [Obama's] overreach.[257]

A White House press release echoed these points, and was titled: "President Donald J. Trump Restores Responsibility and the Rule of Law to Immigration."[258] Of course, many Trump supporters agree with that rule of law prognosis.[259]

As would be expected, however, this rhetorical wrangling for the rule of law high ground has not gone unchallenged. Just for instance, Pennsylvania Attorney General Josh Shapiro said that the decision to end DACA violated the rule of law because "[t]he federal government made a promise . . . and the rule of law says we can't rip that away from [Dreamers] now."[260] Others argued that the rule of law arguments coming from the Trump Administration were a cover-up for racial animus toward the Latino community.[261] Others argued that the Trump Administration's appeal to the rule of law was hypocritical, in

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256 Sessions Memo, *supra* note 255.

257 *Attorney General Sessions Delivers Remarks on DACA*, U.S. DEP'T JUST. (Sept. 5, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-daca.

258 Press Release, White House Office of the Press Sec'y, *supra* note 49. Elsewhere in the press release, it states (in bold font), "RESTORING LAW AND ORDER TO OUR IMMIGRATION SYSTEM." *Id.*

259 *See, e.g.*, Dale Wilcox, *Here Are the Ways DACA Violates the Rule of Law*, PJ MEDIA (Sept. 5, 2017), https://pjmedia.com/trending/2017/09/05/ways-daca-violates-rule-law/. Wilcox argues that President Trump's DACA decision makes him "a faithful defender of the Constitution." *Id.* Wilcox explains four reasons that DACA violated the rule of law, arguing that DACA (1) "conferred amnesty and federal benefits under the false pretense of 'Prosecutorial Discretion'"; (2) "violated federal statutes which require the initiation of removal proceedings"; (3) "violated the constitutional obligation of the executive to 'Take Care That The Laws Are Faithfully Executed'"; and (4) "conferred a benefit without promulgating a rule." *Id.*

260 Natasha Lindstrom, *Shapiro: Trump's Plans to End DACA 'Violate the Rule of Law,'* TRIBLIVE (Sept. 6, 2017, 4:39 PM), http://triblive.com/politics/politicalheadlines/12705260-74/shapiro-trumps-plans-to-end-daca-violate-the-rule-of-law.

261 *See, e.g.*, Jamelle Bouie, *The Wrong Side of the Law: When the Trump Administration Refers to the "Rule of Law," It Really Means "Exclusion.,"* SLATE (Sept. 6, 2017, 7:35 PM), http://www.slate.com/articles/news_and_politics/politics/2017/09/the_law_is_just_a_smokescreen_for_trump_ending_daca.html; Christopher Petrella, *Ending DACA Isn't About the Rule of Law. It's About Race.*, WASH. POST (Sept. 6, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/09/06/ending-daca-isnt-about-the-rule-of-law-its-about-race/?utm_term=.A1e587911b5d.

light of Trump's presidential pardon of former Arizona Sheriff Joe Arpaio.[262] (A pardon that, unsurprisingly, drew its own rule of law scrum.)[263]

Meanwhile, litigation challenging DACA's repeal is pending around the country.[264] The complaints raise several legal challenges, including Fifth Amendment due process claims, Fifth Amendment equal protections claims, and APA claims.[265]

C. Do Trump's Immigration Policies Violate the Rule of Law?

Many who answered "yes" to the Obama rule of law question are answering "no" to Trump's initiatives. Conversely, many who an-

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262 *See, e.g.*, David A. Martin, *Illegal Immigration Challenges the Rule of Law. But Trump is Making Things Worse.*, VOX (Sept. 15, 2017, 9:40 AM), https://www.vox.com/the-big-idea/2017/9/15/16311592/illegal-immigration-rule-of-law-daca-sessions-arpaio ("[T]he pardon perniciously undercut one of the greatest and most important guarantees of the rule of law: that executive officials who misuse their governmental powers are subject to checks and balances administered by an independent judiciary.").

263 *Compare* Press Release, U.S. Comm'n on Civil Rights, The U.S. Commission on Civil Rights Denounces the Pardon of Former Sheriff Joe Arpaio (Sept. 8, 2017), http://www.usccr.gov/press/2017/09-08-Arpaio.pdf (arguing the pardon "undermines the rule of law in this country by signaling that supporters and allies of the President who violate civil rights and ignore orders from federal courts will not be held accountable as our system of justice requires"), *and* Editorial Board, *The Arpaio Pardon Displays Trump's Disdain for the Rule of Law*, WASH. POST (Aug. 28, 2017), https://www.washingtonpost.com/opinions/the-arpaio-pardon-displays-trumps-disdain-for-the-rule-of-law/2017/08/28/062b0334-8c2c-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.192e906a529a, *with* Press Release, Congressman Andy Biggs, Congressman Andy Biggs' Statement on Presidential Pardon for Sheriff Joe Arpaio (Aug. 25, 2017), https://biggs.house.gov/media/press-releases/congressman-andy-biggs-statement-presidential-pardon-sheriff-joe-arpaio ("[President Trump] brought justice to a situation where the Obama administration had attempted to destroy a political opponent. . . . [Sheriff Arpaio] did right by the law—even as the political consequences continued to mount."), *and* James Fotis, *Trump's Pardon of Ex-Sheriff Joe Arpaio Was the Right (and Courageous) Thing to Do*, FOX NEWS (Aug. 26, 2017) http://www.foxnews.com/opinion/2017/08/26/trumps-pardon-ex-sheriff-joe-arpaio-was-right-and-courageous-thing-to-do.html (claiming "any reasonable person who was there [in the courtroom during Arpaio's trial] to pass judgment on this honest law-abiding man—who gave his life to the rule of law—could never have found him guilty on the evidence presented").

264 *See, e.g.*, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. C 17-05211 (N.D. Cal. filed Sept. 8, 2017). As of September 20, 2017, three other cases were related: *Garcia v. United States*, No. 3:17-cv-05380 JCS (N.D. Cal. filed Sept. 18, 2017), *San Jose v. Trump*, Case No. 5:17-cv-05329 HRL (N.D. Cal. filed Sept. 14, 2017), and *California v. U.S. Dep't of Homeland Sec.*, No. 17-cv-05235 MEJ (N.D. Cal. filed Sept. 11, 2017). *See* Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05211-WHA, slip op. at 1 (N.D. Cal. Sept. 20, 2017) (Order Relating Cases). Another case challenging the DACA repeal was filed in New York. *See* New York v. Trump, No. 17-cv-5228 (E.D.N.Y. filed Sept. 6, 2017).

265 *See, e.g.*, Complaint for Declaratory & Injunctive Relief, Regents of Univ. of Cal. v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05211 (N.D. Cal. Sept. 8, 2017); Complaint for Declaratory and Injunctive Relief, New York v. Trump, No. 17-cv-5228 (E.D.N.Y. Sept. 6, 2017).

swered "no" to Obama's initiatives are answering "yes" to Trump's.[266] Meanwhile, those who appreciate that "it depends" are likely to continue thinking so. To be sure, the details of what the answers depend upon may change. But the major points of departure remain: commentators disagree about what the rule of law means, the law that matters, the facts that matter, and the speculation that matters.[267]

Beyond the forgoing generalities, a few additional points warrant mention. First, one important difference between Obama's and Trump's respective policies is that the latter implicates questions about constitutional rights (such as due process, equal protection, and religious freedom), whereas Obama's deferred-action initiatives implicated questions about constitutional structure.[268] In both contexts, however, a similar puzzle emerges: Can presidential actions comport with the *rule of law*, if the Constitution envisages "plenary" (i.e., virtually unchecked) federal power over immigration regulation?[269] In the travel ban context, for instance, Trump may have complied with applicable statutes. Still, the vast discretion delegated by Congress in INA section 212(f), or the Court's plenary power doctrine itself, might violate the rule of law.[270] If so, then a myopic focus on whether the travel ban violates the rule of law can miss the bigger picture.

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266 Distinctions are certainly possible. Here, I would only caution that pushing too hard on rule of law claims—whether in support or critique of Trump's policies—is likely to bleed the ideal of further meaning, if it is not already too late.

267 *See generally supra* Part III.

268 *See, e.g.*, Petition for Writ of Habeas Corpus, Medina v. U.S. Dep't of Homeland Sec., No. 3:17-cv-05110 (W.D. Wash. Feb. 13, 2017) (challenging original travel ban on constitutional rights grounds); Complaint for Declaratory & Injunctive Relief, *supra* note 265 (challenging DACA repeal on due process grounds). By comparison, DACA/DAPA may have violated the separation of powers or the Take Care Clause, causing injury to complaining states or the public more generally, but not in a way that violated any individual's constitutional rights.

269 *See* Rubenstein & Gulasekaram, *supra* note 150 (providing an in-depth treatment of the Court's plenary power doctrine, its vestiges, and its recent developments). The Court's plenary power doctrine traces to the late nineteenth century. *See* Fong Yue Ting v. United States, 149 U.S. 698, 705 (1893) (asserting that the immigration power "is vested in the national government, to which the Constitution has committed the entire control of international relations"); Chae Chan Ping v. United States, 130 U.S. 581, 603 (1889) ("Jurisdiction over its own territory to [exclude aliens] is an incident of every independent nation.").

270 Indeed, the text of the Constitution itself does not expressly enumerate a federal immigration power. *See* Jean v. Nelson, 711 F.2d 1455, 1465 (11th Cir. 1983) (noting that "the Constitution fails to delegate specifically the power over immigration"), *aff'd*, 472 U.S. 846 (1985). Instead, the Court has derived a federal immigration power from the Commerce Clause, the Naturalization Clause, and extraconstitutional principles of international sovereignty. *See* INS v. Chadha, 462 U.S. 919, 940 (1983); *Fong Yue Ting*, 149 U.S. at 705; *Chae Chan Ping*, 130 U.S. at 603. While the federal immigration power is now undeniable as a matter of doctrine, that doctrine is arguably incompatible with the written Constitution, and thus the rule of law. That said, if the Court were to overrule its century-old plenary power doctrine, that too has implications

Second, on rule of law grounds, someone might reasonably draw a distinction between nonenforcement of the law (per Obama) and enforcement of the law (per Trump). Whereas enforcement implicates the government's *coercive* power, nonenforcement arguably does not. Still, this distinction does not address the threat of the government's *corrosive* power. Although the harm from nonenforcement may be dispersed, that does not make it any less real, less impactful, or less threatening to the rule of law's axiom of a government bound by law.

V. Taking (More) Care

The Obama-Trump case studies show not only why appeals to the rule of law are generally unhelpful, but also how they may be costly. These protestations notwithstanding, the rule of law ideal is too ingrained in the American conscience to think that paeans to it will suddenly cease. Indeed, if my intuition is correct—that rule of law talk channels anxiety about government power—then I suspect we will hear more chatter in line with growing anxieties in the years ahead.

This Part offers some prescriptions moving forward. First, taking care of the rule of law requires that it be employed more scrupulously. At the retail level of gauging the legitimacy or desirability of presidential actions, the rule of law has little to offer, and can detract or distract from more productive lines of inquiry. Second, and relatedly, we should scrap the *relative* rule of law, or at least proceed with a clear-eyed view of its latent dangers. Third, if the rule of law matters, then we should talk less about it, and insist more on doctrines and institutional arrangements that might actually modulate, if not reverse, the accretion of executive power. The discussion below elaborates on these points.

A. Does the Rule of Law Matter?

Even if nobody wins rule of law arguments, appeals to the rule of law may still have dialogic value. For instance, the concept might provide a useful focal point around which to air competing viewpoints about the uses and abuses of government power.[271] Rule of law de-

for the rule of law. After all, the doctrine of stare decisis is wedded to the rule of law ideal. *See* Galvin v. Press, 347 U.S. 522, 523–24, 530–31 (1954) (upholding the deportation of a long-term resident alien who was a member of the Communist Party, and noting that if the Court were writing on a "clean slate" it might reach a different conclusion—but that, alas, the "slate is not clean. . . . [T]here is not merely 'a page of history,' but a whole volume" (citation omitted)); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865, 869 (1992) (citing the "rule of law" as a reason for adhering to stare decisis, and for preserving the "Court's legitimacy").

271 *See, e.g.*, Fallon, *supra* note 1, at 41; *cf.* Waldron, *supra* note 42, at 152 ("[T]he contesta-

bates might even help us get a better handle on what the rule of law means, should not mean, or could mean.[272] But these possibilities say nothing about how well the rule of law serves these dialogic functions, at what potential cost, and compared to what alternatives.

If nothing else, the Obama-Trump case studies suggest that the dialogic value of rule of law talk is highly contingent. Cultural context, political saliency, legal and factual indeterminacy—all can affect the utility of rule of law talk. Rather than focus debate, appeals to the rule of law can polarize debate. Rather than lead to understanding, appeals to the rule of law can lead to misunderstandings. Rather than shame government officials into proper action, appeals to the rule of law can legitimize improper action.

These generalized concerns are especially acute when the rule of law ideal is employed to evaluate particular presidential actions or policies. At that level of specificity, the rule of law is too often and easily politicized. For those holding out hope that the rule of law may yet remain a useful concept, political contamination of the ideal should be a matter of great concern. If the rule of law comes to lose all meaning in the presidential context, that infection can spread to hamper the ideal's utility in contexts where it might otherwise be put to better use.

Moreover, because of its emotive appeal, rule of law talk can be distorting. In almost all instances, we do not need the rule of law to evaluate the uses and abuses of presidential power. The following queries get to the heart of this skepticism: (1) Can a presidential policy violate the Constitution or applicable statutes, yet still comply with the rule of law? (2) Conversely, if a presidential policy complies with the Constitution and applicable statutes, can the policy nevertheless violate the rule of law?

Negative answers to both questions arguably leave no additional work for the rule of law to do. For instance, if we can answer whether Obama's deferred-action initiatives violate *positive law*, then whether they violate the *rule of law* is superfluous. And in that case, rule of law talk may simply be a meaningless side show. Meanwhile, affirmative answers to the questions above would mean that complying with positive law is neither necessary nor sufficient to comply with the rule of law. That is cause for a different concern. What would the rule of law mean, and how would it translate in action, if compliance with the *rule*

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tion between rival [rule of law] conceptions deepens and enriches all sides' understanding of the area of value that the contested concept marks out.").

272 *See* Waldron, *supra* note 42, at 161–63.

of law did not depend on government adherence to the *law*? The answers, whatever they may be, would likely have more to do with political preferences, or what we think the law ought to be.

To be sure, rule of law talk may help rally troops in ways that more tailored arguments do not. When all is said, however, judgments that a particular presidential policy violates or complies with the rule of law will hardly ever convince others who hold alternative views. Normative predispositions about the presidential policy at issue will naturally prevail.

B. Pitfalls in the "Relative Rule of Law"

Recall that, under the relative rule of law, commentators offer accolades to government policies or arrangements that move the rule of law needle in the right direction relative to the status quo. During the Obama Administration, the relative rule of law was popular among DACA/DAPA supporters because it offered a way to justify these programs in rule of law terms.[273] Now that the tables are turned, Trump's supporters are making similar use of this idea. Consider, for instance, how Trump supporters have argued that the repeal of DACA/DAPA moves the rule of law needle back in the right direction.[274] Notice, however, that if we take both sets of evaluations at face value, neither amounts to a claim that the rule of law ideal is being met. Just that, from the evaluator's perspective, the presidential policies under consideration are better for the rule of law relative to some preconceived baseline.

Despite good intentions, the relative rule of law is analytically fraught and normatively unsatisfying. To begin with, the relative rule of law succumbs to all the analytical traps attending the (regular) rule of law,[275] *plus* another: there is no way to know whether a presidential action is moving the system in the right direction.

This analytical blind spot owes, in large measure, to the complexity of our legal system.[276] By design, our legal system features overlap-

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273 *See supra* notes 193–97 and accompanying text.

274 *See, e.g.*, Andrew C. McCarthy, *Trump's Immigration Guidance: The Rule of Law Returns*, PJ MEDIA (Feb. 22, 2017), https://pjmedia.com/andrewmccarthy/2017/02/22/trumps-immigration-guidance-the-rule-of-law-returns/.

275 *See supra* Part III.

276 The core idea of "complexity" (or "systems") theory is "that institutions, groups and other aggregates—including nested aggregates of aggregates—can have emergent properties that cannot be deduced by inspecting their components or members in isolation, one by one." ADRIAN VERMEULE, THE SYSTEM OF THE CONSTITUTION 8 (2011) (bringing systems theory to constitutional law). The properties of a complex system "arise from the interaction of institu-

ping, intersecting, and nested subcomponents. At the most basic level, federal law consists of the Constitution, federal statutes, and regulations—each with their own intermingling complexities and, at times, contradictions. Add to that a variety of institutions—Judiciary, Congress, Executive—each playing an iterative part in the law's creation, implementation, and interpretation. Now add states to the mix—each with their own structures, institutions, laws, etc.

Against this backdrop, it is hard if not impossible to know whether a rule of law improvement at a system sublevel will mark an improvement at other sublevels, much less at the overall system level. Moreover, all of this assumes that we can identify what qualifies as a rule of law improvement in the first place. That assessment depends not only on contestable rule of law evaluations of the replacement policy, but also on contestable rule of law evaluations of the policy being replaced.

Even stepping away from this complexity, the relative rule of law will, in some contexts, lead to inherently contradictory results. The nonenforcement of congressional statutes is a prime example. Any rule of law advancements for the "law in action" can, simultaneously, upset the "law on the books" by equal or greater margins. To see how, assume arguendo that nonbinding guidance documents advance the rule of law norm of anti-arbitrariness at the *administrative level*. Still, the more systematized nonenforcement becomes at that level, the more it arguably moves the rule of law needle in the wrong direction at the *statutory level*. Put otherwise, the more clear, stable, and transparent the nonenforcement policy is, the more clearly, stably, and transparently it may rub against Congress's laws.[277]

Beyond these analytical pitfalls, the relative rule of law may be rejected on principle alone. Not because it falls short of the rule of law ideal; I agree we will never reach it. Rather, the objection is that incremental improvements (assuming they are improvements) should not necessarily satisfy us. After all, it is relative. For example, assume that

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tions," *id.*, and can be difficult if not impossible to anticipate ex ante. *See* Caryn Devins et al., *Against Design*, 47 ARIZ. ST. L.J. 609, 622 (2015) ("The larger system within which a legal rule or a legal institution functions is subject to unpredictable, unimaginable, unprestateable change."); *see also* J.B. Ruhl & Daniel Martin Katz, *Measuring, Monitoring, and Managing Legal Complexity*, 101 IOWA L. REV. 191 (2015).

277 Zachary Price has likewise argued that the rule of law ideal does not resolve questions about executive power in nonenforcement contexts. *See* Price, *supra* note 41, at 237 ("[M]ore transparent and definite enforcement policies may be less arbitrary, but by more clearly signaling the limits of enforcement, such policies may yield an on-the-ground law in sharper conflict with statutory requirements.").

nonbinding enforcement policies are better for the rule of law than freewheeling enforcement discretion at the administrative level. Still, *binding* agency enforcement policies will generally be better for all the same rule of law reasons and more. If the hydraulics of governance lead agencies to the path of least procedural resistance, then we may never get what is better, much less what is best.[278]

Understood in context, the relative rule of law sets us on a dangerous slope. If the argument is that the relative rule of law is a worthwhile evaluative tool, it clearly is not for all the reasons the (regular) rule of law is not, plus the additional reasons discussed above. If the argument is that the relative rule of law is a limiting principle, it also clearly is not. Indeed, resort to the relative rule of law could have the opposite effect: accommodating, if not enabling, executive action. Finally, if the relative rule of law is intended as a second-best option, then I demur. There are other options, which to my mind are far more promising for gauging and checking executive power. The relative rule of law throws in the towel, but there is plenty of fight left. Which brings me to my last set of prescriptions.

C. Judicial Review & Doctrinal Nudges

Instead of appealing to the rule of law, the Executive may be kept in check through judicial review and doctrinal nudges. Judicial review can serve double duty here: first, shaping the doctrines; second, calling the Executive to account to the law, not just to the Electoral College.[279]

A few caveats before proceeding. My suggestions are aimed at controlling executive power, not at promoting the rule of law per se. If those outcomes align, all the better. But, for reasons that should now

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278 *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 408 (2007) (noting that the risk of an adverse judicial ruling increases agency incentives to use policymaking mechanisms not subject to judicial review); *see also* Ashutosh Bhagwat, *Three-Branch Monte*, 72 NOTRE DAME L. REV. 157, 157 (1996) (arguing that because agency nonenforcement decisions have been presumptively exempted from judicial review, administrative agencies "shield policy decisions of great public significance from judicial review by creating a situation in which agencies are able to hide what are at bottom legislative and judicial judgments behind the facade of executive discretion").

279 *Cf.* Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the "Rule" of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161, 166–67 (2007) ("It is simply impossible to define, 'unconstitutional, unauthorized or simply arbitrary or capricious' without judicial review and without a rule-like, systematic backdrop."); Adam Shinar, *Enabling Resistance: How Courts Facilitate Departures from the Law, and Why This May Not Be a Bad Thing*, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 989, 992 (2014) ("The removal of such oversight opens the door to interpretations and actions that may deviate from those of the courts to the point of violating the law.").

be clear, my project does not depend on squaring the rule of law with executive governance.[280] Moreover, it is beyond this Article's purview to insist on any particular doctrinal rule. My more limited objective is to highlight some flexors in existing doctrines where adjustments might be made without upsetting the bedrocks of administrative governance. As matters currently stand, *all* of the doctrines discussed below are somewhat up for grabs, and *all* may break in favor of presidential power. My suggestions here angle against that dangerous prospect.[281]

1. Judicial Review

Left to their own devices, the political organs of government can work things out.[282] Whatever the merits of such bargaining, however, nobody doubts that the President would have the upper hand, and, with it, more potential to act outside the law.[283]

Absent judicial review, it is too easy for government officials to insist that the actions at issue are lawful, and give public reasons that either are not the real reasons, or not legally cognizable ones. The mere availability of judicial review might help keep the President *legally honest*—not only with respect to the content of executive policies, but also the motivations behind them.[284]

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280 For recent accounts that do make this effort, see, for example, *supra* note 88.

281 Incidentally, I agree with Kathy Watts's assessment that a coordinated, holistic, doctrinal approach is needed to "control[] presidential control" of the administrative state. *See generally* Watts, *supra* note 34. My doctrinal prescriptions here are candidates for consideration, but should not be taken as my attempt at a comprehensive package. That project would require much more analysis than space allows here.

282 *See* Erin F. Delaney, *Analyzing Avoidance: Judicial Strategy in Comparative Perspective*, 66 DUKE L.J. 1, 1 (2016) (arguing that some justiciability doctrines promote interbranch dialogue, thus contributing to a more democratic resolution); Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1620–31, 1683–86 (2014) (arguing that the branches negotiate their institutional interests with one another and that courts are not well placed to monitor these "intermural deals," which instead should be policed for bad outcomes by elected officials); *see also* Cox & Rodríguez, *supra* note 38, at 210–14 (embracing a dynamic view of interbranch contestation for developing immigration policy).

283 *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 436–38 (2012); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 1010–15 (2008) (addressing social costs and benefits to "showdowns" between Congress and the President); Rubenstein, *supra* note 135, at 1648–49, 1659 (explicating how constitutional self-help, if legitimized, would wreak havoc for both separation of powers and federalism). *But see* David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 16–17 (2014) (making the positive case for separation of powers self-help, partly on rule of law grounds).

284 Under existing doctrine, motivations can be an important element of discerning constitutional rights violations, as the litigation over Trump's travel ban illustrates. But, just as well, government motivations can be important for structural reasons too. Consider, in this respect,

Owing to the law's indeterminacy, executive officials will almost always have some legal reasoning to offer up. Judicial review, however, requires the executive branch to defend its legal reasoning in ways that discourse in other public forums cannot. Indeed, without a judicial umpire, the general public is more likely to hold the President accountable for *rule of law* violations rather than for *legal* ones—a troubling prospect given how distorting rule of law talk can be.

The case studies presented in this Article provide important examples of how judicial review can pierce political rhetoric. In the *Texas* litigation, for example, the Obama Administration was uncomfortably pressed to explain how DAPA was not law, and yet, if implemented as planned, would have dramatically reshaped the lives of millions of undocumented immigrants without Congress.[285]

The information-generating effects of judicial review continue under the Trump Administration. For instance, government lawyers have been pressed by courts to explain how the travel ban is different from, not merely a subterfuge for, Trump's campaign pledge for a Muslim ban.[286] Although we might never know the truth, we will have a better chance through judicial processes than we could through Twitter.

The foregoing examples demonstrate what judicial review offers, but should not be taken for granted. Recall that both Administrations argued in the cases above that the courts had *no* role to play, whether for lack of standing, lack of APA reviewability, or because immigration is a special area of law.[287] Depending on context, greater or lesser amounts of deference might be appropriate.[288] The suggestion here is only to keep the facility of judicial review open.

2. Taking Care of De Facto Delegation

Recall that de facto delegation is not the product of any particular statute. Rather, it emerges from the conflation of increasingly

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whether congressional gridlock is a legally sufficient (or even legally relevant) motivation for unilateral executive action. I think not, and the Court does not appear to think so either. *See* Rubenstein, *supra* note 135, at 1629 n.43 (discussing the Court's negative reaction to the Obama Administration's suggestion, in *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014), that recess appointments were necessary because the Senate was being obstructionist).

285 *See supra* notes 113–22 and accompanying text.

286 *See* Oral Argument at 1:02:29–1:05:15, Washington v. Trump, 847 F.3d 1151 (9th Cir. 2017) (No. 17-35105), https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000010885.

287 *See supra* note 20 and accompanying text.

288 *Cf.* Chevron U.S.A. Inc. v. Nat. Res. Def. Counsel, Inc., 467 U.S. 837, 842–45 (1984); Skidmore v. Swift & Co., 323 U.S. 134, 136–38 (1944). Of course, the literature on agency deference is legion. Mercifully, it is also beyond the scope of this Article.

stringent immigration laws, economic draws into the country, and the executive branch's inability to effectively police the border. The result is an enormous unauthorized population, which the Executive can shape through enforcement decisions that bear significantly on the country's demographics and economy.[289]

Scholars who prescriptively defend executive lawmaking, based on descriptive accounts of de facto delegation, are quite understandably trying to make the most out of a bad hand. Essentially, they are seeking to close some of the gap between the law in action and what they perceive to be outmoded conceptions of the legislative-executive lawmaking relationship.[290] But countenancing de facto delegation in constitutional or rule of law terms can make a bad hand worse. More specifically, Congress may pass even more restrictive immigration laws, hoping or anticipating—but by no means guaranteeing—that the excesses will be responsibly modulated by future Presidents.[291]

Conceiving (or reconceiving) the President as a lawmaking principal, as some have suggested, is a remarkable constitutional concession.[292] To see how, compare de facto delegation with express delegation. Under the latter, statutory conferrals of authority must contain an "intelligible principle" to pass constitutional muster.[293] In application, the nondelegation doctrine is famously toothless; just about anything counts as an intelligible principle.[294] But justifying presidential lawmaking power on the basis of de facto delegation goes

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289 *See* Cox & Rodríguez, *supra* note 160, at 463–65, 511–14; *see also* MOTOMURA, *supra* note 38, at 53 ("[T]he uncertainty that selective discretion creates for unauthorized migrants is an essential part of the system itself.").

290 Cox & Rodríguez, *supra* note 38, at 219–20 (discussing their support for a "two-principals" lawmaking model in "second-best" terms).

291 This is not a far-fetched possibility. In 1996, for example, Congress passed two major immigration-related bills that significantly expanded the crime-based grounds of deportability, stripped immigration judges of certain relief-awarding discretion, and significantly curtailed judicial review of agency removal decisions. As Congressman Frank recounts, however, key members of Congress who led efforts to *pass* the 1996 laws later criticized the executive branch for not exercising more favorable discretion under those laws. *See Transcript of Panel Presentation on Immigration and Criminal Law. Hosted by the Association of the Bar of the City of New York*, 4 N.Y.C. L. REV. 9, 32–33 (2001).

292 *See* Cox & Rodríguez, *supra* note 38.

293 *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

294 *See* Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2099 (2004) (noting the "difficulty of squaring" the postulate that "Congress may not delegate legislative power[] with the fact that Congress has massively delegated legislative rulemaking authority to administrative agencies"). For paradigmatic examples of the Court's tolerance for broad delegations, see, for example, *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946); and *Yakus v. United States*, 321 U.S. 414, 426 (1944).

considerably further. By its very nature, de facto delegation emerges from the structure of the immigration code and external political and socioeconomic levers.[295] The vernacular of an "intelligible principle" does not even translate on this grid.[296] Far from yielding an intelligible principle, de facto delegation effectively converts the president into a lawmaking principal.

If de facto delegation is a defining feature of the immigration system, then something should be done to curb this pathology. Moreover, if de facto delegation is not unique to the field of immigration, then how it is handled (or not handled) can extend to other administrative contexts.

The Article II Take Care Clause offers promise. More specifically, that provision could be interpreted and applied to create substantive limits on how the Executive exercises its de facto delegated power. The metes and bounds of what that substantive limitation would be, or could be, was left undecided in *United States v. Texas*,[297] and has been debated at length in the literature.[298]

Again, it is beyond this Article's purview to specify what that doctrine should be. But I reject the notion that the Court should not even try simply because the result might be doctrinally messy. A lot of constitutional law is messy, and this is no occasion for the Court to pass on its self-proclaimed duty from *Marbury v. Madison* "to say what the law is."[299]

3. Notice-and-Comment Rulemaking

The Supreme Court missed another opportunity, in the *Texas* litigation, to shore up the befuddling line between so-called "legislative"

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295 *See supra* notes 160–61 and accompanying text.

296 Indeed, this concern may be at the core of Cox & Rodríguez's critique of the OLC Memo that accompanied DAPA. *See* Cox & Rodríguez, *supra* note 38, at 146 ("[F]or the vast majority of enforcement choices that must be made, there are no coherent congressional priorities to expect from the [immigration] Code.").

297 *See supra* notes 123–27 and accompanying text.

298 *See* Cox & Rodríguez, *supra* note 38, at 143–44; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 784–85 (2013); Price, *supra* note 41, at 274–77.

299 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). In lieu of judicial abdication, courts may instead use administrative law "to translate constitutional separation-of-powers concerns into a doctrinal framework that poses fewer threats to the capacity of courts and is more effective when courts do decide to intervene." Daniel E. Walters, *The Judicial Role in Constraining Presidential Nonenforcement Discretion: The Virtues of an APA Approach*, 164 U. PA. L. REV. 1911, 1948 (2016). For suggestions along these lines, see *infra* Section V.C.3.

rules (which must undergo notice-and-comment procedures) and "nonlegislative" rules (which are exempted from those procedures).[300] The academic literature on the subject is legion, but it generally tracks the two sides of the DACA/DAPA procedural debate.[301] On the one hand, notice-and-comment rulemaking is generally preferred over guidance documents—including for some rule of law reasons, such as stability, transparency, agency reason-giving, and more. On the other hand, if agencies are required to undergo notice-and-comment procedures when they publish rules, agencies may opt instead to not have categorical enforcement policies, or to have such policies but not make them publicly known.

Rather than rehash those competing viewpoints, I will simply add my general support for notice-and-comment rulemaking and my reasons for why. Foremost, if we are looking for ways to legitimize and contain executive lawmaking, notice-and-comment procedures are a fairly modest means to that end. These procedures would not prevent the substance of any policy; they simply require that the decisions be made with public participation and reasoned deliberation.[302] Relatedly, the public vetting that attends notice-and-comment rulemaking can help ensure that the government's publicly given reasons are the real reasons for administrative action, especially when those reasons are judicially reviewable.[303] Moreover, notice-and-comment procedures enable interested parties to alert Congress *before* executive poli-

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300 *See* Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1312 (1992); John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 894–96 (2004).

301 For some of that commentary, see *supra* note 300; and see also Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381; Stephen M. Johnson, *Good Guidance, Good Grief!*, 72 MO. L. REV. 695 (2007); Ronald M. Levin, *Nonlegislative Rules and the Administrative Open Mind*, 41 DUKE L.J. 1497 (1992); Levin, *supra* note 125; M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383 (2004); Mendelson, *supra* note 278, at 408; Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483 (1997); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463 (1992); and Connor N. Raso, Note, *Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782 (2010).

302 *See* Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Administrative Procedures as Instruments of Political Control*, 3 J.L. ECON. & ORG. 243, 244, 258 (1987).

303 *See* Kozel & Pojanowski, *supra* note 11, at 149–51. The centrality of reason-giving to the legitimacy of administrative governance is canonized in cases such as *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), which "makes the validity of agency action depend upon the validity of contemporaneous agency reason-giving," Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 YALE L.J. 952, 956 (2007), and *Motor Vehicles Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42–43 (1983), which requires courts to take a hard-look at agencies' reasons for action and inaction.

cies take effect, when legislative input and influence is likely to matter most.[304] In this way, administrative procedure can indirectly facilitate political checks in Congress.

The administrative system accommodates broad congressional delegation and some amount of executive lawmaking. Those accommodations, however, come with procedural strings attached.[305] Courts should reinforce them. Granted, there will be some contexts where nonbinding administrative guidance may be preferred to notice-and-comment rulemaking. That said, there are also contexts where legislation may be preferred to administrative rulemaking. Understood in that broader context, notice-and-comment procedures are a compromise, not an untoward imposition, when the President leverages the administrative apparatus to significantly alter the legal landscape. If the President can effectively change the law "on the books" *and* "in action," simply on the President's say-so, then we really have arrived at the point where law and politics are the same thing.

4. Executive Preemption via Nonbinding Enforcement Policies

The past decade has witnessed an unprecedented surge of state and local laws directed at undocumented immigrants.[306] During the Obama Administration, red states checked the Executive through restrictionist laws. Now, against the Trump Administration, blue states are doing the checking through integrationist laws, including sanctuary laws.[307] Whatever one thinks about the merits of restrictionist and integrationist subfederal laws, these decentralized pockets of resistance operate as a check against presidential policies. Whether they

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304 *See* McCubbins, Noll & Weingast, *supra* note 302, at 254; Mathew D. McCubbins, Roger G. Noll & Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 468–81 (1989); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

305 *See* KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 219 (1969) (explaining that administrative discretion is unavoidable, and desirable provided that it is "guided by administrative rules adopted through procedure like that prescribed by the federal Administrative Procedure Act"); *see also* Waldron, *supra* note 69, at 18 (specifying procedures necessary for rule of law).

306 *See supra* notes 92–94 and accompanying text.

307 The "sanctuary" movement is ill-defined, but it generally connotes a set of state and local policies that restrain local law enforcement from initiating independent immigration enforcement activity, limit compliance with federal detainer requests, preclude participation in joint enforcement operations with the federal government, prevent immigration agents from accessing local jails, or some combination thereof. *See supra* notes 48 (collecting sources on sanctuary cities), 92–94 and accompanying text.

can withstand federal preemption may depend on how the Court's doctrine develops.

Under the Supreme Court's mainstream preemption doctrine, only federal statutes and binding administrative action can preempt conflicting state policies.[308] In the recent landmark case of *Arizona v. United States*,[309] however, the Court indicated (if not held) that state law was also preempted by the Obama Administration's *nonbinding* enforcement policies.[310] Now, under the Trump Administration, the question is resurfacing with new hue: Can Trump's nonbinding executive policies likewise preempt state integrationist laws?[311]

As I have argued at length elsewhere, a federalism doctrine that would foreclose the preemptive effect of nonbinding executive policies could, cross-structurally, limit executive power.[312] At least in in-

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308 *See, e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 865 (2000) (holding that an agency regulation with force of law preempted a state tort law claim). For in-depth treatments of administration preemption—some more skeptical than others—see Stuart Minor Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2154 (2008); William Funk, *Preemption by Federal Agency Action*, *in* PREEMPTION CHOICE 214, 215–16 (William W. Buzbee ed., 2009); Galle & Seidenfeld, *supra* note 67, at 1940; Nina A. Mendelson, Chevron *and Preemption*, 102 MICH. L. REV. 737 (2004); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 756 (2008); Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2071–72 (2008); David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125 (2012); and Catherine M. Sharkey, *Federalism Accountability: "Agency-Forcing" Measures*, 58 DUKE L.J. 2125, 2185–86 (2009).

309 567 U.S. 387 (2012).

310 *See id.* at 407–08 (preempting provisions of Arizona's S.B. 1070, at least in part because of its potential conflict with federal immigration enforcement priorities); *see also* Ariz. Dream Act Coal. v. Brewer, 757 F.3d 1053, 1061 (9th Cir. 2014) (declining to resolve a similar preemption claim but deeming it "plausible"). For a detailed discussion of the metes and bounds of administrative preemption, and the Court's questionable extension of this doctrine in *Arizona* to include nonbinding executive action, see generally David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL'Y 267, 268 (2015). *See also* Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31, 62–63 ("*Arizona* may be less significant for its impact on state immigration initiatives than for ratifying and furthering the consolidation of immigration authority in the executive branch."). The enforcement policies at issue disclaimed having legal force, at least as against the federal government. *See, e.g.*, Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf't, to All Field Office Dirs. et al., *supra* note 164, at 6 ("[T]his memorandum . . . does not, and may not be relied upon to create any right or benefit . . . enforceable at law by any party . . . ."). Yet, it was these policies that the Court found to provide a basis, or partial basis, of preempting at least one (maybe two) of the state laws at issue.

311 *See* Rubenstein & Gulasekaram, *supra* note 150, at 4.

312 *See* David S. Rubenstein, *Administrative Federalism as Separation of Powers*, 72 WASH. & LEE L. REV. 171 (2015). For treatments of how federalism can safeguard separation of powers in other contexts, see Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459, 502–03 (2012), exploring this idea for cooperative federalism schemes; and Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB.

stances where the Executive wants national uniformity, preemption would depend on the existence of a congressional statute or binding regulation to displace state law. Either of those alternatives would yield far more accountability, transparency, and deliberation, than if the President can preempt state and local policies through nonbinding executive memoranda and litigation briefs.

To allow the Executive to have policies that are nonbinding on itself, yet binding on states, is a structural hypocrisy that our constitutional system should not condone. Executive policies are either law or they are not. But these policies should not *simultaneously* be deemed law (for purposes of preemption) and not law (for purposes of separation of powers).[313] Something must give. If the Executive can have its cake, for separation of powers, and eat it too, for federalism, then what crumbs remain of our structural constitution?

Conclusion

Through the Obama-Trump case studies, this Article has focused critical light on what the rule of law ideal cannot tell us, and how it can lead us astray. For those holding out hope that the rule of law can and should still matter, it must be employed more scrupulously. When applied at the retail level of gauging the legitimacy of presidential policies, rule of law talk is not only unhelpful, it is potentially dangerous. Whatever value there may be in squaring the rule of law with trends in executive governance, it seldom prevents—and almost always accommodates—accreting executive power. If that is a concern, then we should talk less about the rule of law, and insist more on doctrines and institutional arrangements that might reverse the trend.

Pol'y 181, 185–86 (1998), exploring the same. *See also* Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 Wm. & Mary L. Rev. 825, 829–30 (2004) (exploring this idea for foreign affairs federalism).

313 *See* Rubenstein, *supra* note 310, at 268 ("Administrative preemption is a convenience and contrivance for modern government. But, as hypothesized here, it is also a constitutional paradox.").