

## RELIANCE ON NONENFORCEMENT

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### ABSTRACT

*Can regulated parties ever rely on official assurances that the law will not apply to them? Recent marijuana and immigration non-enforcement policies have presented this question in acute form. Both policies effectively invited large numbers of legally unsophisticated people to undertake significant legal risks in reliance on formally nonbinding governmental assurances. The same question also arises across a range of civil, criminal, and administrative contexts, and it seems likely to recur in the future so long as partisan polarization and sharp disagreement over the merits of existing law persist.*

*This Article addresses when, if ever, constitutional due process principles may protect reliance on federal officials' nonenforcement assurances. The Article proposes that answering this question ultimately requires balancing separation of powers costs against fairness considerations. As a general matter, the balance tilts in favor of preserving the enforceability of substantive prohibitions, so as to deny executive officials de facto authority to cancel statutes by inviting*

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*reliance on promised nonenforcement. In certain circumstances, however, particularly acute fairness concerns or limited separation of powers costs support recognizing a reliance defense.*

*Courts have already recognized a limited anti-entrapment due process defense in some cases in which enforcement officials mistakenly assure regulated parties that planned conduct is lawful. This Article proposes that an analogous reliance defense should bar use of information obtained in reliance on promised nonenforcement, including information provided to the government in connection with recent immigration programs; that other forms of indirect reliance, such as providing facilities or services to formally illegal businesses, should receive protection; that courts should sometimes protect individuals' reliance on congressionally mandated (rather than agency-initiated) nonenforcement; and that longstanding persistence of overt nonenforcement policies should eventually support a due process defense of desuetude. The Article also suggests that Presidents and Congresses in the future might seek to avoid risks of unfairness created by nonenforcement policies by relying instead on executive clemency, administrative measures, and legislative reforms to moderate the scope of outdated or unpopular laws.*

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## INTRODUCTION

When, if ever, may private parties rely on official assurances that federal law will not apply to them? This question arises in a bewildering array of contexts, from humdrum to monumental. At the most everyday level, federal park police might allow parking in a particular spot only to return with a ticket, or harried Internal Revenue Service personnel might provide mistaken guidance on how to complete a tax return. More consequentially, federal law enforcement and intelligence officials may enlist undercover agents to join criminal operations as a means of uncovering crimes, some federal agencies issue no-action letters and advisory opinions indicating that planned conduct will not be punished, and a panoply of administrative agencies issue enforcement policies indicating how they plan to enforce the many detailed statutes and regulations they administer. Such government assurances are often formally non-binding—they indicate only what the government plans to do, not what the law is—and yet at the same time they seem certain as a practical matter to induce reliance. Indeed, in three administrative law cases in the past five years, regulated parties have appeared before the Supreme Court crying foul because of an agency's unexpected shift in enforcement practice.<sup>1</sup>

Recently, this question has arisen in still more acute form as a result of two controversial enforcement policies, both approved at the highest levels of government and now in doubt as a result of Donald Trump's election as President, which occurred just as this Article was going to press. First, in a series of guidance documents, the U.S. Justice Department announced enforcement priorities aimed at accommodating the increasing number of states that have amended their own laws to legalize marijuana.<sup>2</sup> Although possessing

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1. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-27 (2016); *FCC v. Fox Television Stations, Inc. (Fox II)*, 132 S. Ct. 2307, 2317-18 (2012); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012).

2. See Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice, to All U.S. Attorneys (Feb. 14, 2014) [hereinafter 2014 Cole Financial Crimes Guidance], [https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20\(2\).pdf](https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf) [<https://perma.cc/E8X6-FN57>]; Memorandum from James M. Cole, Deputy

(let alone distributing) marijuana remains a federal crime,<sup>3</sup> the Department of Justice guidance indicates that federal prosecutors generally will not devote resources to enforcing federal narcotics laws against parties operating in compliance with state law.<sup>4</sup> Second, in two programs (one ultimately blocked by a preliminary injunction<sup>5</sup>), the Department of Homeland Security invited broad categories of undocumented immigrants to apply for “deferred action,”<sup>6</sup> a two- or three-year promise of nonremoval that entailed eligibility for work authorization and other potential benefits.<sup>7</sup> As this Article was going to press, the incoming President’s exact plans with respect to marijuana and immigration remained unclear, but his sharp anti-immigration rhetoric during the campaign suggested he might well choose to terminate the deferred action programs.<sup>8</sup>

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Attorney Gen., U.S. Dep’t of Justice, to All U.S. Attorneys (Aug. 29, 2013) [hereinafter 2013 Cole Marijuana Enforcement Guidance], <https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf> [<https://perma.cc/PW6N-LD2G>]; Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice, to All U.S. Attorneys (June 29, 2011) [hereinafter 2011 Cole Medical Marijuana Guidance], <https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf> [<https://perma.cc/NP5Q-3UN2>]; Memorandum from David W. Ogden, Deputy Attorney Gen., U.S. Dep’t of Justice, to Selected U.S. Attorneys (Oct. 19, 2009) [hereinafter Ogden Marijuana Guidance], <https://www.justice.gov/sites/default/files/opa/legacy/2009/10/19/medical-marijuana.pdf> [<https://perma.cc/3NWU-QD8C>].

3. 21 U.S.C. §§ 812(c), 841, 844 (2012).

4. See Ogden Marijuana Guidance, *supra* note 2, at 2.

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

6. See Memorandum from Jeh Charles Johnson, Sec’y, U.S. Dep’t of Homeland Sec., to Leon Rodriguez, Dir., U.S. Citizenship & Immigration Servs.; Thomas S. Winkowski, Acting Dir., U.S. Immigration & Customs Enf’t; & R. Gil Kerlikowske, Comm’r, U.S. Customs & Border Prot. (Nov. 20, 2014) [hereinafter DAPA Memo], [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf) [<https://perma.cc/JJ2UT-UZTK>]; Memorandum from Janet Napolitano, Sec’y, U.S. Dep’t of Homeland Sec., to David V. Aguilar, Acting Comm’r, U.S. Customs & Border Prot.; Alejandro Mayorkas, Dir., U.S. Citizenship & Immigration Servs.; & John Morton, Dir., U.S. Immigration & Customs Enf’t (June 15, 2012) [hereinafter DACA Memo], <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [<https://perma.cc/67EL-EJB7>].

7. See 8 C.F.R. § 274a.12(c)(14) (2016); DAPA Memo, *supra* note 6, at 2.

8. See Jonathan Capehart, *Why Millions Fear the Looming Trump Presidency*, WASH. POST: POST PARTISAN (Nov. 14, 2016), <https://www.washingtonpost.com/blogs/post-partisan/wp/2016/11/14/why-millions-fear-the-looming-trump-presidency/> [<https://perma.cc/86W3-9HCH>] (noting that terminating DACA and DAPA is “No. 5 on Trump’s ‘10-point plan to put America first’”).

The marijuana and immigration policies raise difficult reliance concerns because both policies, like other nonenforcement promises, were formally nonbinding: the policy documents made clear that they guaranteed nothing.<sup>9</sup> Yet as a practical matter, both policies effectively invited millions of people, many of them legally unsophisticated, to take significant legal risks. If the government resumes enforcement, marijuana entrepreneurs could be guilty of multiple federal crimes with stiff penalties,<sup>10</sup> while deferred action applicants will have provided the government with a removal case “on a platter.”<sup>11</sup> A dissenting Fifth Circuit judge even touted this feature of the immigration programs as evidence of their validity:

[B]y encouraging removable aliens to self-identify and register, both [deferred action programs] allow DHS to collect information (names, addresses, etc.) that will make it easier to locate these aliens in the future—if and when DHS ultimately decides to remove them. DHS is, of course, a law enforcement agency, and this is what we would call “good policing.”<sup>12</sup>

It seems doubtful, to put it mildly, that deferred action applicants would have applied if they expected such use of their information; nor is it plausible that marijuana entrepreneurs (let alone their customers) expected federal officials to suddenly reverse course and throw them in jail. A key question the policies raise, then, is whether the detrimental reliance that these initiatives and other similar policies invite should receive legal protection. Of course, the government in the past has normally kept its promises so that no question of reliance would arise. Yet the divisive recent election gives us reason to worry that such informal good-government norms may provide much weaker restraints in the future.<sup>13</sup>

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9. See 2014 Cole Financial Crimes Guidance, *supra* note 2, at 3; 2013 Cole Marijuana Enforcement Guidance, *supra* note 2, at 4; 2011 Cole Medical Marijuana Guidance, *supra* note 2, at 2; Ogden Marijuana Guidance, *supra* note 2, at 3; DAPA Memo, *supra* note 6, at 5; DACA Memo, *supra* note 6, at 3.

10. See 21 U.S.C. §§ 841, 844 (2012).

11. Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 WASH. U. L. REV. 907, 939-40 (2015).

12. *Texas v. United States*, 809 F.3d 134, 191 (5th Cir. 2015) (King, J., dissenting), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

13. See *supra* note 8 and accompanying text.

What is more, although any repudiation of President Obama's immigration policies will be a grave disappointment to many, renewed enforcement following executive assurances to the contrary might be equally important in responding to Trump's own administration in the future. In accepting the Republican Party's presidential nomination, Trump pledged ominously that on the day of his inauguration Americans would "wake up in a country where the laws of the United States are enforced."<sup>14</sup> Notwithstanding Trump's posturing, however, the breadth of current federal prohibitions makes extensive enforcement discretion inevitable in any administration, and past Republican Presidents have used nonenforcement to advance partisan policy objectives too.<sup>15</sup> Nor is it hard to imagine Trump or some other future Republican President adopting enforcement policies with respect to, say, gun control, environmental protection, or tax compliance that a Democratic successor would feel compelled to repudiate. Should any of these possibilities come to pass, the reliance question addressed here will arise in stark form, as indeed it already has in a series of cases challenging the fairness of marijuana prosecutions in light of announced federal enforcement policies.<sup>16</sup>

At present, this reliance question is governed by an untidy and undertheorized set of cases holding that due process bars prosecution in some circumstances but not others.<sup>17</sup> This Article offers an account of this case law and proposes an organizing principle for the doctrine. Although key decisions have often framed the issue in

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14. Donald J. Trump, Republican Nomination Acceptance Speech at the Republican National Convention (July 21, 2016), [https://assets.donaldjtrump.com/DJT\\_Acceptance\\_Speech.pdf](https://assets.donaldjtrump.com/DJT_Acceptance_Speech.pdf) [<https://perma.cc/JH3T-2GMV>].

15. For my prior discussion of some examples, see Zachary S. Price, *Politics of Nonenforcement*, 65 CASE W. RES. L. REV. 1119, 1125-33 (2015).

16. See, e.g., *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014); *United States v. Canori*, 737 F.3d 181, 184-85 (2d Cir. 2013); *United States v. Trujillo*, No. CR-13-2109-FVS-1, 2014 WL 3697796, at \*2 (E.D. Wash. July 24, 2014); *United States v. Washington*, 887 F. Supp. 2d 1077, 1084 (D. Mont.), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012); *Marin All. for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1153-55 (N.D. Cal. 2011); *cf. United States v. Rodriguez*, 147 F. Supp. 3d 1278, 1291-92 (D.N.M. 2015) (reducing sentence for marijuana offense in light of executive enforcement policy).

17. Compare *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 65-66 (1984), and *Matamoros v. Grams*, 706 F.3d 783, 793-94 (7th Cir. 2013), with *United States v. Pa. Indust. Chem. Corp. (PICCO)*, 411 U.S. 655, 674 (1973), and *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965), and *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959).

terms of intuitive unfairness,<sup>18</sup> in fact, reliance defenses require balancing separation of powers concerns against considerations of individual fair notice. On the one hand, protecting individual reliance on promised nonenforcement would enable executive officials to wipe away substantive laws, a result that would defy the basic separation of powers principle that executive officials can alter substantive legal obligations only if Congress has delegated authority to do so.<sup>19</sup> On the other hand, failing to protect individual reliance risks punishing individuals for conduct that they lacked fair notice was subject to sanction.

On the whole, without quite framing the issue in these terms, existing case law has struck this balance in favor of enforceability and against individual reliance,<sup>20</sup> while at the same time carving out a narrow exception in some cases when enforcement officials invited unlawful conduct with assurances of legality rather than mere promises of nonenforcement.<sup>21</sup> Federal courts thus have sometimes protected reliance when official assurances involved at least an apparent exercise of delegated interpretive authority to determine legal meaning or when executive officials held authority to enlist private parties in government operations not subject to generally applicable legal prohibitions.<sup>22</sup> In contrast, courts have generally rejected reliance on promised nonenforcement—even when doing so results in acute unfairness—when officials made no representation that conduct was lawful and promised only to exercise their discretion not to prosecute.<sup>23</sup>

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18. See, e.g., *PICCO*, 411 U.S. at 674 (invoking “traditional notions of fairness inherent in our system of criminal justice”); *Raley*, 360 U.S. at 438 (rejecting prosecution that would “sanction the most indefensible sort of entrapment by the State”); *United States v. Rampton*, 762 F.3d 1152, 1157 (10th Cir. 2014) (describing due process as “rooted in conceptions of fairness”); *United States v. Abcasis*, 45 F.3d 39, 44 (2d Cir. 1995) (recognizing defense to prosecution based on “unfairness” of allowing government to proceed under the circumstances); *United States v. Levin*, 973 F.2d 463, 468 (6th Cir. 1992) (describing the entrapment by estoppel defense as “based upon fundamental notions of fairness embodied in the Due Process Clause of the Constitution”); *United States v. Smith*, 940 F.2d 710, 714 (1st Cir. 1991) (characterizing entrapment by estoppel defense as “predicated upon fundamental notions of fairness embodied in the Fifth Amendment’s due process clause”).

19. See U.S. CONST. art. II, § 3.

20. See, e.g., *Heckler*, 467 U.S. at 60.

21. See, e.g., *PICCO*, 411 U.S. at 674; *Cox*, 379 U.S. at 570-71; *Raley*, 360 U.S. at 438-39.

22. See *PICCO*, 411 U.S. at 674; *Cox*, 379 U.S. at 571; *Raley*, 360 U.S. at 438-39.

23. See, e.g., *United States v. Washington*, 887 F. Supp. 2d 1077, 1095 (D. Mont.), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).



Far from tracking any intuitive notion of fundamental fairness, this pattern of case results ultimately tracks the important separation of powers principle, accepted even by most proponents of broad nonenforcement policies, that enforcement discretion entails authority to ignore completed violations but not to excuse future ones. With the doctrine framed in these terms, I give it an uneasy defense. Historically, executive authority to cancel legal prohibitions was known as the “suspending” or “dispensing” power,<sup>24</sup> and though English monarchs exercised this authority, the Constitution repudiates it by requiring that Presidents “faithfully execute[]” federal laws.<sup>25</sup> This anti-suspending rule—that, absent more specific legislative delegation, executive officials have discretion over which violations to pursue,<sup>26</sup> but not over whether conduct violates the law in the first place—forms an important constitutional background principle against which Congress legislates. The principle preserves ultimate legislative responsibility for the content of law (or at least the scope of interpretive delegations to executive agencies), and it enables creation of regulatory structures that leverage limited enforcement resources to achieve broader societal compliance with substantive law.

A broad reliance defense would undermine this separation of powers principle by creating a legislatively unauthorized suspending power by operation of due process: executive officials could eliminate legal prohibitions simply by inducing reliance on promised nonenforcement. Courts have properly precluded this result by cabining the contexts in which reliance will receive legal protection.<sup>27</sup> To put the point most sharply, individuals who accept any invitation by the President or executive officials to undertake illegal conduct must do so at their peril. Due process cannot normally shield them from future enforcement.

Yet if limits on reliance defenses thus advance separation of powers values, framing reliance defenses in terms of a balance between fair notice and separation of powers may help identify

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24. See Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 278-79 (2009).

25. U.S. CONST. art. II, § 3.

26. See *id.*

27. See, e.g., *United States v. Rampton*, 762 F.3d 1152, 1157 (10th Cir. 2014); *United States v. Hancock*, 231 F.3d 557, 567 (9th Cir. 2000).

additional contexts, like cases involving mistaken assurances of legality, in which the balance should tip the other way. This inquiry carries the inevitable imprecision of all incommensurate balancing tests: it involves, to some degree, assessing “whether a particular line is longer than a particular rock is heavy.”<sup>28</sup> Nevertheless, I suggest several types of cases in which more limited separation of powers costs or more acute fairness concerns may justify broader legal protection for reliance.

First, although courts have generally been more receptive to reliance defenses in the criminal context, reliance defenses should carry similar scope with respect to penal sanctions imposed through civil or administrative processes. Second, broader reliance defenses may be available when parties rely indirectly rather than directly on nonenforcement assurances. In particular, due process principles should thus protect reliance when—as in the Obama Administration’s immigration programs—parties rely by providing damning information to government authorities, or when they violate secondary legal prohibitions that exist mainly to reinforce primary prohibitions that officials promised not to enforce. Third, reliance defenses may carry broader scope when Congress, rather than the executive branch alone, prescribes nonenforcement by denying funding for federal enforcement, as it has done recently with respect to prosecution of state-authorized medical marijuana businesses. And finally, longstanding overt nonenforcement policies might eventually give rise to a desuetude defense against future retrospective enforcement.

Beyond my particular doctrinal proposals, I also suggest here that both Congress and the President might make a more deliberate effort to avoid catching regulated parties, particularly parties as unsuspecting and sympathetic as marijuana entrepreneurs and undocumented immigrants, in the crossfire of future battles over enforcement policy.<sup>29</sup> Presidents might do so in appropriate cases

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28. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (criticizing a balancing test as applied to the dormant Commerce Clause).

29. I have addressed questions regarding executive nonenforcement in two previous articles: Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 748-50 (2014) [hereinafter Price, *Enforcement Discretion*]; Zachary S. Price, *Law Enforcement as Political Question*, 91 NOTRE DAME L. REV. 1571, 1622-24 (2016) [hereinafter Price, *Law Enforcement as Political Question*]. For citations to other scholarship addressing related

through constitutional clemency powers or delegated administrative authorities, and Congress, of course, may amend underlying laws themselves.

As a preliminary caveat regarding scope, I concentrate here on nonenforcement of federal laws governing private conduct through imposition of penal sanctions. I thus hold aside the important question, which I hope to address separately in the future, of how due process defenses may apply to self-dealing government policies, that is, policies that excuse illegality by government agents themselves, whether by deeming governing statutes inapplicable or unconstitutional or simply as a matter of nonenforcement.<sup>30</sup> Nor do I address here other theories, such as selective prosecution on political or racial grounds, that might constrain an administration's enforcement options with respect to marijuana, immigration, or other areas of law following a period of promised nonenforcement.

I also concentrate here on federal rather than state law. Some key due process cases discussed below address due process violations by state officials, and the same basic balance is likely implicated in any system of law enforcement involving separated legislative and executive powers. Nevertheless, in principle, states might choose to strike the balance differently by granting narrower or broader scope to executive enforcement discretion, and narrower or broader scope to resulting reliance interests. In fact, as addressed briefly below, state courts have taken a variety of approaches to estoppel claims asserted against state governments.<sup>31</sup>

My analysis proceeds as follows. I begin in Part I with a brief account of the Supreme Court's pertinent case law to date, followed by a discussion of how the marijuana and immigration policies in particular, and trends toward political polarization and presidential administration more generally, have placed pressure on existing doctrine. Part II then offers a normative defense of current doctrine and its limitations in terms of the balancing framework I have

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questions, see *infra* notes 86 and 136.

30. The most notorious recent example of such self-dealing interpretation is the Office of Legal Counsel's withdrawn opinion deeming statutory prohibitions on torture unconstitutional. See Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President 31 (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download> [<https://perma.cc/437E-C7Z4>].

31. See *infra* Part II.B.4.

proposed. Part II also briefly rebuts competing proposals. Part III then addresses additional contexts in which due process principles might support a reliance defense, and Part IV identifies benefits of employing presidential clemency or substantive legal reforms rather than nonenforcement. The Article ends with a conclusion summarizing the overall argument.

### I. FRAMING THE PROBLEM

Fair notice of what conduct will incur sanctions is a basic aspect of due process.<sup>32</sup> The Constitution thus protects individuals' reliance on the legality of their conduct at the time it is undertaken.<sup>33</sup> But in a world in which few laws are fully enforced and enforcement discretion is pervasive, enforcement choices may be as significant as formal law in determining on-the-ground perceptions of legality. In particular contexts, furthermore, enforcement officials may provide specific indications about how the law will be enforced, or even what the law is. Does due process ever protect reliance on expectations formed by such government actions?

To date, the Supreme Court has directly addressed this question principally in a perplexing and undertheorized trilogy of cases from over forty years ago.<sup>34</sup> The questions addressed in these cases, however, have gained new importance as a result of controversial federal nonenforcement policies relating to marijuana and immigration<sup>35</sup>—policies that are now very much in doubt given Donald Trump's victory in the 2016 presidential election. At the same time, the increasingly polarized and erratic character of our politics gives reason to fear that similar questions will continue to arise, in these or other areas of law.

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32. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994) ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.").

33. U.S. CONST. amend. V.

34. See *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 674 (1973); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965); *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959).

35. See 2014 Cole Financial Crimes Guidance, *supra* note 2, at 1-2; 2013 Cole Marijuana Enforcement Guidance, *supra* note 2, at 1-2; 2011 Cole Medical Marijuana Guidance, *supra* note 2, at 2; Ogden Marijuana Guidance, *supra* note 2, at 1; DAPA Memo, *supra* note 6, at 2, 4; DACA Memo, *supra* note 6, at 1-2.

### A. *Existing Doctrine*

Under current doctrine, as reflected in the age-old maxim that “ignorance of the law is no excuse,” misapprehension of governing law generally provides no defense against enforcement.<sup>36</sup> The Supreme Court thus has generally resisted protecting reliance on mistaken assurances about the law or its application. In particular, the Court has repeatedly rejected arguments that the government may be estopped from recovering benefits overpayments or otherwise correcting legal errors simply because regulated parties relied to their detriment on federal officials’ guidance.<sup>37</sup> Nevertheless, in three decisions between 1959 and 1973, the Court established that due process may sometimes bar criminal enforcement following such mistaken official assurances.

The seminal case for this due process defense is *Raley v. Ohio*.<sup>38</sup> There, the Court overturned state law convictions of several witnesses who refused to answer a state legislative commission’s questions about alleged Communist Party activity.<sup>39</sup> Without any apparent objection by the commission, the witnesses asserted a privilege against self-incrimination under the U.S. and Ohio Constitutions, even though in fact a state immunity statute precluded use of their statements in subsequent criminal proceedings (thus arguably obviating the privilege).<sup>40</sup> “[T]o sustain [the convictions] ... after the Commission had acted as it did,” Justice Brennan’s majority opinion thundered, “would be to sanction the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.”<sup>41</sup> Hence, even though the state’s high court deemed the

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36. See, e.g., *Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (rejecting view that “a defendant must know that his conduct is illegal before he may be found guilty” because “[t]he familiar maxim ‘ignorance of the law is no excuse’ typically holds true”); *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014) (“[A]n individual generally cannot escape criminal liability based on a mistaken understanding of the law.”).

37. See, e.g., *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 63-64 (1984); see also *Matamoros v. Grams*, 706 F.3d 783, 793-94 (7th Cir. 2013) (collecting case law and observing that the Supreme Court has never affirmed a holding of equitable estoppel against the government and has reversed every such holding it has reviewed).

38. 360 U.S. 423 (1959).

39. *Id.* at 442.

40. *Id.* at 426-32.

41. *Id.* at 438.

Commission's implicit assurances legally erroneous, the U.S. Supreme Court held that such "active misleading" by "the voice of the State most presently speaking to the [witnesses]" at the hearing violated due process.<sup>42</sup>

The Court's second case in this line, *Cox v. Louisiana*, extended *Raley's* due process principle to overturn disorderly conduct convictions of protesters who demonstrated across the street from a state courthouse.<sup>43</sup> Although the state statute in question prohibited protests "in or near" a court building, senior police officials evidently granted the protesters permission to demonstrate in the location they chose.<sup>44</sup> Quoting *Raley*, the Court again found "an indefensible sort of entrapment by the State" in punishing the protesters for conduct the state itself appeared to authorize.<sup>45</sup>

Finally, in *United States v. Pennsylvania Industrial Chemical Corp. (PICCO)*, the Court overturned a criminal conviction under federal environmental statutes because the district court prevented the defendant from presenting evidence that it relied on an executive agency's "longstanding administrative construction" of the statute in question.<sup>46</sup> Citing *Raley* and *Cox*, the Court emphasized that the defendant wished to show "it was affirmatively misled by the responsible administrative agency into believing that the law did not apply in this situation."<sup>47</sup> The Court agreed that the defendant "had a right to look to the [agency's] regulations for guidance."<sup>48</sup> The Court explained:

[The regulations'] designed purpose was to guide persons as to the meaning and requirements of the statute. Thus, to the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, we think there can be no doubt that traditional notions

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42. *Id.* at 438-39. The Court divided evenly as to one defendant who a plurality believed did not rely on the privilege in refusing to answer certain questions. *Id.*

43. 379 U.S. 559, 568-69 (1965).

44. *Id.* at 560.

45. *Id.* at 571 (quoting *Raley*, 360 U.S. at 426).

46. 411 U.S. 655, 657 (1973).

47. *Id.* at 673-74.

48. *Id.* at 674.

of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.<sup>49</sup>

As discussed further below, lower courts have generally construed these three decisions narrowly.<sup>50</sup> Though the *Raley-Cox-PICCO* trilogy might suggest that any misleading assurances by executive officials potentially support a due process defense, courts have generally understood them to limit nonenforcement only in closely analogous circumstances.<sup>51</sup> Yet recent marijuana and immigration enforcement policies, adopted against a backdrop of partisan polarization and sharp disagreement over existing law, have given new importance to questions regarding any due process reliance defense.

## *B. Marijuana and Immigration*

### *1. The Policies*

Because they constitute important current case studies, and because they may well augur future trends, some background on the Obama Administration's marijuana and immigration policies is appropriate here. Importantly, both policies arose against the backdrop of widespread underenforcement of the applicable federal substantive laws. According to the law on the books, distributing and possessing marijuana are federal crimes.<sup>52</sup> Marijuana possession may also constitute a predicate for conspiracy or racketeering crimes.<sup>53</sup> In practice, however, the federal government rarely pursued low-level marijuana offenses, preferring instead to focus limited investigative and prosecutorial resources on terrorism, financial crimes, large-scale drug trafficking, and myriad other offenses that implicate stronger federal interests or pose greater public safety threats.<sup>54</sup>

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49. *Id.*

50. *See infra* Part III.A.

51. *See, e.g.,* *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60-61 (1984).

52. 21 U.S.C. §§ 812(c), 841, 844 (2012).

53. *See* 18 U.S.C. § 1961 (1) (2012); 21 U.S.C. §§ 847, 848.

54. *See* Robert A. Mikos, *Medical Marijuana and the Political Safeguards of Federalism*, 89 DENV. U. L. REV. 997, 1002-03 (2012); Ernest A. Young, *Modern-Day Nullification: Mari-*

Similarly, entering the United States without inspection by immigration officials is also a federal crime,<sup>55</sup> and immigrants in the United States without lawful authorization are generally subject to removal.<sup>56</sup> Employers, moreover, are generally barred from employing such immigrants.<sup>57</sup> Immigrants may also commit a federal misdemeanor by failing to register with the federal government or carry proof of status.<sup>58</sup> Yet these harsh restrictions, too, have often been obeyed in the breach. Due to longstanding unauthorized migration and equally longstanding failures of enforcement, roughly eleven million formally removable immigrants reside in the United States, many of them now well integrated into local communities and performing important social and economic roles.<sup>59</sup> During the Obama Administration, the government estimated that with available resources it could remove at most four hundred thousand of these eleven million each year.<sup>60</sup>

Facing mounting political pressure to conform these outdated laws to current social realities, the Obama Administration took bold measures to reduce the effective risk of enforcement. Political conflict over federal marijuana policy became acute as increasing numbers of states relaxed state restrictions on marijuana possession and use.<sup>61</sup> Though state reforms initially applied to only medical marijuana, several states have now legalized recreational use of the drug.<sup>62</sup> The U.S. Justice Department responded to these developments

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*juana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction*, 65 CASE W. RES. L. REV. 769, 774-75 (2015).

55. 8 U.S.C. § 1325 (2012).

56. *Id.* § 1227(a)(1).

57. *Id.* § 1324a(a).

58. *Id.* §§ 1304(e), 1306(a).

59. See Adam B. Cox & Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 YALE L.J. 104, 107, 129-32 (2015) (discussing history of recent migration, immigrant employment, and federal enforcement).

60. See The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others, 38 Op. O.L.C. (Nov. 19, 2014) (mem. op. at 1) [hereinafter OLC Immigration Opinion], <https://www.justice.gov/sites/default/files/olc/opinions/attachments/2014/11/20/2014-11-19-auth-prioritize-removal.pdf> [https://perma.cc/72C5-UTQ6].

61. See Fan, *supra* note 11, at 929-31.

62. See *id.* at 925-26. In November 2016, voters in four additional states, including California, approved measures to legalize recreational marijuana use as a matter of state law. Christopher Ingraham, *Marijuana Reform Went 8 for 9 on the Ballot This Week. It Could Be the Tipping Point.*, WASH. POST: WONKBLOG (Nov. 10, 2016), <https://www.washingtonpost.com/>



with a series of memoranda to U.S. Attorneys that establish federal priorities for marijuana enforcement and effectively eliminate risks of enforcement outside those priorities.<sup>63</sup> Initially, in 2009, the Deputy Attorney General issued guidance to U.S. Attorneys directing them not to focus prosecutorial resources on “individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”<sup>64</sup> Roughly a year and a half later, new guidance clarified that large-scale growing operations remained subject to prosecution and that U.S. Attorneys should evaluate all possible prosecutions on a case-by-case basis.<sup>65</sup>

Finally, in 2013, following legalization of recreational marijuana in Colorado and Washington, the Justice Department issued a new memorandum to U.S. Attorneys identifying specified priorities for federal marijuana enforcement and indicating that prosecution would not otherwise be a priority, provided the states maintained “strong and effective regulatory and enforcement systems.”<sup>66</sup> The Administration later followed up with a further memo indicating that prosecution of marijuana-related financial crimes, such as money laundering and failure to report certain transactions, should track the same priorities applied to marijuana violations themselves.<sup>67</sup>

The Obama Administration’s approach to immigration enforcement followed a similar pattern of escalating assurances of nonenforcement. Facing mounting pressure from immigrant advocates for legal reform, the Administration urged Congress to provide lawful status for otherwise law-abiding undocumented

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news/wonk/wp/2016/11/10/marijuana-reform-went-8-for-9-on-the-ballot-this-week-it-could-be-the-tipping-point/[https://perma.cc/VK68-Q87K] (discussing ballot measures legalizing recreational marijuana use in California, Maine, Massachusetts, and Nevada).

63. See 2013 Cole Marijuana Enforcement Guidance, *supra* note 2.

64. Ogden Marijuana Guidance, *supra* note 2, at 2.

65. See 2011 Cole Medical Marijuana Guidance, *supra* note 2, at 1-2.

66. 2013 Cole Marijuana Enforcement Guidance, *supra* note 2, at 2.

67. See 2014 Cole Financial Crimes Guidance, *supra* note 2; see also Fin. Crimes Enf’t Network, U.S. Dep’t of the Treasury, FIN-2014-G001, *BSA Expectations Regarding Marijuana-Related Businesses* (Feb. 14, 2014) (clarifying bank reporting obligations with respect to marijuana-related transactions); Memorandum from Monty Wilkinson, Dir., Exec. Office for U.S. Attorneys, to All U.S. Attorneys (Oct. 28, 2014) (extending same priorities to marijuana enforcement in Indian country).

immigrants.<sup>68</sup> At the same time, in the so-called Morton Memorandum, the Administration adopted enforcement priorities, akin to its marijuana guidance, that focused enforcement efforts on criminals and new entrants rather than the longtime undocumented.<sup>69</sup> Amid increasing partisanship and political polarization over immigration, however, reform efforts in Congress ultimately failed. Congress failed even to provide relief for DREAMers—immigrants who entered the United States as young children and grew up as law-abiding Americans with no other home.<sup>70</sup> The Morton Memorandum, meanwhile, failed to significantly shift enforcement patterns, a result some attributed to resistance within the enforcement bureaucracy.<sup>71</sup>

In this context, the Administration took a bolder approach, establishing programs to provide “deferred action” to large categories of undocumented immigrants. “Deferred action” is formally nothing more than a temporary decision, subject to reconsideration at any time, not to seek an immigrant’s removal.<sup>72</sup> In that sense, it amounts to an exercise of enforcement discretion, and immigration authorities have offered it to immigrants on an ad hoc basis for decades.<sup>73</sup> Under applicable regulations, however, granting deferred action may render immigrants eligible for work authorization and other benefits.<sup>74</sup> In practice, moreover, deferred action may amount to an effective reprieve from any meaningful risk of deportation.

In a first program announced in June 2012, Deferred Action for Childhood Arrivals (DACA), the Department of Homeland Security invited certain immigrants who entered the United States as young children and met other specified criteria to apply for two-year

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68. See, e.g., WHITE HOUSE, BUILDING A 21ST CENTURY IMMIGRATION SYSTEM (2011), <https://perma.cc/VJL3-ENSR> (offering comprehensive “blueprint” for immigration reform, including passage of legislative relief for many undocumented immigrants).

69. Memorandum from John Morton, Dir., U.S. Immigration & Customs Enf’t, to All Field Office Dirs. (June 17, 2011) [hereinafter Morton Memo], <https://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf> [<https://perma.cc/Q536-LDBF>].

70. See Jeffrey Toobin, *American Limbo*, NEW YORKER (July 27, 2015), <http://www.newyorker.com/magazine/2015/07/27/american-limbo> [<https://perma.cc/YG6L-L9R2>].

71. See Cox & Rodríguez, *supra* note 59, at 136-37.

72. See OLC Immigration Opinion, *supra* note 60, at 12-19.

73. See Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 245, 248 (2010).

74. See 8 C.F.R. § 274a.12(c)(14) (2016).

renewable grants of deferred action.<sup>75</sup> Two and a half years later, in November 2014, the Department announced a second program, Deferred Action for Parents of Americans (DAPA), that opened deferred action applications to a much larger group.<sup>76</sup> Under DAPA, most immigrants who were parents of U.S. citizens or permanent residents, and who were not otherwise priorities for removal, could apply for deferred action.<sup>77</sup> DAPA, moreover, expanded eligibility criteria for DACA and extended grants of deferred action under both programs to three years.<sup>78</sup>

Congress's response to these various initiatives was mixed. Responding to shifting public attitudes toward marijuana, Congress repeatedly enacted an appropriations rider barring use of Justice Department funds "to prevent [listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana."<sup>79</sup> Proposed substantive legal reforms, however, failed to gain traction at the federal level, although ballot measures in November 2016 legalized medical or recreational marijuana as a matter of state law in several additional states.<sup>80</sup>

Immigration politics, meanwhile, grew increasingly toxic. Although Congress failed to stymie either DACA or DAPA directly during President Obama's tenure (in part because both were funded with user fees rather than ongoing appropriations), Republican politicians and presidential candidates railed against the programs in increasingly vituperative terms.<sup>81</sup> Texas and roughly two dozen other states successfully sued to enjoin DAPA (though not DACA).<sup>82</sup>

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75. DACA Memo, *supra* note 6.

76. DAPA Memo, *supra* note 6.

77. *Id.* at 4.

78. *Id.*

79. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (including similar restriction); *see also* Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 103, 129 Stat. 502, 506 (2015) (extending force of § 538 with respect to continuing appropriations).

80. *See* Ingraham, *supra* note 62 (discussing successful measures to legalize recreational marijuana use in California, Maine, Massachusetts, and Nevada and medical use in Arkansas, Florida, Montana, and North Dakota).

81. *See* Toobin, *supra* note 70.

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

The Fifth Circuit affirmed a district court's preliminary injunction halting DAPA, and the Supreme Court in turn affirmed the Fifth Circuit by an equally divided vote, thus leaving the preliminary injunction in place through the end of Obama's presidency.<sup>83</sup> Incoming President Donald Trump, meanwhile, pledged at times during his campaign to deport all eleven million unauthorized immigrants from the United States.<sup>84</sup> While it remained unclear as this Article was going to press precisely what enforcement policy President Trump would adopt with respect to either marijuana or immigration, it appeared likely that his Administration would terminate DACA and DAPA.<sup>85</sup>

## 2. *Questions of Authority, the Rule of Law, and Reliance*

Legal controversy over the Obama marijuana and immigration policies centered on questions of legal authority. Critics, including the challengers in the Texas litigation, charged that one or both of these policies surpassed limits on what can be done to change on-the-ground law through enforcement discretion.<sup>86</sup> Relatedly, the policies' supporters and opponents debated whether exercising enforcement discretion in such overt and deliberate ways undermined or advanced rule-of-law values.<sup>87</sup>

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83. *Id.*

84. Julia Preston et al., *What Would It Take for Donald Trump to Deport 11 Million and Build a Wall?*, N.Y. TIMES (May 9, 2016), <http://www.nytimes.com/2016/05/20/us/politics/donald-trump-immigration.html> [https://perma.cc/8NSQ-KV2C].

85. See *supra* note 8.

86. For a sampling of scholarly articles defending or questioning one or both policies, see, for example, Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031 (2013); Jason A. Cade, *Enforcing Immigration Equity*, 84 FORDHAM L. REV. 661 (2015); Cox & Rodríguez, *supra* note 59; Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781 (2013); Jeffrey A. Love & Arpit K. Garg, *Presidential Inaction and the Separation of Powers*, 112 MICH. L. REV. 1195 (2014); Peter Margulies, *The Boundaries of Executive Discretion: Deferred Action, Unlawful Presence, and Immigration Law*, 64 AM. U. L. REV. 1183 (2015); Thomas W. Merrill, *Presidential Administration and the Traditions of Administrative Law*, 115 COLUM. L. REV. 1953 (2015); Saikrishna Bangalore Prakash, Response, *The Statutory Nonenforcement Power*, 91 TEX. L. REV. 115 (2013); Price, *Enforcement Discretion*, *supra* note 29; Shoba Sivaprasad Wadhia, *The History of Prosecutorial Discretion in Immigration Law*, 64 AM. U. L. REV. 1285 (2015).

87. For challenges to one or both policies on rule-of-law grounds, see, for example, DAVID E. BERNSTEIN, *LAWLESS: THE OBAMA ADMINISTRATION'S UNPRECEDENTED ASSAULT ON THE CONSTITUTION AND THE RULE OF LAW* (2015); Josh Blackman, *The Constitutionality of DAPA*

Yet the policies also raise another vexing question that has received less attention, but could now arise in stark form: What protection should the law give to detrimental reliance on these policies? In doctrinal terms, can some theory rooted in *Raley*, *Cox*, and *PICCO* provide protection—or, if not, should these cases be reconsidered?

Whether or not DACA, DAPA, and the marijuana guidance are lawful or appropriate exercises of executive authority, as a practical matter millions of people—many of them legally unsophisticated and unlikely to have parsed the fine print—have made potentially catastrophic personal decisions based on perceived assurances contained in these policies. Indeed, considering the legal questions surrounding the programs, the extent of private parties' reliance is remarkable.

For example, by some estimates marijuana is now at least a \$700 million industry in Colorado alone.<sup>88</sup> Operating a business to sell marijuana is nevertheless a serious federal crime. Not only does each transaction violate the Controlled Substances Act,<sup>89</sup> but buyers and sellers alike could be charged with participating in a criminal “enterprise” under the Controlled Substances Act or Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>90</sup> At the very least, the business constitutes a narcotics conspiracy, one that might even encompass government officials involved in licensing and regulating

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*Part II: Faithfully Executing the Law*, 19 TEX. REV. L. & POL. 213 (2015); Senator Ted Cruz, *The Obama Administration's Unprecedented Lawlessness*, 38 HARV. J.L. & PUB. POL'Y 63 (2015); Ken Paxton, *The President Must Respect the Rule of Law*, NAT'L REV. (Mar. 11, 2015, 4:00 AM), <http://www.nationalreview.com/article/415209/president-must-respect-rule-law-ken-paxton> [<https://perma.cc/U24V-QK2F>]. For defenses, see, for example, Cox & Rodríguez, *supra* note 59; Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58 (2015). For some reflections on this aspect of the debate, see Zachary S. Price, *Seeking Baselines for Negative Authority: Constitutional and Rule-of-Law Arguments Over Nonenforcement and Waiver*, 8 J. LEGAL ANALYSIS 235 (2016); see also Merrill, *supra* note 86, at 1965, 1977 (discussing competing conceptions of the rule of law at play in current debates).

88. See Christopher Ingraham, *Colorado's Legal Weed Market: \$700 Million in Sales Last Year, \$1 Billion by 2016*, WASH. POST: WONKBLOG (Feb. 12, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/02/12/colorados-legal-weed-market-700-million-in-sales-last-year-1-billion-by-2016/> [<https://perma.cc/LK3F-G3NA>].

89. See 21 U.S.C. §§ 812(c), 841, 844 (2012).

90. See 18 U.S.C. §§ 1960-1961 (2012) (establishing criminal penalties for participating in a racketeering enterprise); 21 U.S.C. § 848 (imposing mandatory minimum twenty-year sentence on certain participants in narcotics-related “continuing criminal enterprise[s]”).

its operation and collecting tax revenue from it.<sup>91</sup> Although the general five-year statute of limitations for federal crimes affords some protection against prosecution for offenses long in the past,<sup>92</sup> the limitations period for ongoing offenses will begin running only when the offense terminates.<sup>93</sup>

For the time being, the appropriations rider noted earlier prevents enforcement with respect to medical marijuana. Indeed, the Ninth Circuit recently held that individual criminal defendants may invoke the appropriations restrictions as a defense to prosecution.<sup>94</sup> Yet the riders manifestly do not reach recreational marijuana businesses like those in Colorado.<sup>95</sup> Meanwhile, several additional states, including California, legalized marijuana's recreational use

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91. The Controlled Substances Act specifically exempts from its scope enforcement activities by both federal and state officials:

Except as provided in [certain other provisions], no civil or criminal liability shall be imposed by virtue of this subchapter upon any duly authorized Federal officer lawfully engaged in the enforcement of this subchapter, or upon any duly authorized officer of any State, territory, political subdivision thereof, the District of Columbia, or any possession of the United States, who shall be lawfully engaged in the enforcement of any law or municipal ordinance relating to controlled substances.

21 U.S.C. § 885(d). Early in California's marijuana legalization adventure, Oakland city officials creatively sought to exempt an officially designated marijuana dispensary from federal controlled substances restrictions by claiming that dispensary officials were effectively "enforcing" municipal drug laws. *See United States v. Rosenthal*, 454 F.3d 943, 948 (9th Cir. 2006). The Ninth Circuit rejected this argument. *Id.* Agreeing with the district court, it wrote that "'enforcement' means 'to compel compliance with the law.... At best, [the dispensary's executive] was implementing or facilitating the purpose of the statute; he was not compelling anyone to do or not to do anything.'" *Id.* (quoting *Rosenthal*, 266 F. Supp. 2d 1068, 1078 (N.D. Cal. 2003)).

92. *See* 18 U.S.C. § 3282.

93. *See, e.g., id.* § 1961(5) (defining "pattern of racketeering activity" for RICO purposes to include acts ten years apart); *Smith v. United States*, 133 S. Ct. 714, 719-20 (2013) (explaining that limitations period for conspiracy violations begins running only when the individual defendant withdraws from the conspiracy); *United States v. Bostick*, 791 F.3d 127, 140-41 (D.C. Cir. 2015) (holding that only the most recent predicate act of a continuing criminal enterprise under 21 U.S.C. § 848 need occur within limitations period), *cert. denied sub nom.* *Edelin v. United States*, 137 S. Ct. 184 (2016) (mem.). With respect to immigration, the five-year limitations period generally prevents long-delayed criminal prosecution for illegal entry or reentry, but no such limit applies to the civil remedy of removal. *See generally* Daniel I. Morales, *Crimes of Migration*, 49 WAKE FOREST L. REV. 1257 (2014).

94. *United States v. McIntosh*, 833 F.3d 1163, 1172-73 (9th Cir. 2016).

95. *See Consolidated Appropriations Act, 2016*, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2332-33 (2015) (barring use of funds only with respect to "medical marijuana").

through successful ballot initiatives in November 2016.<sup>96</sup> Outside the scope of the riders, individuals buying and selling marijuana in compliance with state law, or even licensing and taxing it as required by state law, have relied exclusively on the Justice Department's stated intention to look the other way.<sup>97</sup>

Reliance interests implicated by DACA and DAPA are equally significant. To apply for deferred action under the programs, immigrants provided a range of documentation, including information about when they arrived in the United States and where they currently live.<sup>98</sup> Were the government to deny or cancel deferred action, this information would provide immigration authorities with a removal case "on a platter."<sup>99</sup> For this reason, although over 700,000 immigrants received deferred action through DACA,<sup>100</sup> some immigration attorneys questioned whether to advise clients to apply.<sup>101</sup> DHS's official responses regarding the program naturally included assurances that application information would not be provided to enforcement authorities—but the guidance indicated in the same breath that these assurances were nonbinding and subject to change.<sup>102</sup>

In addition to providing the information required to apply, moreover, deferred action recipients may well have lived more openly in reliance on the government's promises. At the least, they

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96. See *supra* note 62.

97. Cf. *United States v. Silkeutsabay*, No. 13-CR-0140-TOR-1, 2015 WL 2376170, at \*1-2 (E.D. Wash. May 18, 2015) (rejecting application of rider when conduct was not in compliance with state law).

98. See DAPA Memo, *supra* note 6, at 4; DACA Memo, *supra* note 6, at 1; *Frequently Asked Questions*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> [<https://perma.cc/S6G2-3D8M>] [hereinafter DACA FAQs] (updated June 15, 2015).

99. Fan, *supra* note 11, at 940.

100. U.S. CITIZENSHIP & IMMIGRATION SERVS., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2016 (MARCH 31) (2016), [https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d\\_performancedata\\_fy2016\\_qtr2.pdf](https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/I821d_performancedata_fy2016_qtr2.pdf) [<https://perma.cc/X7WJ-PVNA>]; Julia Preston & Jennifer Medina, *Immigrants Who Came to U.S. as Children Fear Deportation Under Trump*, N.Y. TIMES (Nov. 19, 2016), <http://www.nytimes.com/2016/11/20/us/immigrants-donald-trump-daca.html> [<https://perma.cc/VCU8-3VYQ>].

101. Fan, *supra* note 11, at 939.

102. See DACA FAQs, *supra* note 98.

could work lawfully, pay taxes, and receive other legal benefits.<sup>103</sup> As President Obama stated when announcing DAPA, deferred action carried the promise that those who “me[t] the criteria” could “come out of the shadows and get right with the law.”<sup>104</sup> But immigrants subject to removal were in the shadows for a reason. In other contexts, encouraging individuals engaged in unlawful conduct to expose themselves may be “good policing,” as the Fifth Circuit dissent put it,<sup>105</sup> but it seems doubtful that immigrants would have taken this risk without the perceived assurance that doing so would place them at reduced, rather than increased, risk of future enforcement.

### C. A Dark Future?

Among many fears surrounding the incoming Trump Administration is concern about whether and how he may adjust current executive enforcement policies, a question that remained unanswered as this Article was going to press. Increasing state-level support for marijuana liberalization might provide political protection for state-authorized marijuana businesses, but immigration is another matter. Having promised at times to seek deportation of all unauthorized migrants in the United States,<sup>106</sup> Trump appears likely to increase enforcement in some way, though many hope he will not go as far as he promised during the campaign.<sup>107</sup>

In any event, whatever the fate of these particular policies, the very forces of polarization and partisan disagreement that gave rise to them may well lead to other similar policies, perhaps in quite different areas of law. As Kate Andrias has argued, the marijuana and immigration policies reflect a trend across recent administrations towards “presidential enforcement,” meaning increasingly overt, deliberate, and centrally directed use of enforcement as a

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103. See Cox & Rodriguez, *supra* note 59, at 217; see also *Texas v. United States*, 809 F.3d 134, 147-49 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 227 (2016).

104. *Full Text: Obama's Immigration Speech*, USA TODAY (Nov. 21, 2014, 8:45 AM), <http://www.usatoday.com/story/news/politics/2014/11/20/obama-immigration-full-remarks/70030636/> [<https://perma.cc/LJ5K-2GNP>] [hereinafter Obama DAPA Speech].

105. *Texas*, 809 F.3d at 191 (King, J., dissenting).

106. See *supra* note 84 and accompanying text.

107. See *supra* note 8 and accompanying text.



policy tool.<sup>108</sup> Much as Presidents have asserted greater control over regulatory policy through so-called presidential administration, so too have they exercised increasingly centralized control over enforcement, with a view towards achieving political goals and gaining favor with key constituencies.<sup>109</sup>

Much like presidential administration itself, enforcement policy on this account may become more responsive to political pressures and thus more accountable, but by the same token it may also become more politically driven.<sup>110</sup> Historically, as the examples of marijuana and immigration enforcement demonstrate, a certain political economy has often governed executive enforcement.<sup>111</sup> Presidents have soft-pedaled unpopular laws (or at least laws their constituents disfavor), while prosecutors and administrative agencies have normally exercised their discretion to protect reliance on their informal assurances, whether or not due process required them to do so.<sup>112</sup> Yet if enforcement becomes more politicized, as it did during the 2016 presidential campaign, and if Presidents continue to exercise enforcement policy in a salient fashion on politically contested issues, then there may well be greater risk that implicit good-governance norms that have generally prevented sharp reversals will break down. A future administration with different partisan preferences might then choose to reverse course, perhaps even with respect to conduct openly tolerated by a past administration—precisely as Trump might choose to do with respect to immigration.<sup>113</sup>

At any rate, the very example the marijuana and immigration policies have set may increase the likelihood of similar policies in other contested areas. To highlight just one example, a number of states have adopted gun freedom statutes purporting to authorize

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108. Andrias, *supra* note 86, at 1034-35, 1066-67.

109. *Id.* at 1064, 1069; *see also* Price, *Enforcement Discretion*, *supra* note 29, at 687.

110. For further reflections on this development, *see* Price, *supra* note 15, at 1139-40.

111. *See* Price, *Enforcement Discretion*, *supra* note 29, at 757-61.

112. Michael Asimow found in a survey conducted in the early 1970s that agencies generally protected “justifiable reliance interest[s]” with respect to even nonbinding agency advice. MICHAEL ASIMOW, *ADVICE TO THE PUBLIC FROM FEDERAL ADMINISTRATIVE AGENCIES* 7-8, 30-31 (1973).

113. Julie Hirschfeld Davis & Julia Preston, *What Donald Trump’s Vow to Deport up to 3 Million Immigrants Would Mean*, N.Y. TIMES (Nov. 14, 2016), <http://www.nytimes.com/2016/11/15/us/politics/donald-trump-deport-immigrants.html> [<https://perma.cc/H5X3-ZNFD>].

local gun manufacturing and sales in defiance of federal law.<sup>114</sup> Whereas the Obama Administration (quite properly) asserted the supremacy of federal law and threatened federal enforcement to shut down such state-level efforts, a gun-friendly Trump Administration might choose the opposite course.<sup>115</sup> Nor is it hard to imagine aggressive uses of nonenforcement in contested areas such as tax law, environmental regulation, or healthcare, even if for the time being unified party control of the presidency and both Houses of Congress also makes substantial legislative reform possible.<sup>116</sup> Reliance questions, in short, could be just as salient in the aftermath of Trump's presidency as in weighing the effects of Obama's policies.

At any rate, questions of fair notice and reliance have already arisen in some marijuana prosecutions, prompting one judge to comment openly on the apparent unfairness of proceeding against defendants confused by shifting official pronouncements.<sup>117</sup> Private parties, moreover, may well file civil suits against marijuana businesses under federal racketeering statutes based on alleged criminal violations.<sup>118</sup> And questions of reliance in administrative

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114. See, e.g., ALASKA STAT. § 44.99.500 (2015); ARIZ. REV. STAT. ANN. § 13-3114 (2016); IDAHO CODE § 18-3315A (2016); Second Amendment Protection Act, KAN. STAT. ANN. §§ 50-1201 to -1211 (2016); Montana Firearms Freedom Act, MONT. CODE ANN. §§ 30-20-101 to -106 (2015); S.D. CODIFIED LAWS § 37-35-2 (2016); Tennessee Firearms Freedom Act, TENN. CODE ANN. §§ 4-54-102 to -106 (2016); Utah State-Made Firearms Protection Act, UTAH CODE ANN. §§ 53-5b-101 to -202 (LexisNexis 2016); Wyoming Firearms Freedom Act, WYO. STAT. ANN. §§ 6-8-401 to -406 (2016).

115. For a description of the federal response to one such state law and rejection of constitutional arguments against its preemption, see *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 982 (9th Cir. 2013). For general discussion of these laws, see Fan, *supra* note 11, at 932-35.

116. For examples of past Republican administrations' use of nonenforcement to advance deregulatory objectives, see Andrias, *supra* note 86, at 1057-63; Price, *supra* note 15, at 1125-33.

117. See *United States v. Washington*, 887 F. Supp. 2d 1077, 1084 (D. Mont.) ("[T]he words of federal officials were enough to convince those who were considering entry into the medical marijuana business that they could engage in that enterprise without fear of federal criminal consequences."), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

118. See Robert A. Mikos, *A Critical Appraisal of the Department of Justice's New Approach to Medical Marijuana*, 22 STAN. L. & POL'Y REV. 633, 649-56 (2011) (discussing this possibility). At least one such suit concluded in a settlement. See Ricardo Baca, *Anti-Pot Racketeering Suit Settles, Opens Door for Future RICO Claims*, DENV. POST (Dec. 30, 2015, 10:48 AM), <http://www.denverpost.com/2015/12/30/anti-pot-racketeering-suit-settles-opens-door-for-future-rico-claims/> [<https://perma.cc/6YAX-5P9B>].

contexts have arisen with significant frequency in recent Supreme Court litigation.<sup>119</sup>

For all these reasons, the due process reliance defense recognized by the Supreme Court a half century ago merits another look. To date, however, although extensive scholarship has addressed questions of executive authority<sup>120</sup> and federalism,<sup>121</sup> to my knowledge only one scholar has focused directly on questions of reliance.<sup>122</sup> This scholar's approach, moreover, differs from my own for reasons addressed below.<sup>123</sup> My analysis here thus aims to add an important new dimension to burgeoning debates over nonenforcement.

## II. A BALANCING FRAMEWORK

For all the Supreme Court's bluster in *Raley*, *Cox*, and *PICCO* about "active misleading," fundamental fairness, and "indefensible" treatment,<sup>124</sup> reliance on nonenforcement in fact implicates a complicated tradeoff between fundamentally incommensurate concerns. On the one hand, allowing executive officials' assurances to disable future enforcement would undermine basic separation of powers limits on executive authority: Executive officials could change substantive legal obligations without adequate delegated authority to do so. On the other hand, as the marijuana and immigration examples starkly illustrate, regulated parties may be quite likely as a practical matter to rely on even formally nonbinding policies and promises.<sup>125</sup> As a result, from the individual's perspective at least, enforcement in defiance of such assurances may seem to violate basic notions of fair warning, or at least fair dealing, that form an important component of constitutional due process.<sup>126</sup>

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119. See *infra* Part II.A.3.

120. See *supra* notes 86-87.

121. See, e.g., William Baude, *State Regulation and the Necessary and Proper Clause*, 65 CASE W. RES. L. REV. 513 (2015); Mikos, *supra* note 54, at 997; Young, *supra* note 54, at 772-73.

122. See *generally* Fan, *supra* note 11.

123. See *infra* Part II.B.2.

124. See *supra* Part I.A.

125. See *supra* Part I.B.

126. See, e.g., *United States v. Washington*, 887 F. Supp. 2d 1077, 1084 (D. Mont.) ("[T]here is a strongly held belief among those in the medical marijuana community that the federal government has not treated them fairly."), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

Framing the doctrine in these terms—as a balance between fair notice and separation of powers—better explains the pattern of current case law than the nebulous notions of fairness and reasonableness that courts have tended to invoke.<sup>127</sup> In fact, the doctrine as it stands permits quite stark unfairness in many cases, but that is because separation of powers limits on executive authority cannot otherwise be protected. The doctrine, in effect, must often sacrifice individual defendants' reliance to achieve separation of powers compliance. From this perspective, the specific holdings of *Raley*, *Cox*, and *PICCO* are justified, but lower courts have correctly understood these decisions to protect reliance only in narrow circumstances in which the balance plausibly tips in favor of fairness rather than separation of powers.

In Part III, I will turn to identifying additional contexts where the trade-offs between fairness and separation of powers may support protecting reliance.<sup>128</sup> Here, I elaborate on this tentative defense of current doctrine and rebut recent calls for a broader reliance defense.

### *A. The Basic Doctrine Defended and Refined*

#### *1. General Rule*

As a general matter, when it comes to reliance on nonenforcement, the balance between separation of powers limits and fairness considerations must favor the former over the latter, even at the risk of egregious unfairness in some cases. That is so because fundamental, constitutionally based limits on executive authority would otherwise be obliterated.

Within the federal constitutional scheme, current doctrine gives Congress broad authority to delegate effective lawmaking power to executive agencies.<sup>129</sup> Under the familiar doctrine of “*Chevron* deference,” moreover, courts treat ambiguities in agency-administered statutes as delegations of interpretive discretion to the agency.<sup>130</sup> Nevertheless, absent some such delegation of lawmaking

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127. See *infra* Part II.A.2.

128. See *infra* Part III.

129. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473-75 (2001).

130. *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865-66 (1984).

authority, executive officials hold discretion only with respect to how the law is enforced, not over what the law requires in the first place. At some point, even in administrative contexts, ambiguity gives out and the obligation to execute the law as written kicks in. Accordingly, although resource constraints and practical challenges often preclude anything close to full enforcement of federal laws, executive enforcement discretion is nonetheless subject to the ultimate outer limit that executive officials lack authority to change legal obligations by licensing violations ahead of time. As the Supreme Court recently observed, enforcement discretion provides no authority “to *alter* [legal] requirements and to establish with the force of law that otherwise-prohibited conduct will not violate” a statute.<sup>131</sup> “An agency confronting resource constraints may change its own conduct, but it cannot change the law.”<sup>132</sup>

The Constitution, indeed, directly expresses this limit by obligating the President to “take Care that the Laws be faithfully executed.”<sup>133</sup> Historically, English monarchs had claimed authority not only to forbear enforcement of statutes in particular cases, but also to wipe away those statutes’ legal effect, either generally in the form of a suspension or more specifically in the form of a dispensation.<sup>134</sup> Whatever else the President’s constitutional obligation of faithful execution means (a point I have addressed at length elsewhere<sup>135</sup>), it is widely understood to repudiate such prospective cancellations of statutory law without affirmative authority from Congress for doing so.<sup>136</sup>

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131. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014).

132. *Id.* at 2446. For further elaboration of my views on enforcement discretion as an executive authority, see Price, *Enforcement Discretion*, *supra* note 29, at 688.

133. U.S. CONST. art. II, § 3.

134. See generally CORINNE COMSTOCK WESTON & JANELLE RENFROW GREENBERG, SUBJECTS AND SOVEREIGNS 24-29 (1981) (describing these powers and their recognized limits); Reinstein, *supra* note 24, at 278-79 (“Two of the Crown’s asserted prerogatives had empowered kings to suspend the operation of statutes and to grant individuals the dispensation of not being bound by statutes.”).

135. Price, *Enforcement Discretion*, *supra* note 29, at 688-716.

136. See Cox & Rodríguez, *supra* note 59, at 142-43 (“[A]ll participants [in current debates] agree that the President cannot decline to enforce altogether a law that is constitutional.”); see also CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF “UNCONSTITUTIONAL” LAWS 16 (1998); Delahunty & Yoo, *supra* note 86, at 803-04; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1878 (2015) (“General agreement exists ... that the [Take Care] Clause at least embodies the principle that the President must obey constitutional laws and lacks a general prerogative or suspension power.”); Reinstein, *supra*

In light of these principles, the default rule of due process must be that official assurances do not in fact bar future enforcement—even if regulated parties reasonably assumed that officials intended to induce reliance on the assurance. Any contrary rule would obliterate the basic anti-suspending limit on executive authority. A binding nonenforcement promise, after all, is indistinguishable from a change in law. If promised nonenforcement could carry binding effect by virtue of individual reliance, then even *ultra vires* promises of nonenforcement could become an effective dispensing power. As a general matter, courts cannot protect regulated parties against resulting confusion or unfairness because doing so would give executive officials a power to change law that the Constitution itself denies them.

This view appears consistent with the original constitutional understanding of due process. At the least, in one important early case, Supreme Court Justice William Paterson addressed claimed reliance on presidential assurances in precisely these terms. In *United States v. Smith*, the government prosecuted a would-be military adventurer under a statute prohibiting preparations for “any military expedition or enterprise” to be launched from the United States “against the territory or dominions of any foreign prince or state with whom the United States are at peace.”<sup>137</sup> The defendant offered evidence “that this military enterprise was begun, prepared, and set on foot with the knowledge and approbation of the executive department of our government,” but Justice Paterson, presiding over the trial as Circuit Justice, deemed the proffered evidence immaterial.<sup>138</sup> The statute, Justice Paterson observed, “imparts no dispensing power to the president. Does the constitution give it? Far from it, for it explicitly directs that he shall ‘take care that the laws be faithfully executed.’”<sup>139</sup> Executive officials thus could not “authorize a person to do what the law forbids.”<sup>140</sup> Any contrary rule “would render the execution of the laws dependent on [the President’s] will and pleasure,” though only the legislature

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note 24, at 280.

137. 27 F. Cas. 1192, 1229 (C.C.D.N.Y. 1806) (No. 16,342).

138. *Id.*

139. *Id.*

140. *Id.* at 1230.

may properly change the law itself.<sup>141</sup> As Justice Paterson acknowledged, the executive branch could terminate the prosecution by dismissing the charges, or the President could pardon the alleged crime; but such measures, he wrote, “presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law.”<sup>142</sup> Thus, although the defendant in effect claimed reliance on assurances from executive officials, Justice Paterson rejected any reliance defense for fear of creating an executive authority to enable conduct that the legislature sought to prohibit.<sup>143</sup>

Modern due process doctrine considers a broader range of factors. Under the governing framework of *Mathews v. Eldridge*, procedural due process analysis in general requires a relatively untethered balancing of private and public interests affected by mandating a particular procedure.<sup>144</sup> But even if the modern approach in general is more free form than *Smith*’s rigid formalism, structural considerations have remained central to case law addressing problems of reliance and retroactivity. In fact, the Supreme Court has characterized its retroactivity analysis as seeking to ensure proper balance between the “benefits of retroactivity” and “the potential for disruption or unfairness.”<sup>145</sup>

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141. *Id.*

142. *Id.*

143. *See id.*; *see also* Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding that executive “instructions cannot ... legalize an act which without those instructions would have been a plain trespass”). For an argument that nineteenth-century due process doctrine generally embodied principles we associate today with separation of powers, *see* Nathan S. Chapman & Michael W. McConnell, Essay, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1677-79 (2012).

144. 424 U.S. 319, 335 (1976) (holding that the constitutional sufficiency of government procedures for deprivation of life, liberty, or property requires weighing (1) “the private interest that will be affected by the official action”; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the Government’s interest”); *see also* Washington v. Harper, 494 U.S. 210, 229 (1990) (“The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case.”).

145. Landgraf v. USI Film Prods., 511 U.S. 244, 268 (1994) (justifying presumption against retroactivity on the grounds that requiring “Congress [to] first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness”).

Moreover, the Court has generally struck this due process balance in a manner that gives only limited protection to reliance on law or government policy remaining constant. With respect to criminal laws, the Ex Post Facto Clause prevents retroactive imposition of liability for completed conduct.<sup>146</sup> In contrast, the Court understands the Due Process Clause to establish only a presumption against retroactivity, not a hard and fast rule; legislatures thus may pass retroactive laws provided they do so clearly.<sup>147</sup> In addition, due process doctrine generally restricts only what some scholars have called “strong” or “primary” retroactivity, meaning retroactive change in the legal treatment of completed past transactions.<sup>148</sup> The doctrine does not prevent “weak” or “secondary” retroactivity, that

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146. U.S. CONST. art. I, § 9, cl. 3; *Peugh v. United States*, 133 S. Ct. 2072, 2085 (2013) (“The [Ex Post Facto] Clause ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action.”); *Dorsey v. United States*, 132 S. Ct. 2321, 2332 (2012) (“[T]he Constitution’s Ex Post Facto Clause prohibits applying a new Act’s higher penalties to pre-Act conduct.” (emphasis omitted) (internal citation omitted)).

147. *See, e.g., Landgraf*, 511 U.S. at 266-68, 280.

148. *See id.* at 270, 280 (defining constitutionally suspect retroactivity in terms of whether a law “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed,” but also emphasizing that the inquiry requires a functional assessment of “the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event”); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 18 (1976) (upholding retroactive imposition of liability on past conduct because the particular law’s retroactivity was “a rational measure to spread [associated] costs” of past activity). For general discussion of the distinction between strongly and weakly retroactive laws, see, for example, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1068-69 (1997); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1263-64 (2009). For cases applying the distinction, see, for example, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (applying distinction in administrative context); *Nat’l Petrochemical & Refiners Ass’n v. EPA*, 630 F.3d 145, 159 (D.C. Cir. 2010) (recognizing “the distinction between a rule that imposes new sanctions on past conduct, which is retroactive and invalid unless specifically authorized, and one that merely ‘upsets expectations,’” and characterizing *Landgraf* as “mak[ing] a similar distinction for statutes”); *Swisher Int’l, Inc. v. Schafer*, 550 F.3d 1046, 1058 (11th Cir. 2008) (rejecting retroactivity challenge to assessment “based upon current participation in the market, such that new entrants are assessed, as well as those who participated in the past,” notwithstanding its impact on market participants’ expectations); *Nat’l Med. Enters., Inc. v. Sullivan*, 957 F.2d 664, 671 (9th Cir. 1992) (characterizing regulation as “undeniably affect[ing] the future legal consequences of past transactions,” but holding that “such ‘secondary retroactivity’ is an entirely lawful consequence of much agency rulemaking and does not by itself render a rule invalid”).



is, changes in law that disrupt expectations about what the law will be in the future.<sup>149</sup>

As a practical matter, however, such expectations may be matters of quite substantial reliance.<sup>150</sup> Entrepreneurs start businesses in reliance on the company's product remaining legal; investors calculate revenue streams based on settled expectations about tax rates and deductions. Courts have denied constitutional protection to such reliance interests not because they are unreasonable or insignificant, but rather because overriding structural considerations support legislative authority to alter substantive laws.<sup>151</sup> By the same token, fairness considerations alone cannot form the core of any defense of nonenforcement reliance. Instead, just as sovereign legislative authority must often override reliance on seemingly settled law, so too must legislative authority to establish substantive law often override reliance on official enforcement practice with respect to that law.

To put the same point differently, the flip side of reliance is entrenchment—the limitation of future governments' policy choices.<sup>152</sup> As a practical matter, many legislative policies may be self-entrenching: reliance on the policies, or even just psychological attachment to them, may elevate the political stakes of any future repeal effort.<sup>153</sup> As a constitutional matter, however, the settled rule

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149. *See, e.g.*, *United States v. Carlton*, 512 U.S. 26, 33-34 (1994) (“An entirely prospective change in the law may disturb the relied-upon expectations of individuals, but such a change would not be deemed therefore to be violative of due process.”).

150. A number of scholars have in fact criticized the distinction between primary and secondary retroactivity as incoherent on this basis. *See, e.g.*, Fisch, *supra* note 148, at 1069. Even if that is true, however, the broader point that any coherent antiretroactivity doctrine must balance reliance interests against risks of legislative impairment remains valid. For one proposal to reformulate certain land use doctrines along these lines, see Serkin, *supra* note 148, at 1288-90.

151. The Court, indeed, has allowed even primary retroactivity on the theory that retroactive laws “often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary.” *Landgraf*, 511 U.S. at 267-68; *cf.* *United States v. Winstar Corp.*, 518 U.S. 839, 881, 886-87 (1996) (plurality opinion) (holding that contract could bind government to indemnify costs associated with regulatory change but stressing that “the agreements do not purport to bind the Congress from enacting regulatory measures”).

152. *See* Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 881 & n.4 (2011) (surveying literature and defining entrenchment in these terms).

153. *See* Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125

is that one legislature may not bind another; each successive Congress must hold the same essential lawmaking power as its predecessors.<sup>154</sup> Executive enforcement policies, particularly such overt and wide-ranging policies as the recent marijuana and immigration initiatives, present a symmetric problem. As a practical matter, enforcement choices, much like legislative policies, may engender reliance or shift popular perceptions, erecting political obstacles to any future shift in policy.<sup>155</sup> But as a constitutional matter, one executive cannot unilaterally forfeit another's enforcement authority any more than one Congress can forfeit another's legislative power.<sup>156</sup> Accordingly, if a nonenforcement policy in principle cannot be binding—if formally it assures only that for the time being the government has better things to do—then due process cannot prevent the government from shifting priorities in the future and pursuing cases it led regulated parties to believe it would ignore. Considerations of reliance and fair dealing must play second fiddle to separation of powers.

## 2. *Recognized Exceptions*

As a general matter, then, constitutional fair notice principles cannot protect reliance on nonenforcement. But if that is so, what explains *Raley*, *Cox*, and *PICCO*? In these cases, as we have seen,

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YALE L.J. 400, 402 (2015) (“[P]olitical actors intent on entrenching their preferred parties or policies need not resort to manipulating the formal rules of the Constitution, elections, or legislation.”); Eric A. Posner & Adrian Vermeule, Essay, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1666 (2002) (asserting equivalence between formal entrenchment and “sunset clauses, conditional legislation and delegation, the creation, modification, and abolition of administrative agencies, or any of the myriad of other policy instruments that legislatures use to shape the legal and institutional environment of future legislation”). For an empirical study suggesting that violations of unenforced laws carry psychological costs for other individuals, see Ben Depoorter & Stephan Tontrup, *The Costs of Unenforced Laws: A Field Experiment* 27-28 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 16-10, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2749166](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749166) [<https://perma.cc/S9UJ-YNE5>].

154. See *Winstar*, 518 U.S. at 873 (“[A] general law ... may be repealed, amended or disregarded by the legislature which enacted it,” and “is not binding upon any subsequent legislature.”) (alteration in original) (quoting *Manigault v. Springs*, 199 U.S. 473, 487 (1905))). For a recent defense of the rule, see Stephen E. Sachs, *Constitutional Backdrops*, 80 GEO. WASH. L. REV. 1813, 1852 (2012).

155. See Price, *supra* note 15, at 1147-48.

156. See *Winstar*, 518 U.S. at 873 n.19.

the Court held due process to bar prosecution when the government invited reliance on specific assurances regarding planned conduct.<sup>157</sup> The decisions themselves are remarkably undertheorized; they offer little by way of rationale beyond inchoate outrage and vague references to “traditional notions of fairness.”<sup>158</sup> Properly understood, however, the cases may be retheorized in terms of the balancing framework characteristic of modern retroactivity jurisprudence. From this perspective, the *Raley-Cox-PICCO* trilogy establishes a narrow exception to the usual rule that ignorance of the law is no excuse and “the interest of the citizenry as a whole in obedience to the rule of law” must prevail over reliance on official assurances.<sup>159</sup> This exception is justified, moreover, because the cases involved particular circumstances in which balancing fairness and separation of powers favors protecting reliance.

*a. Supreme Court Decisions*

The key feature of *Raley*, *Cox*, and *PICCO* is that the government officials involved did not merely promise forbearance from enforcement, but instead exercised at least apparent authority to interpret and expound governing law and, further, in fact issued guidance that the defendants in question had no reason to doubt was correct. In *Raley*, the Court emphasized that in the proceedings at issue “the Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the [defendants] that the privilege [against self-incrimination] in fact existed.”<sup>160</sup> Moreover,

[o]ther members of the Commission and its counsel made statements which were totally inconsistent with any belief in the

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157. See *supra* Part I.A.

158. See *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 674 (1973) (“[T]here can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent the Government from proceeding with the prosecution.”); *Cox v. Louisiana*, 379 U.S. 559, 571 (1965) (“[U]nder all the circumstances of this case, after the public officials acted as they did, to sustain appellant’s later conviction for demonstrating where they told him he could ‘would be to sanction an indefensible sort of entrapment by the State.” (quoting *Raley v. Ohio*, 360 U.S. 423, 426 (1959)).

159. See *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

160. *Raley*, 360 U.S. at 437.

applicability of the immunity statute, and it is fair to characterize the whole conduct of the inquiry as to the four as identical with what it would have been if [the state] had had no immunity statute at all.<sup>161</sup>

These particular circumstances—involving “active misleading” as to the law by officials with apparent authority to interpret and apply governing statutes—appeared to underlie the Court’s judgment that conviction for refusal to answer under these circumstances constituted “the most indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State clearly had told him was available to him.”<sup>162</sup>

In *Cox*, similarly, executive officials advised the defendants not only that they would not be arrested for protesting where they planned, but that doing so would in fact be affirmatively lawful.<sup>163</sup> Although the state statute in question prohibited protests “in or near” a court building,<sup>164</sup> senior police officials evidently granted the protesters permission to demonstrate in the location they chose.<sup>165</sup> Quoting *Raley*, the Court again found “an indefensible sort of entrapment by the State” in punishing the protesters for conduct that the state itself appeared to authorize.<sup>166</sup> Yet the Court in *Cox* emphasized that the statute implicitly conferred interpretive discretion on local police officials.<sup>167</sup> The Court wrote:

[I]t is clear that the statute, with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it. It is apparent that demonstrators, such as those involved here, would justifiably tend to rely on this administrative interpretation of how “near” the courthouse a particular demonstration might take place.<sup>168</sup>

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161. *Id.* at 437-38.

162. *Id.* at 438.

163. *Cox*, 379 U.S. at 571.

164. *Id.* at 560 (quoting LA. STAT. ANN. § 14:401 (1962)).

165. *Id.* at 569.

166. *Id.* at 571.

167. *Id.* at 568-69.

168. *Id.*

The Court, moreover, emphasized that the limited interpretive discretion afforded by this statute did not “constitute a waiver of law which is beyond the power of the police,” nor was it comparable to “allowing one to commit, for example, murder, or robbery.”<sup>169</sup>

In *PICCO*, finally, the Court emphasized that the defendant had relied on an administrative construction of applicable prohibitions by the very agency charged with administering those prohibitions.<sup>170</sup> According to the Court, it violated due process to deny these defendants the opportunity to present evidence of reliance on the agency’s “longstanding administrative construction” of the statute in question.<sup>171</sup> The defendant, the Court explained, “had a right to look to the [agency’s] regulations for guidance”—after all, the regulations’ “designed purpose was to guide persons as to the meaning and requirements of the statute.”<sup>172</sup> Accordingly, in the Court’s view, “to the extent that the regulations deprived [the defendant] of fair warning as to what conduct the Government intended to make criminal, ... there can be no doubt that traditional notions of fairness inherent in our system of criminal justice prevent[ed] the Government from proceeding with the prosecution.”<sup>173</sup>

In *Raley*, *Cox*, and *PICCO*, the Court thus recognized that, in at least some circumstances, a due process guarantee of fundamental fairness might prevent executive officials from criminally prosecuting private parties for conduct those officials had promised to allow. As already noted, however, the Court’s opinions left important ambiguities about the scope of this guarantee—about what sorts of government promises could count as impermissible “entrapment,” and about when private reliance on such promises could be reasonable.<sup>174</sup> Some observers at the time hoped for an expansive doctrine.<sup>175</sup> One commentator argued in 1969, based on *Raley* and *Cox*, that “[w]henver the law goes largely unenforced against a particular class of violations for reasons which suggest that officials do not really want to sanction these violations, an estoppel defense

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169. *Id.* at 569.

170. *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 673-74 (1973).

171. *Id.* at 657.

172. *Id.* at 674.

173. *Id.*

174. *See supra* Part I.A.

175. *See, e.g.*, Comment, *Applying Estoppel Principles in Criminal Cases*, 78 *YALE L.J.* 1046, 1062-63 (1969) (advocating broad estoppel defense based on *Raley* and *Cox*).

should be available to the occasional transgressor who relies on the enforcement policy and is prosecuted.”<sup>176</sup>

Yet the three cases also track a narrower line: that individuals may rely on assurances of legality only if those assurances reasonably appear to reflect authoritative interpretation of governing law, rather than a mere choice not to enforce that law under the circumstances. This understanding was implicit in *Raley*, in which the witnesses had no reason to suspect the Commission’s assurances were mistaken.<sup>177</sup> It was explicit in both *Cox* and *PICCO*; in those decisions, the Court emphasized that officials in question had not claimed any improper “waiver” authority,<sup>178</sup> but rather advanced an apparent “administrative construction” of the governing substantive law.<sup>179</sup> Consistent with this interpretation, the Court’s more recent estoppel cases have emphasized the loss to the “citizenry as a whole” if government assurances bar future enforcement of otherwise-applicable substantive law.<sup>180</sup>

So construed, the three decisions are justified because they involve circumstances presenting quite different tradeoffs from garden-variety nonenforcement. On the individual side of the balance, fairness concerns are particularly acute in this circumstance. Even if ignorance of the law is normally no excuse, fair notice concerns carry particular force when regulated parties, far from lacking actual notice of the law, in fact receive affirmative official assurances that the law allows their activity.<sup>181</sup> At the same time, separation of powers concerns may be somewhat attenuated, because protecting reliance on assessments of this sort will normally advance rather than undermine systemic interests in private adherence to public law. Seeking guidance from enforcement officials is normally a way in which regulated parties learn what they cannot do.<sup>182</sup> Denying reliance across the board on such guidance could

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176. *Id.* at 1070-71; *see also PICCO*, 411 U.S. at 674 (favorably citing this Comment).

177. *See Raley v. Ohio*, 360 U.S. 423, 439-40 (1959).

178. *Cox v. Louisiana*, 379 U.S. 559, 569 (1965).

179. *PICCO*, 411 U.S. at 657.

180. *See Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984); *see also Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 423 (1990) (noting the strength of the government’s argument that recognizing estoppel based on executive misrepresentations would “invade the legislative province reserved to Congress”).

181. *See, e.g., Raley*, 360 U.S. at 425-26.

182. *See, e.g., Emily Cauble, Detrimental Reliance on IRS Guidance*, 2015 WIS. L. REV. 421,

thus have corrosive effects on citizens' overall legal compliance and respect for government.<sup>183</sup>

Furthermore, drawing the reliance boundary at this limit intersects importantly with principles of reviewability. While the Supreme Court has interpreted the Administrative Procedure Act (APA) to exempt case-specific enforcement decisions from judicial review,<sup>184</sup> formal assurances of legality may be reviewable, at least if they are sufficiently definitive to qualify as "final agency action" and a challenger with standing brings suit.<sup>185</sup> I have argued elsewhere that general policies deeming statutorily proscribed conduct affirmatively lawful should often be subject to review and invalidation under the APA, even if the policy is framed in terms of enforcement.<sup>186</sup> To the extent that is true, reliance may be the flip side of reviewability. When a policy is subject to legally protected reliance, it may also be subject to pre-enforcement review, at least if a party with sufficiently concrete adverse interests chooses to challenge it.<sup>187</sup> On the other hand, enforcement policies—even those

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422-24 (discussing implications of taxpayer usage of formal and informal IRS guidance); Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331, 340-44 (2011) (discussing benefits of guidance documents in general).

183. Richard Pierce argues in more starkly utilitarian terms that official guidance functions as free but unreliable advice that regulated parties rationally employ when they do not wish to pay for more reliable private counsel. 2 RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* 1102 (5th ed. 2010) (estimating the chance of erroneous Internal Revenue Service advice at 15 percent and suggesting that "[a] prudent taxpayer relies exclusively on the free advice available from IRS in the high proportion of cases in which the consequences of relying on erroneous advice are too small to justify paying money to reduce the risk that the advice is wrong"). While this account may accurately reflect the understanding of sophisticated parties, it seems likely to underestimate the real reliance that ordinary citizens place on advice received through channels such as Internal Revenue Service help lines. See Cauble, *supra* note 182, at 463-65 (discussing the use of informal IRS services).

184. See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).

185. See, e.g., *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1813-14 (2016) (upholding reviewability of agency "jurisdictional determination" because the agency action involved a relatively formal agency decision and entailed the grant or denial of an effective five-year safe harbor from official sanction); *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (establishing two-part test of finality in which agency action is reviewable if it "mark[s] the 'consummation' of the agency's decisionmaking process," so that it is not "of a merely tentative or interlocutory nature," and is also an action "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow'" (quoting *Port of Bos. Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970))).

186. See Price, *Law Enforcement as Political Question*, *supra* note 29, at 1622-24.

187. See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967) (upholding preenforcement review under ripeness doctrine).

that defy proper notions of faithful execution—may often evade judicial correction because of judicial manageability problems and limits on APA reviewability.<sup>188</sup> By the same token, however, such policies are not subject to legally protected reliance. Hence, in many cases, back-end legal risk substitutes for front-end judicial review in confining executive freedom of action.

At any rate, limiting the reliance defense to cases involving formal assurance of legality significantly limits its range of potential application, thus cabining any capacity for executive officials to alter substantive law through enforcement policy. By channeling the reliance inquiry into consideration of whether officials provided assurances of legality, the *Raley-Cox-PICCO* doctrine effectively replaces one formal line with another, swapping the general rule that reliance is unprotected for a narrower rule that reliance can be protected only if executive officials provided assurances of legality rather than mere promises of forbearance. While perhaps “highly formalistic,”<sup>189</sup> this line is at least readily administrable, and it tracks the same basic boundary between legal interpretation and enforcement discretion that necessarily underlies the doctrine as a whole.

Even so, the due process analysis cannot turn entirely on the character of the assurance executive officials provided. *Raley*, *Cox*, and *PICCO* cannot mean that a reliance defense is always available so long as enforcement officials provide assurance of legality rather than mere promises of forbearance. If the cases stood for any such bright-line rule, then the problem of ultra vires executive suspending power would simply recur in different guise: executive officials could alter substantive laws simply by framing their assurances as promises of legality, however implausible under the circumstances. Instead, as lower courts have recognized, the due process reliance defense must be cabined by some further assessment of reasonableness—of whether, under the particular circumstances, the legal guidance was facially plausible and a regulated party genuinely interested in following the law would rely on it.<sup>190</sup> While this

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188. See *Heckler*, 470 U.S. at 831; see also Price, *Law Enforcement as Political Question*, *supra* note 29, at 1599-1600 (discussing *Heckler*).

189. Mikos, *supra* note 118, at 643.

190. See, e.g., *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970) (requiring such a showing of reasonableness by criminal defendant).



reasonableness inquiry risks collapsing into circularity—reliance is reasonable if it is legally protected and legally protected if it is reasonable—lower courts have sought to give it content through case-specific elaboration.

*b. Lower Court Elaboration*

In the years since *PICCO*, lower federal courts have recognized two related criminal defenses based on the Supreme Court's holdings. The first is confusingly named "entrapment by estoppel," by which courts seem to mean something more like "anti-entrapment estoppel." This doctrine prevents prosecution when, "because of the statements of an official, the defendant believes that his conduct constitutes no offense."<sup>191</sup> The second defense, called "public authority," may apply when, as in an undercover operation, "the defendant engages in conduct at the request of a government official that the defendant knows to be otherwise illegal."<sup>192</sup>

Lower courts have appropriately limited both defenses to cut off the broader potential implications of *Raley*, *Cox*, and *PICCO* and restrict due process protection for reliance to contexts in which the trade-offs between separation of powers and fairness are tolerable. With respect to anti-entrapment estoppel, as already noted, courts have imposed a reasonableness gloss on the Supreme Court's suggestion that official assurances of legality may legitimately invite reliance. Federal courts thus generally require two key elements for an entrapment by estoppel defense: "that the government affirmatively told [the defendant] the proscribed conduct was permissible, and that [the defendant] reasonably relied on the government's statement."<sup>193</sup>

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191. *United States v. Jumah*, 493 F.3d 868, 874 n.4 (7th Cir. 2007).

192. *Id.*

193. *United States v. Hancock*, 231 F.3d 557, 567 (9th Cir. 2000) (quoting *United States v. Ramirez-Valencia*, 202 F.3d 1106, 1109 (9th Cir. 2000)). Courts have offered various formulations of the defense's requirements. *See, e.g.*, *United States v. Bader*, 678 F.3d 858, 886 (10th Cir. 2012) (holding that "a defendant must prove (1) that there was an 'active misleading by a government agent'; (2) that the defendant actually relied upon the agent's representation, which was 'reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation'; and (3) that the government agent is 'one who is responsible for interpreting, administering, or enforcing the law defining the offense.'" (quoting *United States v. Apperson*, 441 F.3d 1162, 1204-05 (10th Cir. 2006))); *United States v. Batterjee*, 361 F.3d 1210, 1216 (9th Cir. 2004) (applying a five-element test

As the Tenth Circuit recently explained, “consistent enforcement of the law requires a reasonableness limitation on the entrapment-by-estoppel exception to the general rule” that a mistake of law is no defense.<sup>194</sup> Without such a limitation, “the more successfully a defendant presented himself as ill-educated or naïve, the stronger would be his argument.”<sup>195</sup> Courts, accordingly, have demanded that reliance be “reasonable—in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.”<sup>196</sup> In other words, the reliance must be “reasonable in light of the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation.”<sup>197</sup> By these measures, courts have rejected reliance claims when the defendant provided false information to authorities,<sup>198</sup> when government officials sent “mixed messages” about whether planned conduct was legal,<sup>199</sup> when the government provided the relied-upon assurances to third parties,<sup>200</sup> when state rather than federal officials provided inaccurate

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with similar components).

194. *United States v. Rampton*, 762 F.3d 1152, 1157 (10th Cir. 2014).

195. *Id.* (quoting *United States v. Rector*, 111 F.3d 503, 506 (7th Cir. 1997)).

196. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970); *see also Batterjee*, 361 F.3d at 1216-17.

197. *Bader*, 678 F.3d at 886 (quoting *Apperson*, 441 F.3d at 1205).

198. *See, e.g., Rampton*, 762 F.3d at 1157-58 (collecting cases).

199. *See, e.g., United States v. Smith*, 940 F.2d 710, 715 (1st Cir. 1991) (rejecting an entrapment by estoppel defense for possession of firearms when a federal agent allegedly told defendant “both that [he] could not legally possess the weapons and that he should keep them to facilitate his information-gathering for the government”); *see also United States v. Barber*, 603 F. App’x 643, 644 (9th Cir. 2015) (finding a “vague statement” by official insufficient to support an entrapment by estoppel defense).

200. *See, e.g., United States v. Eaton*, 179 F.3d 1328, 1332 (11th Cir. 1999) (per curiam) (rejecting, in a wildlife trafficking prosecution, “reliance on the perceived pattern of Government agents allowing other missionaries to import snakes in their personal luggage”).

guidance about federal prohibitions,<sup>201</sup> and when the defendant himself had a particular obligation to know the law.<sup>202</sup>

Courts have often tried to justify these exceptions in terms of fairness, based on the rather circular logic that there is nothing unfair about penalizing someone when a reasonable person would not have relied.<sup>203</sup> In fact, however, these limits may permit quite significant unfairness. Is it really unreasonable for a nonlawyer citizen to overestimate state officials' authority to provide guidance on federal law, or to misjudge the extent of a particular official's responsibility with respect to administering federal law? The balancing framework articulated above better explains the judicial impulse underlying the reasonableness limitation. Through common law elaboration of reasonableness standards, courts have protected the separation of powers side of the ledger by limiting circumstances in which protecting even quite reasonable reliance would result in giving particular officials undelegated authority to alter the content of legal obligations.

The public authority defense is subject to still sharper limits.<sup>204</sup> This defense recognizes that public officials and their agents sometimes break the law to enforce the law.<sup>205</sup> Stings, undercover

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201. See, e.g., *United States v. Collins*, 773 F.3d 25, 29-30 (4th Cir. 2014) (distinguishing *Raley* and *Cox* and rejecting an entrapment by estoppel defense when the alleged mistaken advice and the subsequent prosecution came from "two different sovereigns"); *United States v. Baker*, 438 F.3d 749, 754 (7th Cir. 2006) ("[L]ocal law enforcement officials ... generally do not have the authority to exempt individuals from violations of federal firearm laws."); *United States v. Ormsby*, 252 F.3d 844, 851 (6th Cir. 2001) ("When this defense is asserted with respect to a federal offense, representations or assurances by state or local officials lack the authority to bind the federal government to an erroneous interpretation of federal law."). *But cf.* *United States v. Brady*, 710 F. Supp. 290, 295-96 (D. Colo. 1989) (upholding an entrapment by estoppel defense when defendant relied on erroneous advice from a state judge who was "constitutionally obligated to apply federal law when he gave advice to the defendant").

202. See, e.g., *United States v. Rodman*, 776 F.3d 638, 643 (9th Cir. 2015) (rejecting this defense when defendant allegedly relied on guidance from federally licensed firearms dealer but was himself a licensed dealer with a duty "to be familiar with the relevant law"). The Ninth Circuit has held that erroneous guidance from federally licensed firearms dealers may support a defense of entrapment by estoppel. See *United States v. Tallmadge*, 829 F.2d 767, 774 (9th Cir. 1987). Other circuits have rejected this view. See, e.g., *United States v. Hardridge*, 379 F.3d 1188, 1193 (10th Cir. 2004) (collecting cases), *reh'g granted in part on other grounds*, 149 F. App'x 746 (10th Cir. 2005).

203. See *supra* note 18 and accompanying text.

204. See generally *United States v. Sariles*, 645 F.3d 315, 319 (5th Cir. 2011); *United States v. Fulcher*, 250 F.3d 244, 254 (4th Cir. 2001).

205. See *Fulcher*, 250 F.3d at 253.

operations, and other tactics essential to ferreting out crime and advancing counter-intelligence objectives may sometimes involve conduct that would violate criminal laws if undertaken by private citizens on their own initiative. Accordingly, just as the defendants in *Raley*, *Cox*, and *PICCO* mistakenly believed their conduct was lawful because government agents told them so,<sup>206</sup> defendants in public authority cases claim to have believed their conduct was lawful because law enforcement or intelligence officials authorized it.<sup>207</sup> Federal courts, however, have effectively collapsed this defense into an inquiry about substantive legality.<sup>208</sup> Apart from one early opinion by a single circuit judge,<sup>209</sup> courts have recognized the defense only when public officials held actual, as opposed to merely apparent, authority to approve the conduct in question.<sup>210</sup> Thus, in one typical example, the Third Circuit rejected the defense when a confidential informant possessed a large quantity of cocaine in alleged reliance on two officials' permission, but unrebutted testimony indicated the officials could have authorized the conduct only with the permission of more senior officers.<sup>211</sup>

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206. See *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 673-74 (1973); *Cox v. Louisiana*, 379 U.S. 559, 569, 570-72 (1965); *Raley v. Ohio*, 360 U.S. 423, 431-32, 437 (1959).

207. See *Fulcher*, 250 F.3d at 253.

208. See *id.* at 254.

209. *United States v. Barker*, 546 F.2d 940, 955 (D.C. Cir. 1976) (per curiam) (Merhige, J., concurring).

210. See, e.g., *United States v. Alvarado*, 808 F.3d 474, 484 (11th Cir. 2015) (indicating that the public authority defense requires that "the government official on whom the defendant purportedly relied must have actually had the authority to permit a cooperating individual to commit the criminal act in question"); *United States v. Sariles*, 645 F.3d 315, 319 (5th Cir. 2011) (as revised) ("[W]e hold that the public authority defense requires the defendant reasonably to rely on the *actual, not apparent*, authority of the government official or law enforcement officer to engage the defendant in covert activity." (emphasis added)); *Fulcher*, 250 F.3d at 254 (collecting cases and "adopt[ing] the unanimous view of our sister circuits that the defense of public authority requires reasonable reliance upon the actual authority of a government official to engage him in a covert activity"). As with the entrapment by estoppel defense, courts further hold that reliance must be "reasonable as well as sincere." *United States v. Burrows*, 36 F.3d 875, 882 (9th Cir. 1994); see also *United States v. Bulger*, 928 F. Supp. 2d 294, 303 (D. Mass. 2013) ("The proposition that a defendant may commit a criminal act without prior notice to any Government official on the basis of a supposed *carte blanche* authorization or a license to do everything but kill is without precedent and stretches any concept of good faith reliance beyond recognition." (quoting *United States v. Berg*, 643 F. Supp. 1472, 1480 (E.D.N.Y. 1986))), *aff'd*, 816 F.3d 137 (1st Cir. 2016).

211. *United States v. Pitt*, 193 F.3d 751, 758 (3d Cir. 1999); see also, e.g., *United States v. Rosenthal*, 793 F.2d 1214, 1235-36 (11th Cir.) (rejecting defense because under applicable

No conceivable fairness rationale justifies this limitation on the public authority defense. From the individual informant's point of view, government assurances are no less an "indefensible sort of entrapment"<sup>212</sup> because the official who offered them lacked genuine authority to do so. Indeed, levels of official authority within the agency will often be entirely opaque to those on the outside. The limits courts have imposed on this defense instead, once again, reflect structural concerns rooted in separation of powers. Like Justice Paterson in *Smith*, courts have declined to give every law enforcement official an effective dispensing power,<sup>213</sup> and by extension every defendant a "Nuremberg defense" of having been following government orders.<sup>214</sup> Instead, again just as the Court did in *Smith*, courts have refracted their due process analysis through separation of powers concerns about executive authority and the rule of law.<sup>215</sup> Doing so, however, effectively closes any gap between reliance and authorization: informants may rely on government authorization only when that authorization in fact provides lawful authority for their conduct.<sup>216</sup>

In sum, the due process reliance defense recognized in *Raley, Cox*, and *PICCO*, as further developed in lower federal courts, reflects an implicit balancing of fairness considerations against separation of

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executive orders intelligence agencies lacked authority to authorize violations of narcotics laws), *modified*, 801 F.2d 378 (11th Cir. 1986).

212. *Raley v. Ohio*, 360 U.S. 423, 426 (1959).

213. *See United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,342).

214. *See, e.g., United States v. North*, 910 F.2d 843, 878-79, 881 (D.C. Cir.) (per curiam) (rejecting proposed defense of good-faith reliance on superior's apparent authority to permit conduct because it would "go so far as to conjure the notion of a 'Nuremberg' defense, a notion from which our criminal justice system, one based on individual accountability and responsibility, has historically recoiled"), *opinion partially withdrawn on other grounds*, 920 F.2d 940 (D.C. Cir. 1990).

215. *See Smith*, 27 F. Cas. at 1229-30.

216. Under a general canon of construction associated with *Nardone v. United States*, statutory prohibitions do not necessarily apply to the government itself. *See* 302 U.S. 379, 383 (1937) (describing "[t]he canon that the general words of a statute do not include the government or affect its rights unless the construction be clear and indisputable upon the text of the act"); *see also United States v. Anty*, 203 F.3d 305, 311 (4th Cir. 2000) (holding that the general statutory bribery prohibition "does not prohibit the United States from acting in accordance with long-standing practice and statutory authority to pay fees, expenses, and rewards to informants"). For a wide-ranging critique of government officials' disregard for generally applicable laws in conducting undercover investigations, *see generally Elizabeth E. Joh, Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009).

powers costs, with the balance strongly tilted in favor of the latter. Defendants may sometimes rely on government assurances of legality if those assurances appear to reflect legitimate authority to expound governing law. But these cases provide no defense if government officials only promised nonenforcement, or if reliance on their assurances was “unreasonable,” or if officials authorized lawbreaking but lacked actual authority to excuse the invited violations. Some decisions reaching such results acknowledge the fundamental unfairness that may result when the government invites conduct and then punishes the perpetrator for it. Yet the lines courts have ultimately drawn better track separation of powers anxieties about officials changing the law without proper authority. Even quite egregious unfairness triggers no due process barrier to prosecution when separation of powers concerns are acute.

### *3. Recent Administrative Decisions Explained*

Framing reliance defenses in terms of a balance between fairness and separation of powers also sheds important light on recent administrative law decisions that have indirectly elaborated the same due process reliance principles. In several Supreme Court cases in recent years, regulated parties have cried foul over apparent shifts in agency enforcement practice.<sup>217</sup> In two such decisions, moreover, the Court understood due process principles or APA anti-arbitrariness standards to effectively protect reliance on past nonenforcement.<sup>218</sup> These cases provide further important evidence that problems of nonenforcement reliance may arise across a range of substantive domains—and indeed that recent trends toward presidential administration and partisan polarization might well generate recurrent problems of reliance as changes in administration yield sharp periodic shifts in agency policy. But the decisions should not be read too broadly. Far from suggesting any general protection for reliance on nonenforcement, these decisions effectively track, and thus reinforce, the same distinction between

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217. See *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2124-26 (2016); *Fox II*, 132 S. Ct. 2307, 2317-18 (2012); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2161, 2164-67 (2012).

218. *Fox II*, 132 S. Ct. at 2317-18; *Christopher*, 132 S. Ct. at 2168.

interpretation and enforcement that underlies the *Raley-Cox-PICCO* trilogy.<sup>219</sup>

First, in two successive decisions regarding the same litigation, the Court addressed challenges to a shift in the Federal Communications Commission's enforcement policy with respect to a statutory prohibition on "obscene, indecent, or profane" broadcasts.<sup>220</sup> In its first decision, *FCC v. Fox Televisions Stations (Fox I)*, the Court held that although the agency may change enforcement policy, it must provide a reasoned explanation for disrupting any "serious reliance interests" engendered by the existing policy.<sup>221</sup> In the second decision in the same litigation (*Fox II*), the Court nonetheless held that due process requirements of fair notice barred the agency from sanctioning broadcasters for content they could not reasonably have anticipated would be considered "indecent."<sup>222</sup> In both decisions, the Court effectively protected regulated parties' reliance on past agency assurances about how governing statutory standards would be enforced.<sup>223</sup> Yet the enforcement policies in question were more than just statements of agency priorities; they reflected the agency's evident interpretation of governing statutory standards that would otherwise be quite indeterminate. *Fox I* and *Fox II* thus stand for the proposition that when Congress gives agencies broad delegated authority to give meaning to capacious statutory standards, due process requires fair warning of significant shifts in agency interpretation.<sup>224</sup> The cases do not protect reliance on enforcement policies in general.

Another decision from the same year as *Fox II* is similar. In *Christopher v. SmithKline Beecham Corp.*, the Court rejected the Department of Labor's view (asserted in litigation brought by private plaintiffs) that applicable regulations defined certain pharmaceutical sales representatives as employees subject to federal wage and hour requirements rather than "outside salesm[e]n"

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219. See *Fox II*, 132 S. Ct. at 2318 (acknowledging a defense due to a change in apparent statutory interpretation after a period of actual nonenforcement rather than merely a promise of nonenforcement); *Christopher*, 132 S. Ct. at 2167-68.

220. See 18 U.S.C. § 1464 (2012).

221. *Fox I*, 556 U.S. 502, 515-16 (2009).

222. *Fox II*, 132 S. Ct. at 2320.

223. See *id.*; *Fox I*, 556 U.S. at 515-16.

224. See *Fox II*, 132 S. Ct. at 2317; *Fox I*, 556 U.S. at 515-16.

falling within a statutory exemption.<sup>225</sup> Though acknowledging that it would normally defer to an agency's reasonable interpretation of its own ambiguous regulations, the Court declined to apply such deference in *Christopher*.<sup>226</sup> Such deference was appropriate, the Court reasoned, only when regulated parties had fair warning of the agency's interpretation.<sup>227</sup> Yet in *Christopher*, according to the Court, the agency had persistently failed to bring any enforcement action or otherwise challenge "the industry's decades-long practice" with respect to the sales representatives.<sup>228</sup>

In effect, then, *Christopher*, like *Fox I* and *Fox II*, protected regulated parties' reliance on past agency enforcement practice,<sup>229</sup> even though the past policies in question were not legislative rules with the "force and effect of law" that formally bound the agency.<sup>230</sup> Nevertheless, in *Christopher*, just as in *Fox I* and *Fox II*, it was crucial to the Court's analysis that the enforcement practice in question reflected an apparent agency interpretation of governing substantive law rather than mere prioritization of enforcement efforts.<sup>231</sup> Indeed, the Court "acknowledge[d] that an agency's enforcement decisions are informed by a host of factors, some bearing no relation to the agency's views regarding whether a violation has occurred."<sup>232</sup> The Court nonetheless protected regulated parties' reliance only because the agency's "very lengthy period of conspicuous inaction" indicated under the circumstances that "the Department did not think the industry's practice was unlawful."<sup>233</sup> What is more, although in *Christopher* the Court deemed the agency's interpretation "quite unpersuasive,"<sup>234</sup> the Court's deference holding would readily have permitted liability if the industry's practice violated the best view of the applicable substantive law.<sup>235</sup>

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225. 132 S. Ct. 2156, 2169 (2012).

226. *Id.* at 2166-68.

227. *Id.* at 2167.

228. *Id.* at 2168.

229. *See id.*

230. On the distinction between binding legislative rules and interpretive rules and policies in general, see *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015).

231. *See Christopher*, 132 S. Ct. at 2167-68.

232. *Id.* at 2168 (citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985)).

233. *Id.*

234. *Id.* at 2169.

235. Much as courts defer to agencies' reasonable interpretations of agency-administered statutes under *Chevron*, they generally defer to agencies' reasonable interpretations of



In fact, under *PICCO*, due process may bar at least criminal sanctions, if not also other penal remedies, even if the prior agency view on which regulated parties relied at the time was not the best interpretation of the statute or regulation.<sup>236</sup> In *PICCO*, although the Court ultimately remanded the case to determine whether the defendant's reliance was reasonable,<sup>237</sup> the Court never suggested that the inquiry turned on de novo interpretation of the statute; nor did it suggest that the agency's past view was legally binding. Quite the opposite, the Court held open the possibility that good-faith reliance afforded a defense despite suggesting that the agency's past construction of the statute was erroneous.<sup>238</sup> Furthermore, in other "fair notice" cases, the Court suggested that reliance on past agency understandings may preclude retroactive sanctions, whatever the merits of the agency's past view.<sup>239</sup>

Just as with anti-entrapment estoppel, any inquiry into reasonable reliance in this context must turn on whether, taking into

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agency-administered regulations under *Auer v. Robbins*, 519 U.S. 452 (1997). See *Christopher*, 132 S. Ct. at 2166-67. The Court in *Christopher* denied such deference to the agency's current view because of the defendant's reliance on the agency's apparent contrary past view. *Id.* In another recent decision, *Encino Motorcars, LLC v. Navarro*, the Court similarly denied *Chevron* defense to a legislative rule that disrupted regulated parties' expectations. 136 S. Ct. 2117, 2127 (2016). *Encino Motors*, however, involved secondary rather than primary retroactivity—the reliance in question involved prospective business operations developed in reliance on the agency's past views, rather than retroactive liability for completed conduct—and the Court denied deference only because the agency inadequately addressed reliance concerns in the rule's preamble. *Id.* at 2126-27. For discussion of primary and secondary retroactivity in the administrative context, see *supra* Part II.A.1.

236. See *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 673-75 (1973).

237. *Id.* at 675.

238. See *id.* at 670-74; see also *United States v. Caceres*, 440 U.S. 741, 752-53 (1979) (characterizing *Raley* and *Cox* as indicating that "the Due Process Clause is implicated [when] an individual has reasonably relied on agency regulations promulgated for his guidance or benefit and has suffered substantially because of their violation by the agency").

239. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (upholding agency authority to announce new legal principles through adjudication rather than rulemaking but emphasizing that "this is not a case in which some new liability is sought to be imposed on individuals for past actions which were taken in good-faith reliance on Board pronouncements[, n]or are fines or damages involved here"); *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 768 (9th Cir. 2008) ("[T]hose regulated by an administrative agency are entitled to know the rules by which the game will be played." (quoting *Ala. Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030, 1035 (D.C. Cir. 1999))); cf. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (indicating that whether the agency "has consistently applied the interpretation embodied in the citation" is "a factor bearing on the reasonableness of the [agency's] position").

account the regulated party's circumstances and legal sophistication, "a person sincerely desirous of obeying the law would have" engaged in the conduct at issue.<sup>240</sup> Here, too, in particular, separation of powers considerations mandate some outer limit of plausibility for reliance-inducing guidance that defies statutory requirements; agencies cannot cancel statutes by promulgating facially implausible interpretive rules. But whatever the precise bounds of protected reliance on past interpretations in the administrative context, the key point here is that recent administrative cases do not support any broader protection for nonenforcement reliance than is supported by the anti-entrapment cases. Despite references to agency "enforcement policy,"<sup>241</sup> *Fox II* and *Christopher* comport with the distinction between interpretation and enforcement drawn in *Raley, Cox*, and *PICCO*.<sup>242</sup> These decisions thus cast no doubt on the settled view that agencies generally cannot eliminate clear statutory obligations simply by failing to enforce those obligations in some or all cases.<sup>243</sup>

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240. See *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970). In fact, some lower courts addressing claimed reliance on formally nonbinding agency guidance have engaged in this type of inquiry. In the tax context, for example, although courts have generally held that compliance with IRS publications cannot excuse statutory violations, see, e.g., *Carpenter v. United States*, 495 F.2d 175, 184 (5th Cir. 1974) (rejecting claimed reliance on IRS publication because "it is for the Congress and the courts and not the Treasury to declare the law applicable to a given situation"), one court deemed it an abuse of discretion to impose a regulatory interpretation retroactively with respect to a taxpayer who relied on an informal manual promising that any future change would be prospective only, see *Gehl Co. v. Comm'r*, 795 F.2d 1324, 1333 (7th Cir. 1986); see also *Miller v. Comm'r*, 114 T.C. 184, 195 (2000) ("Administrative guidance contained in IRS publications is not binding on the Government, nor can it change the plain meaning of tax statutes."); cf. *Dixon v. United States*, 381 U.S. 68, 73 (1965) (rejecting claimed reliance on "prefatory statements" associated with internal revenue bulletins because the statements were expressly "merely guidelines for Bureau personnel").

241. *Fox II*, 132 S. Ct. 2307, 2318 (2012); see also *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (addressing "enforcement policy"); *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012) (discussing agency "enforcement decisions").

242. See *Fox II*, 136 S. Ct. at 2318; *Christopher*, 132 S. Ct. at 2168.

243. As Mila Sohoni has suggested, these decisions might augur resurgence of a more robust general standard of fair notice in the administrative context. Mila Sohoni, *Notice and the New Deal*, 62 DUKE L.J. 1169, 1220-23 (2013). The decisions might imply, in other words, that while Congress may delegate broad authorities to agencies, due process nonetheless obligates agencies to provide advance warning regarding how they intend to interpret capacious statutory standards. *Id.* To the extent that is true, cases involving reliance on past agency views would simply constitute one application of a broader due process principle of fair warning. See *id.* at 1223.

## B. *Competing Proposals Rebutted*

### 1. *Current Doctrine's Necessary Severity*

Key decisions across both criminal and administrative contexts thus have recognized that due process principles of fair notice may sometimes prevent enforcement following assurances that planned conduct will not incur sanctions. The Court's key decisions, however, limit this protection to contexts in which enforcement officials' assurances reflect an apparent interpretation of governing law, as opposed to a choice about where to focus enforcement efforts.<sup>244</sup> Courts, moreover, have further limited due process protection for reliance on such assurances to contexts in which that reliance is reasonable in the specific sense that someone seeking to follow the law might have relied as the defendant did.<sup>245</sup> Far from tracking any intuitive conception of fairness, these limits on due process protection instead reflect separation of powers constraints on executive authority.<sup>246</sup> Courts simply cannot protect regulated parties' reliance in all circumstances in which those parties feel entrapped—or even in all circumstances in which any reasonable nonlawyer might feel entrapped—because doing so would give executive officials a de facto power to change substantive law that the Constitution denies to them.

Once again, recent marijuana and immigration policies sharply illuminate this gap between intuitive fairness and constitutional due process. Those who have opened marijuana businesses, purchased marijuana from such businesses, or even licensed, taxed, or regulated such businesses clearly fall on the wrong side of the line between legal assurance and enforcement discretion that courts have thus far drawn.<sup>247</sup> Possessing or distributing marijuana, or conspiring to possess or distribute it, or even participating in an enterprise that does so—these activities all substantively, and unambiguously, violate federal criminal law.<sup>248</sup> The federal government

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244. See, e.g., *Christopher*, 132 S. Ct. at 2167-68.

245. See *supra* note 196 and accompanying text.

246. See *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,324).

247. See, e.g., *United States v. Washington*, 887 F. Supp. 2d 1077, 1083-84 (D. Mont.), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

248. See *supra* note 10 and accompanying text.

at most issued a nonbinding promise not to enforce these laws in certain circumstances; it did not purport to (and in any event could not) alter the law itself.<sup>249</sup>

Much the same analysis applies to the Obama deferred action programs, DACA and DAPA. Beneficiaries of these programs were concededly removable under federal immigration statutes, even if their removal would be a low priority for any sensible and humane administration.<sup>250</sup> Administrative cases such as *Fox I*, *Fox II*, and *Christopher* thus offer no help. The substantive standards at issue are not so capacious as to confer implicit interpretive authority; on the contrary, the executive branch claimed authority only to defer removal precisely because it could not reasonably interpret away the substantive constraints on its authority to confer legal status.

Courts have in fact addressed these questions in several recent marijuana-related cases and have repeatedly rejected reliance defenses based solely on the Justice Department guidance.<sup>251</sup> Yet even if this result is doctrinally sound, on a real-world level it is exceedingly harsh. As one judge observed in rejecting reliance defenses in a marijuana prosecution, “when taken in the aggregate,

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249. Given that private marijuana businesses and customers are violating federal law rather than helping to enforce it, they also cannot qualify for any public authority defense. See generally *supra* note 192 and accompanying text.

250. See *supra* notes 8, 72-78 and accompanying text.

251. See, e.g., *Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 (9th Cir. 2014) (rejecting an asserted estoppel defense because “at no point did the Government promise not to enforce the [Controlled Substances Act]”); *United States v. Canori*, 737 F.3d 181, 184-85 (2d Cir. 2013) (“That the Department of Justice has chosen to prioritize certain types of prosecutions unequivocally does not mean that some types of marijuana use are now legal under the [Controlled Substances Act].”); *United States v. Trujillo*, No. CR-13-2109-FVS-1, 2014 WL 3697796, at \*2 (E.D. Wash. July 24, 2014) (rejecting an asserted defense based on the Ogden and Cole memos because they do not “create enforceable rights”); *Washington*, 887 F. Supp. 2d at 1083-84 (rejecting reliance defense because “no federal official has ever stated that the cultivation, sale, or use of medical marijuana is *legal* under federal law”); *Marin All. for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1155-56 (N.D. Cal. 2011) (rejecting an entrapment by estoppel theory because nothing in the DOJ’s marijuana guidance “affirmatively informs medical marijuana growers and distributors that their conduct is legal”); cf. *United States v. Pickard*, 100 F. Supp. 3d 981, 1010 (E.D. Cal. 2015) (rejecting an equal protection challenge to the Controlled Substance Act “[b]ecause the [Ogden] memorandum does not treat individuals living in states where marijuana has been decriminalized in whole or part differently from those who live in states where it has not”). In one such case, the court did allow the defendants to present a reliance defense to the jury based on more specific alleged statements by a particular government official. *Washington*, 887 F. Supp. 2d at 1099.

particularly through the filter of the news media, the words of federal officials,” though “nebulous, equivocal, and highly qualified,” were nonetheless “enough to convince those who were considering entry into the medical marijuana business that they could engage in that enterprise without fear of federal criminal consequences.”<sup>252</sup> Acknowledging the “strongly held belief among those in the medical marijuana community that the federal government has not treated them fairly,” the judge observed that providers’ choice to enter the medical marijuana industry had proved “very costly”—they were now “facing federal felony marijuana distribution charges,” some with “mandatory minimum sentences of five years or more.”<sup>253</sup>

As this judge’s observations highlight, it is quite unlikely that every ordinary marijuana seller or customer or, for that matter, every undocumented immigrant who benefited from the Obama Administration’s deferred action policies—individuals assured by the President of the United States that they may “come out of the shadows and get right with the law,”<sup>254</sup> and that the President is “not going to be using Justice Department resources to try to circumvent state laws on this issue”<sup>255</sup>—fully appreciated the legal risks held open by disclaimers in the marijuana guidance and deferred action policies. To the extent they read the disclaimers at all (or were advised about them by their lawyers), such individuals may well have perceived them to be lawyers’ technicalities, much like arbitration clauses and other harsh terms in adhesionsary consumer contracts—technical rights, demanded by the lawyers, but unlikely to govern actual social relations. Nor was that expectation unreasonable: the government would normally keep such promises (however nonbinding), just as it likely declines to prosecute many informant cases in which public authority or entrapment by estoppel defenses are technically inapplicable. Even holding open the possibility of prosecution or removal in these cases is thus normatively troubling, because nonenforcement seemed likely to generate social realities in which individuals lost sight of the real legal risks of their behavior.

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252. *Washington*, 887 F. Supp. 2d at 1084.

253. *Id.*

254. Obama DAPA Speech, *supra* note 104.

255. *Washington*, 887 F. Supp. 2d at 1096 (quoting a statement from Barack Obama’s presidential campaign and collecting other similar statements).

Nevertheless, here, as in other nonenforcement contexts, courts cannot recognize an across-the-board reliance defense, because doing so would effectively grant executive officials an unrestricted suspending power—an authority to eliminate legal obligations by inviting reliance on promised nonenforcement.<sup>256</sup> For this reason, one scholar’s recent attempt to justify a broader reliance defense with respect to marijuana and immigration is unconvincing,<sup>257</sup> and two other possible approaches—preserving enforcement only prospectively or weighing the normative importance of statutory policies—also miss the mark.

## 2. *Legalization Conflicts*

Recoiling from the harshness of current doctrine as applied to marijuana and immigration, Professor Mary Fan has proposed recognizing a broader reliance defense whenever nonenforcement results from what she calls a “legalization conflict.”<sup>258</sup> On this view, “when conduct is decriminalized or permitted by one authority while remaining criminalized under another concurrent legal regime,” reliance defenses should be available to the extent that “the entity charged with enforcing the criminalization regime acquiesces in the competing legalization regime.”<sup>259</sup> Professor Fan thus argues that future federal enforcement of federal marijuana laws against state-licensed businesses should be barred because executive officials “expressly acquiesced—and even facilitated—state legalization efforts” by announcing federal nonenforcement policies despite federal criminalization.<sup>260</sup> Professor Fan contrasts the marijuana example with federal officials’ express nonacquiescence in state laws purporting to nullify federal firearms restrictions.<sup>261</sup> In that context, reliance would be unreasonable because federal officials gave regulated parties no reason to believe they could rely on state legalization of federally proscribed conduct.<sup>262</sup> “States,” Professor

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256. See *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D.N.Y. 1806) (No. 16,324).

257. See Fan, *supra* note 11, at 912.

258. *Id.*

259. *Id.* at 910-12.

260. *Id.* at 948.

261. *Id.* at 949.

262. *Id.*

Fan argues, “cannot by fiat render clear and controlling criminalization unclear—but the conduct of agencies and officials charged with administering the criminalization regime can change the equities.”<sup>263</sup>

Though properly recognizing the sharp risk of confusion and unfairness created by the Obama Administration’s marijuana policy, Professor Fan’s analysis ultimately mistakes a separation of powers problem for a federalism conflict. To begin with, as Professor Fan acknowledges, the paradigm of “legalization conflict” fails to capture the fairness problems resulting from deferred action, as immigration enforcement is exclusively federal.<sup>264</sup> In that context, at least, the problem was not conflicting federal and state law, but rather conflicting executive and congressional policies.

Even in cases of federal-state conflict, however, legalization conflicts present the question whether federal executive officials hold authority to acquiesce in conflicting state law, and relatedly whether reliance defenses should operate to cabin or enable such executive action. To give the starkest example, Southern Jim Crow regimes on some level involved a “legalization conflict”; at key points, federal nonenforcement of civil rights protections may have invited reliance by state officials on unconstitutional state laws and practices that disenfranchised and discriminated against African Americans.<sup>265</sup> Yet federal executive officials held no authority to

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263. *Id.*

264. See *Arizona v. United States*, 132 S. Ct. 2492, 2510 (2012) (deeming state immigration enforcement measures preempted by federal law).

265. See generally PAMELA BRANDWEIN, *RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION* 183 (2011) (describing “persistent though inadequate [federal] voting rights enforcement” between 1876 and 1891 followed by “definitive political abandonment of blacks in 1891”); Michael W. McConnell, *The Forgotten Constitutional Moment*, 11 CONST. COMMENT. 115, 131 (1994) (identifying “[a] major element” of white supremacist consolidation of power in southern states after Reconstruction as “the continuation of fraud and political violence against black voters—this time with no federal troops or threats of prosecutions under the Ku Klux Klan Act to restrain them”); Note, *Discretion to Prosecute Federal Civil Rights Crimes*, 74 YALE L.J. 1297, 1303–07 (1965) (discussing then-current federal policy with respect to enforcement of Reconstruction-era criminal statutes and advocating mandatory duty of prosecution). Admittedly, following Reconstruction’s collapse, the Supreme Court upheld some Jim Crow practices, see, e.g., *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding racial segregation on railroad); *Giles v. Harris*, 189 U.S. 475 (1903) (rejecting suit alleging discriminatory denial of voting rights), but the Supreme Court later repudiated this view in decisions such as *Brown v. Board of Education*, 347 U.S. 483 (1954) (invalidating racial segregation in public schools).

authorize what federal law prohibited, and by extension state officials could place no justified reliance on federal nonenforcement.

Although forbearance from federal marijuana or immigration enforcement obviously does not raise the same moral and policy concerns as the shameful post-Reconstruction abandonment of civil rights, the ultimate question these policies present is analogous: to what degree may executive officials disable future federal enforcement through present acquiescence in state-condoned violations of federal law? The answer should be the same as well. However compelling marijuana legalization or immigration relief may be as a matter of policy, if federal enforcement officials lack authority to legalize the conduct in question, reliance defenses should not operate to grant them that authority across the board as a function of due process.

### *3. Pure Prospectivity*

Another alternative approach might protect reliance on announced nonenforcement policies retrospectively but not prospectively. Under this approach, due process would bar enforcement (either categorically or presumptively) with respect to conduct undertaken while an overt nonenforcement policy was in effect, but not conduct undertaken after its repeal. This approach may carry intuitive appeal, particularly with respect to marijuana policy; one would hope that no President would resume enforcement without warning state-authorized businesses ahead of time to cease and desist.<sup>266</sup> Nevertheless, this option is not viable as a legal doctrine. It would collapse the distinction between substantive law and its enforcement, giving Presidents the very power to suspend laws that enforcement discretion alone cannot provide.

For those sympathetic (as I am) to the Obama Administration's marijuana and immigration policies, it is important to remember that the principle restricting suspension power must constrain other

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266. Applying the proposal to immigration would be less straightforward, as unlawful presence is arguably always an ongoing rather than completed violation. *See Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (characterizing unlawful presence as "an ongoing violation of United States law" (emphasis omitted)). For a contrary view that removal is only a retrospective sanction for unlawful entry or a visa overstay, see Cox & Rodríguez, *supra* note 59, at 200 (characterizing removal as a remedy for unlawful entry).



Presidents too. As noted earlier, Trump or some other Republican successor might well use aggressive nonenforcement policies to curtail federal firearms restrictions, environmental protections, tax requirements, or any number of other disfavored laws, even as he goes about enforcing other laws with draconian regularity.

To be sure, at present, Trump's co-partisans control both Houses of Congress. He may thus obtain outright repeal of many laws he disfavors. But Congress is unlikely to give him everything he wants, and in any event nonenforcement is always easier than the hard work of legislating; if nothing else, it may spare members of Congress the need to take hard votes. Those who value federal firearms restrictions, environmental protections, and other laws threatened by Republican administrations should be able to count on threats of future enforcement in a different administration to keep some lid on statutorily proscribed behavior. As a general rule, given constitutional limits on executive authority to change law unilaterally, those who jump at the chance to violate valid federal statutes should do so at their peril.

#### 4. *Normative Balancing*

Some state court estoppel cases suggest a third possible framework for broadening federal reliance defenses. Under this approach, courts balance public and private interests affected by estopping the government, but filter their assessments through a normative judgment about the importance of the public policies at issue.<sup>267</sup> Though state estoppel case law in general may provide a useful model for federal courts (a point addressed further below<sup>268</sup>), the normative dimension of some state courts' estoppel inquiry fails to provide a sound model for federal due process doctrine.<sup>269</sup>

While federal courts have resisted applying estoppel to the federal government,<sup>270</sup> some state courts have upheld equitable estoppel

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267. See, e.g., *City of Goleta v. Superior Court*, 147 P.3d 1037, 1042 (Cal. 2006) (noting that an estoppel defense generally cannot defeat a strong public policy interest).

268. See *infra* Part III.A.

269. I am grateful to Michael Asimow for calling my attention to this state case law. Because a full fifty-state survey would go well beyond the scope of my analysis of federal law, I focus on California cases as an example of an alternate approach.

270. See, e.g., *Bartlett v. USDA*, 716 F.3d 464, 477 (8th Cir. 2013); *Kowalczyk v. INS*, 245 F.3d 1143, 1149 (10th Cir. 2001) (noting that estoppel against the government does not lie in

claims against state and local authorities.<sup>271</sup> At the same time, these state courts, like their federal counterparts, have recognized that estopping official enforcement of public laws raises concerns absent in the private law context.<sup>272</sup> Indeed, in rough parallel to the framework I have advocated here, some courts have recognized that adjudicating equitable estoppel claims against the government ultimately requires balancing essentially incommensurate private and public interests.<sup>273</sup> Even when the usual elements of equitable estoppel are satisfied, for example, the California Supreme Court permits estoppel against the government only if, “in the considered view of a court of equity, the injustice which would result from a failure to uphold an estoppel is of sufficient dimension to justify any effect upon public interest or policy which would result from the raising of an estoppel.”<sup>274</sup>

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the way it does against private litigants).

271. See, e.g., Prop. Owners Ass'n of the Highlands Subdivision A Portion of USMS 769 v. City of Ketchikan, 781 P.2d 567, 573 (Alaska 1989) (“Estoppel may be asserted against a public agency.”); *City of Goleta*, 147 P.3d at 1042 (noting that equitable estoppel might apply against the government in certain circumstances); *City of Long Beach v. Mansell*, 476 P.2d 423, 445 (Cal. 1970) (“It is settled that [t]he doctrine of equitable estoppel may be applied against the government where justice and right require it.” (alteration in original) (quoting *Driscoll v. City of Los Angeles*, 431 P.2d 245, 250 (1967))); *Mesaba Aviation Div. of Halvorson of Duluth, Inc. v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977) (“[I]f justice demands, estoppel can be applied against the government even when it acted in a sovereign capacity if the equities advanced by the individual are sufficiently great.”); *Blume Constr., Inc. v. State*, 872 N.W.2d 312, 321 (N.D. 2015) (identifying elements of estoppel claim against state government). *But see, e.g., ABC Disposal Sys., Inc. v. Dep't of Nat. Res.*, 681 N.W.2d 596, 607 (Iowa 2004) (“We have consistently held equitable estoppel will not lie against a government agency except in exceptional circumstances.”); *Del Gallo v. Sec'y of the Commonwealth*, 816 N.E.2d 108, 111 (Mass. 2004) (“Generally, the doctrine of estoppel is not applied against the government in the exercise of its public duties, or against the enforcement of a statute.” (quoting *LaBarge v. Chief Admin. Justice of the Trial Court*, 524 N.E.2d 59, 63 (Mass. 1988))); *ConocoPhillips Co. v. Lyons*, 299 P.3d 844, 854 (N.M. 2012) (“Generally equitable estoppel will only be an effective defense against the State when there is a ‘shocking degree of aggravated or overreaching conduct or where right and justice demand it.’” (quoting *Waters-Haskins v. N.M. Human Servs. Dep't*, 210 P.3d 817, 823 (N.M. 2009))).

272. See, e.g., *City of Goleta*, 147 P.3d at 1042.

273. See *City of Long Beach*, 476 P.2d at 448 (noting competing individual and public interests).

274. *Id.*; see also, e.g., *HPT IHG-2 Props. Tr. v. City of Anaheim*, 196 Cal. Rptr. 3d 326, 337 (Ct. App. 2015); *Schafer v. City of Los Angeles*, 188 Cal. Rptr. 3d 655, 666 (Ct. App. 2015) (characterizing inquiry as requiring “weighing policy concerns to determine whether the avoidance of injustice in the particular case justifies any adverse impact on public policy or the public interest”). For similar recognition of the need for balancing in other state courts, see, for example, *Blume Constr.*, 872 N.W.2d at 321 (“Estoppel against the government is

Given that federal courts have never been so frank about the interplay of interests at stake in barring official enforcement of public law, this state level case law offers important indirect support for this Article's central assertion that an analogous form of balancing implicitly informs the relevant federal case law. As discussed further below, it also suggests that some narrow federal estoppel defense might workably be extended beyond criminal law to civil and administrative enforcement of punitive sanctions.<sup>275</sup> Nevertheless, in crafting this doctrine, some courts have engaged in a frankly normative assessment of statutory policies that federal courts have rightly resisted. As California courts, at least, have framed the inquiry, the balance requires asking whether estoppel would "defeat a strong public policy."<sup>276</sup> Courts have thus rejected estoppel claims that would defeat putatively "strong" policies such as land use restrictions,<sup>277</sup> tax laws,<sup>278</sup> and environmental statutes,<sup>279</sup> while giving greater scope to estoppel claims with respect to

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available in limited circumstances and should be applied on a case-by-case basis with a careful weighing of the inequities that would result if the doctrine is *not* applied versus the public interest at stake and the resulting harm to that interest if the doctrine *is* applied." (quoting *Miller v. Walsh Cty. Water Res. Dist.*, 819 N.W.2d 526, 534 (N.D. 2012)); *In re Spencer*, 566 A.2d 959, 965-66 (Vt. 1989) (employing a balancing test drawn from *City of Long Beach*, 476 P.2d 423).

275. See *infra* Part III.A.

276. *City of Goleta*, 147 P.3d at 1042 (quoting *Hughes v. Bd. of Architectural Exam'rs*, 952 P.2d 641, 661 (Cal. 1998)); see also, e.g., *HPT IHG-2 Props. Tr.*, 196 Cal. Rptr. 3d at 337. For analogous reasoning from other state courts, see, for example, *Plateau Mining Co. v. Utah Div. of State Lands & Forestry*, 802 P.2d 720, 729 (Utah 1990) (rejecting an estoppel claim when estoppel would "contravene the important public policy that the State should recover full value from the lease of school trust land").

277. See, e.g., *Schafer*, 188 Cal. Rptr. 3d at 666 (emphasizing the "strong public policy in favor of enforcing the substantive and procedural requirements for land use approvals"); *Pettitt v. City of Fresno*, 110 Cal. Rptr. 262, 268 (Ct. App. 1973) ("In the field of zoning laws, we are dealing with a vital public interest—not one that is strictly between the municipality and the individual litigant." (footnote omitted)).

278. See, e.g., *Parmar v. Bd. of Equalization*, 126 Cal. Rptr. 3d 405, 415 (Ct. App. 2011) ("[I]t is the unusual case in which estoppel will be applied in tax cases." (quoting *U.S. Fid. & Guar. Co. v. State Bd. of Equalization*, 303 P.2d 1034, 1037 (Cal. 1956))); *Transamerica Occidental Life Ins. Co. v. State Bd. of Equalization*, 284 Cal. Rptr. 9, 13 (Ct. App. 1991) (emphasizing the strength of public policies supporting collection of tax revenues despite erroneous guidance from tax officials).

279. See, e.g., *W. Wash. Props., LLC v. Dep't of Transp.*, 149 Cal. Rptr. 3d 39, 49-50 (Ct. App. 2012) (holding state agency was not estopped from requiring removal of an illegal billboard left in place for twenty-two years).

procedural preconditions for recovery<sup>280</sup> or prevailing wage requirements for public contracts.<sup>281</sup>

For those with little love for harsh federal narcotics and immigration laws, this approach may well hold certain attractions: perhaps federal enforcement in these areas should be estopped because the laws themselves generally do little public good, while the injustice of enforcement in individual cases may be manifest. But while such normative assessments may be more comfortable for state courts that hold common lawmaking powers and confront a diverse array of state and municipal enforcement authorities,<sup>282</sup> for federal courts to interpret the Due Process Clause to embody such normative judgments would itself raise separation of powers concerns. Indeed, even apart from the pertinent constitutional considerations, the very intensity of political disagreements surrounding federal laws such as immigration and narcotics restrictions—as well as federal firearms laws and any number of other prohibitions—suggests the wisdom of seeking more neutral judicial standards for legally protected reliance. Accordingly, the Supreme Court has been correct to emphasize the citizenry's interest in “obedience to the rule of law” when rejecting estoppel claims,<sup>283</sup> and federal courts elaborating anti-entrapment due process standards have likewise been correct to emphasize the objective character of the assurances provided, rather than the strength or wisdom of the underlying statutory prohibitions at issue.<sup>284</sup>

In fairness, state courts, too, appear to have conducted this normative inquiry with a heavy presumption in favor of preserving statutory policies. Successful estoppel claims in California, at least, appear to have been limited to specific cases rather than applied to

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280. See, e.g., *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.*, 2 Cal. Rptr. 3d 339, 350-51 (Ct. App. 2003).

281. *Lusardi Constr. Co. v. Aubry*, 824 P.2d 643, 655 (Cal. 1992) (applying equitable estoppel to bar the imposition of penalties on a contractor who attempted in good-faith to comply). For another example of estoppel defeating a substantive policy, see *City of Long Beach v. Mansell*, 476 P.2d 423, 450-51 (Cal. 1970) (holding that allowing unlawful development on public lands would not undermine any strong public policy in the unique circumstances of the particular case).

282. For discussion of how state courts' common law powers affect statutory interpretation, see generally Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013).

283. See *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

284. See *supra* Part II.A.2.b.

generalized policies like recent federal marijuana and immigration guidance.<sup>285</sup> More to the point here, to say that due process analysis must take the wisdom of statutory policies as a given is not to say that courts cannot identify additional situations in which reliance interests may properly receive due process protection. In fact, elaborating the same framework that implicitly underlies existing case law may permit identification of additional contexts in which particularly acute fairness concerns, or particularly attenuated separation of powers costs, may justify recognizing a due process reliance defense.

### III. CLARIFICATIONS AND QUALIFICATIONS

Due process principles, I have argued, cannot support a broad doctrine of nonenforcement reliance. But if separation of powers anxieties should override individual reliance interests as a general matter, then framing the question as I have proposed—in terms of an implicit separation of powers balance—also permits identification of additional contexts, beyond those already recognized in the criminal anti-entrapment cases, in which the balance should tip the other way. Here, I briefly address four such examples: (1) case-specific civil and administrative guidance that invites significant, reasonable reliance; (2) indirect forms of reliance on nonenforcement policies, such as through providing information to authorities or aiding or facilitating primary violations; (3) congressionally mandated nonenforcement; and (4) longstanding overt nonenforcement policies.

The inquiry this framework requires is often quite context-dependent. As with any balance between incommensurate principles, the tradeoffs are messy and contestable; they involve a degree of “judging whether a particular line is longer than a particular rock is heavy.”<sup>286</sup> To the extent categorical judgments are impossible,

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285. For an overview of pertinent California case law, see MICHAEL ASIMOW ET AL., CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW §§ 10:145 to :149 (perm. ed., rev. vol. 2016) (citing cases that detail limitations on estoppel against the government).

286. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (criticizing a balancing test as applied to the dormant Commerce Clause). I am grateful to Rob Mikos for emphasizing this point and calling my attention to Justice Scalia’s apt metaphor.

however, a degree of fact-specific unpredictability may often be as much virtue as vice. Protecting reliance in any given case means departing from the usual rule that statutory policy should prevail over executive assurances. In the estoppel context, courts have emphasized that because the doctrine aims “to avoid injustice in particular cases,” its “hallmark ... is its flexible application.”<sup>287</sup> The same should often be true of the related due process standards addressed here.

### *A. Case-Specific Estoppel as to Civil and Administrative Penalties*

A first, fairly limited reform is that federal courts should reconsider their extreme hostility to case-specific estoppel claims outside the criminal context. Lower courts appear to have applied the *Raley-Cox-PICCO* doctrine exclusively to criminal prosecutions.<sup>288</sup> More generally, despite the Supreme Court’s refusal to close the door completely on civil and administrative estoppel, federal courts almost never accept such claims.<sup>289</sup> As already noted, however, recent “fair notice” cases in the administrative context have drawn lines similar to those suggested by anti-entrapment case law,<sup>290</sup> and in any event the same due process principles of fair warning should logically extend beyond criminal law to other penal sanctions.<sup>291</sup> An analogous defense thus should apply in appropriate civil and administrative penalty cases—albeit with the same limits and qualifications as in the criminal context.

Although many presume a sharp line between criminal and civil enforcement, the Constitution fails to support any rigid distinction on the questions most pertinent here. To be sure, the *Ex Post Facto* Clause prohibits retroactive criminal (but not civil) legislation,<sup>292</sup>

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287. *Heckler*, 467 U.S. at 59.

288. *See supra* Part II.A.2.

289. *See supra* Part II.A.1.

290. *See supra* Part II.A.3.

291. Estoppel claims arise across a range of other contexts, too, such as benefits overpayments and other administrative mistakes. I do not address here such other contexts, which may well involve a different balance of factors.

292. *Kansas v. Hendricks*, 521 U.S. 346, 370-71 (1997); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 399 (1798) (opinion of Iredell, J.). For a critique of this view, see Evan C. Zoldan, *The Civil Ex Post Facto Clause*, 2015 WIS. L. REV. 727, 732 (claiming that the *Ex Post Facto* Clause encompasses civil and criminal laws).

and Presidents hold authority to grant clemency with respect to criminal (but not civil) offenses.<sup>293</sup> Furthermore, as discussed earlier, administrative agencies often hold delegated lawmaking and interpretive authority that criminal prosecutors lack.<sup>294</sup> Yet the same basic executive obligation of faithful execution applies in both contexts, as does the same Due Process Clause. What is more, although the stakes for the individual defendant may be higher in criminal cases, and reliance concerns thus more acute, by the same token the public policies at stake are (one hopes) more important in the civil context. And while criminal violations typically carry mens rea requirements that might in principle make good-faith compliance efforts exculpatory, courts have generally rejected wide-ranging mistake-of-law defenses even in the criminal context.<sup>295</sup> At any rate, the Supreme Court itself has implied that analogous reliance principles apply across criminal, civil, and administrative contexts involving penal enforcement.<sup>296</sup>

Just as in the criminal context, then, a due process reliance defense should sometimes bar civil or administrative penalties when regulated parties placed significant reliance on specific assurances that planned conduct was lawful. Accordingly, to be concrete, even formally nonbinding no-action letters and advisory opinions from enforcement agencies like the Securities and Exchange Commission might sometimes support an anti-entrapment estoppel defense, and by the same token, so too should assurances provided through IRS help lines and other official sources accessible to everyday citizens seeking to comply with the law as best they can.

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293. See U.S. CONST. art. II, § 2, cl. 1 (authorizing presidential clemency with respect to “Offences against the United States, except in Cases of Impeachment”); *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law.”); see also *infra* Part IV.A.

294. See *supra* Part II.A.1.

295. See *People v. Snyder*, 652 P.2d 42, 44 (Cal. 1982) (holding that mistake of law was not a defense when defendant did not know she was a convicted felon); *State v. Howard*, 339 P.3d 809, 819 (Kan. Ct. App. 2014) (rejecting defendant’s mistake-of-law argument). *But see Jenkins v. State*, 468 S.W.3d 656, 682 (Tex. Ct. App. 2015) (holding that a trial court’s refusal to instruct the jury on defendant’s mistake-of-law claim was not harmless error).

296. See *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 n.12 (1984) (associating both *PICCO* and administrative fair notice cases with the “premise that when the Government acts in misleading ways, it may not enforce the law if to do so would harm a private party as a result of governmental deception”).

Much like the assurances protected by anti-entrapment estoppel in the criminal context, such case-specific guidance regarding planned conduct is likely, as a practical matter, to invite significant detrimental reliance, thus raising particularly acute fairness concerns. At the same time, protecting reliance may help promote systemic interest in compliance without unduly eroding the boundary between the law and its enforcement. Furthermore, if the assurance in question relates only to one particular party or transaction (and third parties cannot rely on it without seeking guidance of their own), then barring enforcement may carry only limited risks to overall statutory objectives. It is true that protecting reliance may elevate the stakes for the agency, thus perhaps making it less likely that agencies will adopt such programs in the first place. But by the same token, even if anti-entrapment estoppel bars retrospective enforcement in some cases, the agency will presumably still gain at least as much as it loses in terms of accomplishing its mission, particularly if it remains free to enforce the best view of the law in other cases in which it issued no specific guidance.<sup>297</sup> At any rate, as we have seen, the intuition that a narrow estoppel defense poses little threat to the rule of law appears to underlie many state cases recognizing estoppel defenses, and the sky has not fallen in California or elsewhere where courts are more solicitous of compelling case-specific claims of reliance on mistaken legal assurances.<sup>298</sup>

That said, protection for reliance must remain the exception rather than the rule, and standards of reasonableness should turn as much or more on structural considerations as on intuitive notions of fair dealing. Reliance should again be protected based only on a context-specific assessment that takes into account “the identity of the agent, the point of law misrepresented, and the substance of the misrepresentation,”<sup>299</sup> as well as the circumstances and sophistication of the party seeking guidance.<sup>300</sup> It must remain the case that

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297. *Cf.* U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1816 (2016) (rejecting a similar “count your blessings” argument against the reviewability of certain agency jurisdictional determinations in the Clean Water Act context).

298. *See supra* Part II.B.4.

299. *United States v. Bader*, 678 F.3d 858, 886 (10th Cir. 2012) (quoting *United States v. Apperson*, 441 F.3d 1162, 1204 (10th Cir. 2006)).

300. *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970).



estoppel is possible only if “a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.”<sup>301</sup>

Courts accordingly should be far more solicitous of claims by everyday citizens than those of sophisticated business entities. Relatedly, well-lawyered parties with the sophistication to seek no-action letters and the like should never be able to claim reliance on legal interpretations that exceed the bounds of reasonable agency interpretive discretion under applicable standards of deference. Due process principles of fair warning might properly mean that an agency is stuck in one particular case with a considered, reasonable past interpretation that invited significant reliance. But due process principles should not disable the public from vindicating statutory requirements (or binding regulations implementing those statutes) that a diligent regulated party of comparable sophistication could have understood its conduct violated.

### *B. Indirect Reliance*

A due process reliance defense should also protect some indirect forms of reliance on nonenforcement policies. In particular, the defense should often protect reliance in providing information to authorities or engaging in crimes that facilitated or enabled primary violations that the government disclaimed intent to pursue.

#### *1. Provision of Information*

One way in which parties may rely indirectly on nonenforcement assurances is by providing authorities with information about their own legal violations. As Robert Mikos has observed, information gathering is a central aspect of law enforcement; it constitutes “the bulk of what law enforcement agents actually do—gather and report information about regulated activity.”<sup>302</sup> Yet when the government obtains information by assuring nonenforcement, due process principles of fair notice should limit the government’s use of that

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301. *Id.*

302. Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 107 (2012).

information in future enforcement efforts. That is so because, in this context, fairness concerns are particularly acute, while the cost to separation of powers is limited so long as the government may still pursue the substantive violations in question by other means.

The Obama Administration's immigration programs raise this problem in stark form. As noted, to apply for deferred action under DACA and DAPA, individual immigrants were required to provide identifying information, such as their names and addresses, and document that they met specified eligibility criteria.<sup>303</sup> Were the government to change course and resume enforcement, then these applications could amount to "neatly packaging [the immigrants'] information on a platter for law enforcement officials."<sup>304</sup> To mitigate this risk, a DHS "frequently asked questions" webpage advised: "Information provided in this request is protected from disclosure to [enforcement agencies] for the purpose of immigration enforcement proceedings unless the requestor meets [specified] criteria" for issuing a notice to appear.<sup>305</sup> Nevertheless, the website also pointedly asserted that this "information sharing policy" was subject to change "at any time without notice" and created no "right or benefit."<sup>306</sup> The Fifth Circuit dissent's defense of DAPA—that collecting such information was "good policing" precisely because it could facilitate future enforcement—implied that DAPA applicants' reliance in providing information was legally unprotected.<sup>307</sup> But that view is mistaken.

If reliance defenses require balancing separation of powers costs against risks of individual unfairness, in the immigration context the balance should tip strongly in individual defendants' favor. On the one hand, separation of powers concerns are greatly reduced insofar as the question relates only to use of information, rather than actual enforcement of the law. Even if DACA and DAPA were substantively unlawful, the revocability of deferred action itself (along with ancillary legal benefits such as work authorization) suffices to preserve the primacy of underlying substantive statutes

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303. See *supra* note 98 and accompanying text.

304. Fan, *supra* note 11, at 940.

305. DACA FAQs, *supra* note 98.

306. *Id.*

307. See *Texas v. United States*, 809 F.3d 134, 191 (5th Cir. 2015) (King, J., dissenting), *aff'd by an equally divided court*, 136 S. Ct. 2271 (2016).

over executive enforcement policy. Allowing a new administration bent on enforcement to come out ahead, in terms of ease of enforcement, because a prior administration pursued a more lenient policy would overcorrect the problem: instead of simply restoring enforcement and the associated deterrent effect of underlying immigration restrictions, it would make the government's enforcement job far easier than it would have been without immigrants' unsuspecting cooperation.

On the other hand, the unfairness to individual applicants in using their application information against them would be unusually sharp. A programmatic request for information based on a promised form of amnesty invites reliance in a far more specific way than does promised nonenforcement by itself. While the latter may encourage changes in individual behavior, the former encourages specific assistance to the government itself. It is bad enough to apply a sporadically enforced law to a particular defendant in a particular case. It is quite another thing to select individuals for enforcement precisely because the government earlier assured them that they could avoid enforcement by providing specified information.

Existing case law supports this result. To begin with, on a gut level, the raw outrage underlying *Raley*, *Cox*, and *PICCO* justifies recognizing a due process defense in this context. Whatever else warrants the term, it is difficult to imagine a more outrageous "form of entrapment" than establishing a program to enable legally unsophisticated young immigrants to "get right with the law"<sup>308</sup> and then converting the program into a massive dragnet. The government simply should not treat otherwise law-abiding people this way. Even apart from the immorality of doing so, the long-run costs to law enforcement—in terms of alienating immigrant communities and eroding trust in government assurances—would likely far outweigh any short-run benefits to legal compliance. Furthermore, although deportation is formally a civil rather than criminal remedy,<sup>309</sup> the Supreme Court has recognized that deportation carries consequences for the individual every bit as severe—indeed, often more

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308. See Obama DAPA Speech, *supra* note 104.

309. See, e.g., *R.I.L.-R v. Johnson*, 80 F. Supp. 3d 164, 171 (D.D.C. 2015) ("Unlawful presence in the United States does not itself constitute a federal crime, although it can trigger the civil remedy of removal.").

so—than criminal sanctions.<sup>310</sup> The analogy to criminal reliance cases is thus particularly apt.

On a doctrinal level, it is true that *Raley*, *Cox*, and *PICCO* involved specific assurances that conduct was lawful, rather than a mere promise of nonenforcement.<sup>311</sup> Yet here, too, if we limit the conduct under consideration to the provision of information as opposed to the underlying substantive immigration violations, the government's assurances more closely resemble the type of assurance that justified private parties' reliance in those cases. Despite insisting that granting deferred action does not preclude later immigration enforcement, the government has effectively deemed it "lawful," in the sense of incurring no direct legal sanction, to provide information in the context of a deferred action application. In that sense, completing a DACA application, or for that matter providing tax records and other information to the government pursuant to the resulting work authorization, closely resembles answering the legislative committee's questions in *Raley* or protesting at the police-recommended spot in *Cox*—it is conduct that the government specifically invited with assurances of legality.<sup>312</sup> Inviting such applications amounts to "active misleading" regarding legal consequences, rather than mere passive acquiescence in unlawful conduct.<sup>313</sup> Due process should equally bar the government from relying on information it obtained by such means.

Case law regarding immunity agreements offers further support by analogy. When the government provides specific assurances to suspects in exchange for specific forms of assistance, such as a plea agreement or testimony in a criminal trial against another defendant, courts have held that due process obligates the government to

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310. See, e.g., *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) ("Preserving the client's right to remain in the United States may be more important to the client than any potential jail sentence" (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001))); *Bridges v. Wixon*, 326 U.S. 135, 154 (1945) ("Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (observing that deportation "may result also in loss of both property and life; or of all that makes life worth living").

311. See *United States v. Pa. Indus. Chem. Corp. (PICCO)*, 411 U.S. 655, 675 (1973); *Cox v. Louisiana*, 379 U.S. 559, 570-71 (1965); *Raley v. Ohio*, 360 U.S. 423, 438-39 (1959).

312. See *supra* notes 160-69 and accompanying text.

313. See *Raley*, 360 U.S. at 438 (using the phrase "active misleading").

honor its contractual promises.<sup>314</sup> The reliance here is effectively an estoppel analogue to such contractual reliance. Although the government has not received any specific benefit from the regulated party's reliance, it has invited detrimental reliance in exchange for expected benefits to a degree that may properly limit the government's authority to renege. To be sure, some might assert that the opportunity for future enforcement was precisely the advantage the government obtained by offering deferred action. By that measure, however, the deal the government offered was entirely one-sided and egregiously deceptive: immigrants placed themselves at grave risk while the government bound itself to nothing in return.

Nor does deferred action involve circumstances in which protecting government trickery advances law enforcement interests. The trickery here has a fundamentally different character from deceit aimed at ferreting out violations, as in police interrogations;<sup>315</sup> it involves assuring the legality of conduct and then exploiting individuals' reliance to their detriment. In that sense, again, the correct doctrinal reference point is not criminal procedure case law, but rather the defense of entrapment by estoppel and the *Raley-Cox-PICCO* line of cases that underlie it. Law enforcement officials may often properly use deception to uncover otherwise undetectable crimes, but unsuspecting individuals should not fall prey to future enforcement following a change in policy because they participated in a program that officials at the time pitched to them as advancing their own interests.

Some critics of DACA and DAPA might argue, finally, that enforcement-related use of information obtained through the programs should be permissible as a means of remedying the executive overreach involved in establishing the programs themselves. Any

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314. See, e.g., *Santobello v. New York*, 404 U.S. 257, 262 (1971) (“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”); *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177, 183 (3d Cir. 2006) (“It is ... well established that the Government must adhere strictly to the terms of agreements made with defendants—including plea, cooperation, and immunity agreements—to the extent the agreements require defendants to sacrifice constitutional rights.”).

315. See, e.g., *United States v. Crawford*, 372 F.3d 1048, 1060-61 (9th Cir. 2004) (upholding the voluntariness of a confession despite police deception); *United States v. Kontny*, 238 F.3d 815, 817 (7th Cir. 2001) (“Trickery, deceit, even impersonation do not render a confession inadmissible, certainly in noncustodial situations and usually in custodial ones as well, unless government agents make threats or promises.”).

such argument, however, overlooks the other side of the reliance balance—the aim, reflected in the *Raley-Cox-PICCO* trilogy and its progeny, to avoid especially sharp forms of individual entrapment. As emphasized earlier, the reliance question requires an inquiry that is distinct from the question of executive authority. Even if DACA and DAPA were substantively unlawful, the remedy for their illegality was simply to cancel the programs themselves. The immigration violations in question, after all, were preexisting rather than invited by the government policy itself. It would thus be perverse if the government came out ahead in its enforcement efforts by virtue of having adopted an unlawful program. At the least, immigrants who did nothing wrong by applying for a government-proffered form of relief should not bear the cost of government illegality. Accordingly, should the Trump Administration or another future President begin deporting DACA and DAPA beneficiaries, courts should hold that due process bars removal unless the government can demonstrate that it became aware of an immigrant’s unlawful presence by means other than the immigrant’s own deferred action application and other information provided pursuant to the resulting work authorization.

Looking beyond immigration, similar analysis should apply whenever the government invites disclosure of damning information with explicit assurances about how the information will be used. As just one example, a formal policy of the Department of Justice promises leniency to corporations that self-report certain antitrust violations before other participants in a putative conspiracy do so.<sup>316</sup> Reliance on this policy or other similar programs should receive due process protection in appropriate cases. In administrative contexts, indeed, courts have understood the APA’s prohibition on “arbitrary and capricious” government action to bar such whipsaws. The Eighth Circuit, for example, held recently that the Federal Aviation Administration could not lawfully depart in a particular case from a previously announced policy of declining punitive enforcement with respect to certain self-reported safety violations if the reporting party subsequently agreed to a “comprehensive fix” for the problem.<sup>317</sup>

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316. U.S. DEP’T OF JUSTICE, CORPORATE LENIENCY POLICY (1993), <https://www.justice.gov/sites/default/files/atr/legacy/2007/08/14/0091.pdf> [<https://perma.cc/2GK4-L4EH>].

317. *GoJet Airlines, LLC v. FAA*, 743 F.3d 1168, 1173 (8th Cir. 2014) (concluding that the policy in question “imposes binding limitations on how the agency will thereafter exercise its

By the same token, departing from promised limits on the use of damning information may sometimes present an unconstitutionally arbitrary exercise of enforcement discretion.

The same principles should also prevent federal use of information obtained by state authorities in reliance on a federal nonenforcement policy. Current marijuana policy raises this particular problem. To obtain required licenses or otherwise qualify for state permission to sell marijuana, businesses must often provide significant information about their activities and transactions to state authorities. As Robert Mikos has observed, federal law enforcement officials have claimed authority to obtain such information from state officials through administrative or grand jury subpoenas.<sup>318</sup> Professor Mikos argues that such compelled production of state information violates constitutional federalism principles; in his view, requiring states to produce these records is inconsistent with the Supreme Court's holding in *Printz v. United States* that federal officials may not "commandeer" state assistance with federal law enforcement.<sup>319</sup>

Whether or not Professor Mikos's view is correct as a general matter, and even in contexts in which the commandeering doctrine is inapplicable because state officials voluntarily provide information, due process provides a further reason to bar such federal action. In documenting their illegal activity for state authorities, marijuana entrepreneurs have relied not only on the legality of their activity under state law, but also on federal assurances that the federal violations to which they were effectively confessing would not be prosecuted. Much as with DAPA and DACA applications, precluding federal use of this information carries some cost to federal statutory objectives, as it deprives executive officials of one tool that would facilitate enforcement. Yet the effect is attenuated insofar as the government may nonetheless pursue primary violations on its own, provided it does so the old-fashioned way: through gumshoe investigation by its own personnel.

In short, although information gathering is essential to all law enforcement, a due process defense should sometimes bar access to

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enforcement discretion").

318. Mikos, *supra* note 302, at 115-20 (collecting cases).

319. *Id.* at 158-59; *see also* *Printz v. United States*, 521 U.S. 898, 933 (1997).

the most easily obtainable information if regulated parties provided such information in reliance on assurances that the law would not be enforced against them as a result of their disclosure.

## 2. *Secondary Violations*

Plausible claims of indirect reliance might also arise with respect to legal prohibitions that clearly exist only to add force to some more primary prohibition that executive officials indicated they were unlikely to enforce.

This question, too, has arisen concretely as a result of recent policies. The federal Controlled Substances Act, for example, not only prohibits possession and distribution of controlled substances—including marijuana—but also specifically prohibits knowingly and intentionally leasing or otherwise making property available for use in drug operations.<sup>320</sup> The government has accordingly threatened landlords with criminal prosecution, civil penalties, or forfeiture based on tenants' operation of illegal businesses, including state-licensed marijuana dispensaries, on their property.<sup>321</sup> In at least one marijuana case, the defendants

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320. The statute provides as follows:

Except as authorized by this subchapter, it shall be unlawful to—

(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;

(2) manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

21 U.S.C. § 856(a) (2012). Violations may result in civil or criminal penalties, as well as civil forfeiture. *Id.* § 856(b)-(e).

Courts have upheld convictions against landlords and other similarly situated parties under this provision. *See, e.g.,* *United States v. Wilson*, 503 F.3d 195, 197 (2d Cir. 2007) (“[U]nder § 856(a)(2), the person who manages or controls the building and then rents to others, need not have the express purpose in doing so that drug related activity take place; rather such activity is engaged in by others (*i.e.*, others have the purpose).” (quoting *United States v. Chen*, 913 F.2d 183, 190 (5th Cir. 1990))); *United States v. Tamez*, 941 F.2d 770, 774 (9th Cir. 1991) (upholding conviction of owner of used-car dealership where cocaine dealing occurred because “section 856(a)(2) requires only that proscribed activity was present, [and] that [the defendant] knew of the activity and allowed that activity to continue”).

321. *See, e.g.,* *Ziggy1 Corp. v. Lynch*, 123 F. Supp. 3d 1310, 1314-16 (W.D. Okla. 2015) (describing Drug Enforcement Agency threats to landlords of alleged drug paraphernalia



asserted a due process defense, which the court at the time rejected based on the noncommittal character of the government's nonenforcement assurances.<sup>322</sup> At the time, the very fact of continued federal enforcement likely made claims of legitimate confusion and reliance untenable. Yet the Justice Department's nonenforcement policy later expanded and sharpened into more consistent disregard for primary marijuana violations; it is now even partially codified in an appropriations rider.<sup>323</sup> As nonenforcement continues to harden, the balance should eventually tip in favor of protecting reliance on the part of landlords and other indirect violators.

Much as with information disclosure, individual reliance interests are acute in this context, as landlords and others may come to perceive entering leases or other contracts with marijuana dispensaries as no different from doing so with respect to other ostensibly lawful businesses. On the other side of the balance, moreover, the separation of powers costs to protecting reliance are attenuated given the government's ability to vindicate statutory policies by pursuing those who have violated the law more directly.

Congress, of course, enacts secondary violations in part to deprive those who would engage in primary violations of necessary support and infrastructure. Accordingly, just as with denying access to available information, taking these offenses off the table carries some cost to executive officials' authority (and responsibility) to faithfully execute statutory policies. What is more, in some contexts, distinguishing between primary and secondary offenses may be conceptually incoherent: Congress may prohibit some conduct for its own sake, even if proscribing that conduct also makes engaging in other proscribed conduct more difficult.

Nevertheless, when, as in this example, a relatively clear distinction may be drawn, the balance between fairness considerations and separation of powers may sometimes tip in favor of protecting reliance. Here, the reasonableness inquiry in evaluating such defenses might appropriately be fine-grained, taking account

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business); *Marin All. for Med. Marijuana v. Holder*, 866 F. Supp. 2d 1142, 1146 (N.D. Cal. 2011) (addressing challenge to threatened prosecution against landlords and others associated with marijuana dispensaries operating in compliance with state law).

322. *Marin All. for Med. Marijuana*, 866 F. Supp. 2d at 1155-56 (addressing claimed reliance on 2009 Ogden Marijuana Guidance).

323. *See supra* note 79 and accompanying text.

in particular of the circumstances and legal sophistication of affected private parties. At one end of the spectrum, highly sophisticated, well-lawyered parties such as banks or large-scale commercial landlords might be expected to understand the legal risks they were taking by leasing or otherwise assisting marijuana businesses, notwithstanding the government's enforcement guidance. At the other end, small-time landowners and operators of support businesses might much more plausibly claim confusion with respect to the government's assurances. Even if reliance should not be protected across the board, in suitably compelling cases the claim of individual unfairness should prevail over countervailing separation of powers concerns about executive licensing of unlawful conduct.

### *C. Congressional Nonenforcement*

A further implication of my analysis is that courts should recognize broader reliance defenses with respect to congressionally mandated nonenforcement, as opposed to nonenforcement adopted by enforcement agencies on their own initiative. If anxieties about enabling executive dispensations from substantive law properly explain courts' reluctance to recognize reliance defenses based on nonenforcement decisions, courts should be more solicitous of individual fairness concerns—and thus more willing to recognize legal protections for reliance—when such separation of powers anxieties are inapplicable because Congress, rather than the executive branch alone, has mandated the nonenforcement.

This category is hardly a null set. As noted, Congress has repeatedly adopted an appropriations rider barring use of Justice Department funds “to prevent [listed states] from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.”<sup>324</sup> Although the Justice Department has argued that this rider prevents only prosecution of state officials, not private parties operating in compliance with state

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324. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 542, 129 Stat. 2242, 2333 (2015); Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, § 538, 128 Stat. 2130, 2217 (2014) (including a similar restriction); *see also* Continuing Appropriations Act, 2016, Pub. L. No. 114-53, § 103, 129 Stat. 502, 506 (2015) (extending force of § 538 with respect to continuing appropriations).

law,<sup>325</sup> the Ninth Circuit recently held that the rider establishes a judicially enforceable bar to any prosecution of state-compliant possession or distribution of medical marijuana.<sup>326</sup> Congress has used this same tactic to control administrative action in other contexts. To give just one current example, a recurrent appropriations rider denies federal funding to “implement or enforce” certain statutory energy-efficiency requirements for light bulbs.<sup>327</sup> One scholar counted over 200 such enforcement bans in reported House appropriations bills between 1993 and 2002.<sup>328</sup>

Such congressionally mandated nonenforcement, no less than its agency-initiated counterpart, may present significant reliance concerns, particularly in areas of regulation like marijuana enforcement in which social cues may be more important than formal legal restrictions in determining behavior. For example, under the Ninth Circuit’s reading, the current medical marijuana enforcement ban will effectively create an environment in which participants in state-approved medical marijuana dispensaries may perceive their activity as risk-free. After all, nonenforcement is likely to be more total and categorical when it derives from a judicially enforceable limit on executive authority. Furthermore, whatever the risk of confusion when prosecutors independently halt enforcement, that risk seems likely to be greater still if regulated parties perceive (even mistakenly) that Congress has excused their

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325. See *United States v. McIntosh*, 833 F.3d 1163, 1176 (9th Cir. 2016) (discussing Justice Department’s interpretation).

326. *Id.* at 1172-73. Some courts have rejected rider-based defenses when the conduct in question in fact violated state law. See, e.g., *United States v. Firestack-Harvey*, No. 13-CR-00-24-TOR-1, 2015 WL 3533222, at \*1 (E.D. Wash. June 4, 2015); *United States v. Silkeutsabay*, No. 13-CR-0140-TOR-1, 2015 WL 2376170, at \*2 (E.D. Wash. May 18, 2015), *appeal filed*, No. 15-30392 (9th Cir. Dec. 23, 2015); cf. *United States v. Tote*, No. 1:14-MJ-00212-SAB, 2015 WL 3732010, at \*3 (E.D. Cal. June 12, 2015) (noting that defendant’s apparent driving under the influence of marijuana violated state law, though charge at issue alleged only possession).

327. See, e.g., § 313, 128 Stat. at 2326 (denying use of funds “to implement or enforce the standards established ... with respect to BPAR incandescent reflector lamps, BR incandescent reflector lamps, and ER incandescent reflector lamps”); Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, § 315, 125 Stat. 786, 879 (2011) (same).

328. Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766, 768 (2010). For reasons I intend to elaborate in future work, I assume here that Congress holds authority to restrict enforcement through appropriations limitations. For a contrary view, see Jacques B. LeBoeuf, *Limitations on the Use of Appropriations Riders by Congress to Effectuate Substantive Policy Changes*, 19 HASTINGS CONST. L.Q. 457, 475 (1992).

conduct. Anyone who has sped on the highway without getting stopped likely understands the basic concept of prosecutorial discretion—that law enforcement officials hold no obligation to punish every legal violation, even if the conduct in question is technically illegal. In all likelihood, the distinction between appropriations and substantive legislation is far less familiar to the average citizen.

At any rate, even if the risk of misplaced individual reliance is only equivalent (and not still greater), the central rationale for limiting reliance defenses—concern about shortchanging “the interest of the citizenry as a whole in obedience to the rule of law”<sup>329</sup>—is effectively absent when Congress, rather than an enforcement agency, has mandated the policy. Congress, of course, could change the law if it wished; limiting reliance is not necessary to protect Congress’s ultimate control over substantive legality. Limiting reliance on congressionally mandated nonenforcement instead serves only to protect Congress’s ability to ban enforcement of laws without changing their substantive content.

Enforcement bans, to be sure, may advance important interests. For one thing, appropriations limits provide an important mechanism for legislative control of executive policy. Although some commentators have worried that the appropriations process is prone to gamesmanship and special-interest giveaways, in principle including policy overrides in must-pass annual appropriations bills may give Congress leverage to insist on policies the President would otherwise veto.<sup>330</sup> Appropriations limits may thus provide a key congressional check on exercises of previously delegated administrative authority. At the same time, because appropriations bills are drafted through a less transparent and deliberative process, House and Senate rules limit substantive legal provisions in such legislation.<sup>331</sup> For the same reason, courts presume that ambiguous

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329. *Heckler v. Cmty. Health Servs. of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984).

330. *See* MacDonald, *supra* note 328, at 767.

331. House rules direct that “[a] provision changing existing law may not be reported in a general appropriation bill” and that “[a]n amendment to a general appropriation bill shall not be in order if changing existing law.” RULES OF THE HOUSE OF REPRESENTATIVES, 114TH CONG., R. XXI(2)(b)-(c) (2015), <https://rules.house.gov/sites/republicans.rules.house.gov/files/114/PDF/House-Rules-114.pdf> [<https://perma.cc/AR7S-K599>]. The Senate’s standing rules similarly provide that a point of order may be made against a reported appropriations bill “containing amendments to such bill proposing new or general legislation” and that “no

appropriations legislation does not effect any change in substantive law.<sup>332</sup> Riders aimed at limiting executive action thus are likely to take the form of enforcement bans rather than substantive legal changes. As noted, however, choice of form may cause particular confusion on the part of regulated parties. To the extent it does, practical concerns about the integrity of the appropriations process would provide weak justification for disregarding regulated parties' mistaken reliance. Indeed, insofar as appropriations riders take the form of enforcement bans rather than substantive legal changes only because that route affords the path of least resistance, protecting individual reliance in some circumstances might well advance, rather than thwart, Congress's likely policy goals in adopting the legislation in the first place.

Congress might also choose to enact appropriations limits as a way of hitting the "pause" button on a substantive policy while continuing to consider the policy's merits. Halting enforcement with respect to medical marijuana, for example, might enable state experiments to proceed while Congress considers whether to enact more general legal reforms. Relatedly, an enforcement ban might reflect congressional intent to calibrate enforcement without changing substantive law. Congress might wish to limit current criminal prosecution of medical marijuana while nonetheless maintaining some deterrent limits on marijuana dispensaries. In other words, Congress might seek to strike a balance by limiting current prosecution but maintaining threatened (but uncertain) future enforcement, along with any ancillary legal disabilities or opportunities for private enforcement (such as through civil RICO suits) that result from continued criminalization.

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amendment ... which proposes general legislation shall be received to any general appropriation bill." STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XVI(2), (4), at 11 (2013). Neal Devins argues that "attempting to separate the process of funding from other lawmaking processes" is "a sensible means of ensuring that congressional decisionmaking is deliberate and systematic." Neal E. Devins, *Regulation of Government Agencies Through Limitation Riders*, 1987 DUKE L.J. 456, 458.

332. See *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 190 (1978) ("When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden. Without such an assurance, every appropriations measure would be pregnant with prospects of altering substantive legislation, repealing by implication any prior statute which might prohibit the expenditure.").

These possible rationales again fail to provide a cogent justification for overriding otherwise compelling individual reliance interests. Congress may well prefer to keep its options open, but due process should limit its ability to do so in ways that risk significant confusion and resulting problems of fair notice for regulated parties. Congress, after all, could not pass retroactive criminal legislation; any such law would violate the Ex Post Facto Clause.<sup>333</sup> But if a current enforcement ban risks fostering a good-faith perception of legality (however mistaken) among regulated parties, allowing enforcement to spring back—with respect to past as well as future conduct—would amount in effect to ex post facto criminalization of conduct that Congress itself sought to encourage. Due process principles of fair dealing reflected in *Raley*, *Cox*, and *PICCO* should preclude this result.

Reliance defenses, then, should hold broader scope with respect to congressionally mandated nonenforcement than with respect to agency-initiated nonenforcement. But where exactly should the line be drawn? Given that Congress may have sound reasons for proceeding through appropriations rather than substantive legal changes, a blanket estoppel rule would be inappropriate. Courts should instead consider reliance claims case-by-case based on an assessment of reasonableness under the circumstances. In other words, as is generally true with respect to claims of fundamental fairness or equitable estoppel, the inquiry should be fact-specific and context-dependent; it should turn ultimately on the degree to which regulated parties may credibly claim a good-faith belief that Congress had authorized their conduct.<sup>334</sup> Reliance claims will generally be far more credible when presented by legally unsophisticated parties such as small-time marijuana dispensaries than with respect to well-lawyered participants in heavily regulated industries. By the same token, reliance interests will be strongest when, as in the case of the current medical marijuana rider, Congress and the executive branch were in basic agreement about appropriate policy at the time of the ban, notwithstanding their failure to

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333. See *Collins v. Youngblood*, 497 U.S. 37, 43 (1990).

334. Cf. *Heckler*, 467 U.S. at 59 (observing that “[e]stoppel is an equitable doctrine invoked to avoid injustice in particular cases” and that “a hallmark of the doctrine is its flexible application”).

change the substantive law itself.<sup>335</sup> In contrast, in circumstances of inter-branch conflict, such as appropriations riders barring enforcement of new substantive regulations, the executive branch might undercut claims of reasonable reliance by specifically signaling to regulated parties that it intends to resume enforcement, even with respect to conduct occurring while the rider is in effect, if Congress restores appropriations.<sup>336</sup>

In sum, although existing case law has generally distinguished between misleading statements of law and assurances of nonenforcement, the central rationale for limiting reliance defenses in this fashion is a concern about precluding unauthorized executive cancellation of substantive legal obligations. Because that concern is absent when nonenforcement results from congressional legislation rather than executive policy, courts should give broader protection to individual reliance interests in this context. Congress may have reasons of its own for choosing to limit enforcement rather than changing the law itself, but those reasons do not justify imposing after-the-fact penalties on regulated parties legitimately confused by Congress's apparent encouragement of formally prohibited conduct.

#### *D. Policy-Based Desuetude*

A last possible exception to legal limits on reliance should permit a due process defense when an overt nonenforcement policy has persisted without change or apparent violation over an extended

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335. See 2013 Cole Marijuana Enforcement Guidance, *supra* note 2.

336. The recent decision in *United States v. Tote* may provide an example in which a due process defense would be appropriate on this account. See No. 1:14-MJ-00212-SAB, 2015 WL 3732010 (E.D. Cal. June 12, 2015). In that case, the defendant was arrested by Forest Service police for driving under the influence in a national forest. *Id.* at \*1. Although he claimed to hold valid medical authorization to possess marijuana under state law, federal prosecutors charged him criminally with marijuana possession. *Id.* The court declined to dismiss the charge based on the appropriations restriction. *Id.* at \*3. The Ninth Circuit has since held that appropriations restrictions bar current prosecution, see *United States v. McIntosh*, 833 F.3d 1163, 1176-78 (9th Cir. 2016), but the Ninth Circuit's decision suggested that prosecution could resume if Congress later made funds available. See *id.* at 1179 n.5 ("Congress could restore funding tomorrow, a year from now, or four years from now, and the government could then prosecute individuals who committed offenses while the government lacked funding."). On the theory advocated here, due process could preclude renewed prosecution for individuals like the defendant in *Tote* even after Congress restored funding to pursue such cases.

period of time. As we have seen, the balance between separation of powers compliance and individual reliance generally must favor the former at the expense of the latter, so as to avoid creating an executive suspending power by operation of due process.<sup>337</sup> At some point, however, the balance should tip the other way, at least with respect to *malum prohibitum* offenses like drug prohibition. If the government effectively creates a settled expectation of legality by adhering over a lengthy period to an overt policy of nonenforcement, due process should eventually bar retrospective enforcement in violation of the policy—notwithstanding the significant cost to congressional lawmaking authority that results from this rule.

This proposal would in effect create a narrow doctrine of “desuetude,” under which substantive laws would lose force (at least retrospectively) by virtue of longstanding overt nonenforcement. Desuetude, in the sense used here, refers to a proposed “doctrine by which a legislative enactment is judicially abrogated following a long period of intentional nonenforcement and notorious disregard.”<sup>338</sup> The doctrine is a favorite among academics: a number of prominent scholars have advocated precluding any enforcement of a given substantive law if enforcement officials have brought no prosecutions (or no analogous prosecutions) for an extended period.<sup>339</sup> As justification for such proposals, scholars have argued that longstanding nonenforcement implies a lapse in democratic support for the law itself, making it fundamentally unfair to impose the prohibition on individual defendants without further legislative action to renew the law’s force.<sup>340</sup> Such proposals may also draw strength from due process principles of fair notice. Longstanding nonenforcement, after all, may deprive individuals of genuine warning that their conduct is unlawful.

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337. See *supra* Part II.A.1.

338. Note, *Desuetude*, 119 HARV. L. REV. 2209, 2210 (2006); see also Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 726 (W. Va. 1992) (recognizing desuetude defense where crime in question is *malum prohibitum*, violations have been “open, notorious, and pervasive,” and the government has followed “a conspicuous policy of nonenforcement”).

339. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 18-19 (1982); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63-64 (1961); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 591-93 (2001); Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49-50.

340. See, e.g., Sunstein, *supra* note 339, at 49-50.



Federal courts have nevertheless failed to embrace a broad desuetude defense, and separation of powers concerns almost certainly explain why.<sup>341</sup> As one critic observes,

Sometimes laws are rarely enforced because of a prosecutorial policy to concentrate limited resources elsewhere. Other times laws are not “enforced” because there are no lawbreakers. And still other times they are not enforced because while there may be plenty of lawbreakers, there is little or no evidence of the violations.<sup>342</sup>

Without a clear indication that the persistence of an unenforced law reflects a breakdown of the political process, courts may well hesitate to wipe away substantive prohibitions adopted by past legislatures.

The narrower due process limit proposed here may better thread the needle between individual fairness and legislative impairment. To be sure, any doctrine that converts enforcement practice into an effective enforcement prohibition raises the same separation of powers concern highlighted throughout this Article: in effect, such desuetude doctrines enable choices made by the executive branch alone to alter the content of substantive laws without any affirmative legislative delegation authorizing executive officials to do so. Some might thus argue that longstanding executive defiance of statutory policy should make it more, rather than less, important to maintain the ultimate enforceability of underlying substantive laws. Yet if longstanding adherence potentially magnifies a nonenforcement policy’s separation of powers cost, it may also greatly magnify the unfairness to any individuals who face enforcement after being lulled into a false sense of security by the policy’s longevity.

What is more, the policy’s transparency and longevity may provide particular reason to doubt the underlying substantive law’s continued democratic legitimacy. When enforcement practice is never formalized, courts may lack confidence that the asserted

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341. See generally Note, *Desuetude*, *supra* note 338, at 2213.

342. Saikrishna Prakash, *Radicals in Tweed Jackets: Why Extreme Left-Wing Law Professors Are Wrong for America*, 106 COLUM. L. REV. 2207, 2216 n.13 (2006) (reviewing CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* (2005)).

practice reflects definite public dissatisfaction with the law itself, as opposed to one or more other factors that may lead particular laws to be under-enforced. Formal announcement of a policy, in contrast, suggests at least some political support for mitigating the law's reach. At the same time, as recent controversies over DACA and DAPA illustrate, overt nonenforcement policies may provide a focus for political opposition, as well as potential opportunities for judicial review.<sup>343</sup>

For all these reasons, courts may have relatively stronger confidence that a policy renewed over time by repeated administrations—particularly administrations from different political parties—reflects weakened democratic support for the underlying law itself. Limiting desuetude to contexts of transparent nonenforcement, moreover, would preclude reliance on de facto nonenforcement policies, like the long neglect of federal civil rights enforcement during the Jim Crow era,<sup>344</sup> that are too shameful to be publicly acknowledged. At any rate, were courts to embrace this variety of desuetude, they could preserve the substantive law's ultimate validity by allowing prospective enforcement following an announced change in policy. Just as courts have sought to limit “unfair surprise” with respect to enforcement of administrative statutes by allowing significant changes in policy to operate only prospectively,<sup>345</sup> so too here courts might protect individual reliance on longstanding nonenforcement policies by holding the government to its past policy with respect to past conduct.

How long a period should be sufficient to trigger this limited form of desuetude? Although one might advocate a longer or shorter period, I will here arbitrarily propose that after any such policy remains in effect for fifteen years or more, the burden should shift to the government to demonstrate continued enforcement in comparable cases. Nonenforcement over so long a time period is likely to prompt quite substantial reliance, perhaps even a perceived virtual certainty of immunity from punishment. Just imagine, for example, how entrenched the marijuana industry will likely appear

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343. For my views on the reviewability of nonenforcement policies, see generally Price, *Law Enforcement as Political Question*, *supra* note 29.

344. *See supra* note 265 and accompanying text.

345. *See supra* Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2168-69 (2012); *supra* Part II.A.3.

in states like Colorado if current federal enforcement guidelines remain in place, without change or salient examples of enforcement, for another decade. A fifteen-year period, moreover, would necessarily cover multiple changes in presidency, including in all likelihood (given historic political cycles) one or more changes in partisan control of the White House.<sup>346</sup> It would thus provide courts with substantial assurance of democratic support for the policy reflected in the enforcement practice, as distinct from the underlying statute.

To be sure, so long a period would also provide ample opportunity for congressional action. But at least if Congress has not actively resisted the policy, courts should hesitate to draw the negative inference that congressional failure to ratify it suggests implicit disapproval. One of nonenforcement's many troubling features is that by limiting effective burdens on regulated parties, nonenforcement may also relieve political pressure on Congress to update the underlying substantive laws themselves.<sup>347</sup> Congressional inaction may thus provide only a weak indication of actual public preferences.

In any event, if the policy has persisted over a long enough period of time, concerns about individual reliance should eventually override concerns about protecting legislative authority. Such legal protection for reliance, indeed, should be obtained without regard to whether the policy itself was substantively appropriate or even lawful. The *Raley-Cox-PICCO* anti-entrapment defense, after all, may protect reliance even on incorrect statements of law. There was no actual privilege against self-incrimination at the hearing in *Raley*, but the defendants were nonetheless entitled to rely on assurances that asserting the privilege was lawful.<sup>348</sup>

While the Trump Administration seems likely to end DACA and DAPA,<sup>349</sup> this desuetude proposal has straightforward implications for the current marijuana controversy. If current enforcement policy persists for a lengthy period, across multiple administrations, and if Congress at the same time fails to take more decisive action either in favor of the policy or in opposition to it, the government should

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346. See DOUGLAS CLOUATRE, *PRESIDENTIAL UPSETS* 4 (2013) ("Twelve or more years of same-party control of the White House has occurred only five times since the 1830s.").

347. See Stuntz, *supra* note 339, at 591.

348. See *Raley v. Ohio*, 360 U.S. 423, 441-42 (1959).

349. See *supra* note 8 and accompanying text.

eventually be disabled from enforcing criminal marijuana prohibitions against parties who acted in reliance on the policy.

Reliance concerns may in fact apply with particular force to many intended beneficiaries of the Obama Administration's marijuana policy.<sup>350</sup> While participants in heavily regulated industries and other legally sophisticated parties can perhaps be expected to understand legal risks associated with participating in a given program or relying on particular administrative guidance, the typical small-time marijuana entrepreneur can hardly be charged with assessing the legal strength of objections to programs endorsed by senior officials and embraced by thousands of similarly situated people. If in the short run potentially overriding such individuals' reliance interests is a necessary (though troubling) means of cabining unlawful executive action, in the long run—as reliance grows more entrenched and executive policy gains legitimacy from duration—the balance should tip in favor of protecting reliance.

#### IV. FIRST-BEST SOLUTIONS FOR A SECOND-BEST WORLD

Through the proposals just offered, the balancing framework as I have elaborated it may provide some opportunity at the margins to mitigate harsh effects of the general rule that nonenforcement reliance cannot receive constitutional protection. It bears reiterating, however, that the tradeoffs involved in balancing fairness and separation of powers are necessarily messy and contestable; the inquiry carries the inevitable imprecision of all incommensurate balancing tests.<sup>351</sup> Yet the very difficulty of the inquiry leads to a more fundamental observation: that nonenforcement is a highly problematic means of negotiating political and social conflicts over the merits of existing law.

Nonenforcement, to be sure, has the appealing feature of forbearing from applying potentially harsh measures to sympathetic defendants; in that sense, it provides an important safety valve for outdated laws. Yet because nonenforcement assurances generally

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350. See 2011 Cole Medical Marijuana Guidance, *supra* note 2; Ogden Marijuana Guidance, *supra* note 2; DAPA Memo, *supra* note 6; DACA Memo, *supra* note 6.

351. See *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in the judgment) (pointing out the imprecision of a balancing test applied to the dormant Commerce Clause).

are not—and cannot be—binding, assertive use of nonenforcement policy, particularly in areas of political contestation such as marijuana, immigration, gun control, or environmental protection, may amount to playing chicken with subsequent administrations, daring them to disrupt the practical reliance interests that have built up around the outgoing administration’s policy.<sup>352</sup> Presumably, in most cases, the game will go just fine; the political process will protect sympathetic beneficiaries’ reliance on policies with majority support. But chicken sometimes ends in a crash. Indeed, in the current presidential transition, with respect to immigration at least, we may well be headed towards a quite sharp reversal and potential disruption of expectations.

For this reason, among others, nonenforcement policy itself is very much a second-best solution for addressing outdated and inequitable laws. Executive officials may well judge that the second-best solution is the best they can do in our second-best world, rife with partisan conflict and often beset by legislative paralysis. But the reliance problems such policies generate should remind us how much better the first-best solutions can be. And there are other possibilities. With respect to criminal laws, Presidents hold the clear alternative of employing constitutional clemency powers to mitigate laws they disfavor.<sup>353</sup> In particular areas of federal law, statutes may also provide particular mechanisms for adjusting the substantive scope of legal prohibitions.<sup>354</sup> Finally, of course, Congress itself might devote more attention to conforming past laws to current public preferences, or it might consider delegating broader executive authority to do so.<sup>355</sup>

#### A. *The Clemency Alternative*

How might clemency provide an alternative to nonenforcement? The Constitution gives the President the specific “Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.”<sup>356</sup> Although historically “pardons

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352. See *supra* note 153 and accompanying text.

353. See *infra* Part IV.A.

354. See *infra* Part IV.B.

355. See *infra* Part IV.C.

356. U.S. CONST. art. II, § 2, cl. 1.

and reprieves” were specific forms of clemency, serving respectively to excuse a completed offense or delay imposition of adjudicated punishment, the Supreme Court has understood this clause to provide authority for the full range of traditional types of clemency, including commutations (reductions in punishment) and amnesties (general pardons for specified offenses).<sup>357</sup> The Court has also held that clemency “releases the offender from all disabilities imposed by the offence, and restores to him all his civil rights. In contemplation of law, it so far blots out the offence, that afterwards it cannot be imputed to him to prevent the assertion of his legal rights.”<sup>358</sup> Thus, while a pardon may not impair previously vested property rights or require return of fines or other sums paid into the U.S. Treasury,<sup>359</sup> an unconditional pardon eliminates collateral penalties and disabilities that result directly from commission of the crime or from criminal conviction.<sup>360</sup>

Pardons, to be sure, are normally issued on an individualized basis following lengthy consideration of a particular application.<sup>361</sup> As Rachel Barkow has observed, however, some Presidents have issued pardons systematically to expunge entire categories of violations.<sup>362</sup> Indeed, some have even done so on a class-wide basis through a general amnesty.<sup>363</sup> Most recently, President Carter issued a proclamation in 1977 pardoning, with certain specified exceptions, “all persons who may have committed any offense between August 4, 1964 and March 28, 1973 in violation of the Military Selective Service Act or any rule or regulation promulgated thereunder,” including those convicted of such offenses.<sup>364</sup> Such general amnesties have most often covered political offenses and

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357. Brian M. Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 570, 580 (2001).

358. *Knote v. United States*, 95 U.S. 149, 153 (1877).

359. *Id.* at 154.

360. See Rachel E. Barkow, *Clemency and Presidential Administration of Criminal Law*, 90 N.Y.U. L. REV. 802, 867-68, 867 n.360 (2015); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 327-31 (2010).

361. See Barkow, *supra* note 360, at 811.

362. *Id.* at 836-37; see also Charles Shanor & Marc Miller, *Pardon Us: Systematic Presidential Pardons*, 13 FED. SENT'G REP. 139, 139-40 (2000-2001).

363. See Barkow, *supra* note 360, at 811 & n.40, 813 n.62, 837.

364. Proclamation No. 4483, 42 Fed. Reg. 4391 (Jan. 21, 1977), reprinted in 91 Stat. 1719 (1977); see also Exec. Order No. 11,967, 42 Fed. Reg. 4393 (1977) (directing measures to implement pardons).

rebellions rather than ordinary domestic crimes.<sup>365</sup> But the Supreme Court has doubted whether the labeling of different forms of clemency carries “legal importance” as opposed to mere “philological interest.”<sup>366</sup> In any event, even if some individualized pardoning process is required, historic precedents could support issuing such pardons systematically to achieve consistent policy results.<sup>367</sup> Though President Obama did not pursue this option, such historic actions could have provided a model for protecting reliance on the his Administration’s marijuana nonenforcement policy in a way that due process defenses cannot.

Pardons are often more politically costly than nonenforcement. While an enforcement policy is always subject to revision, a pardon’s effects are irrevocable,<sup>368</sup> and the President must own the choice to excuse conduct that is concededly criminal. The government, moreover, cannot later use pardoned crimes as proxies for other more dangerous behavior or as leverage in plea bargains—reasons for which marijuana or immigration offenses might otherwise be charged in particular cases. Clemency, finally, can operate only retrospectively, with respect to completed violations,<sup>369</sup> an announced nonenforcement policy, in contrast, may encourage behavior ahead of time by altering perceptions of legal risk.<sup>370</sup> Nevertheless, for much the same reasons, clemency also provides greater security to those who benefit from it. What is more, clemency, unlike nonenforcement, rests on an undeniable constitutional power of the Executive.<sup>371</sup> Presidents should consider using this power more broadly in areas of law, like marijuana prohibition, where Congress has proven unresponsive to apparent public preferences regarding the proper scope of criminal prohibitions.

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365. See *Burdick v. United States*, 236 U.S. 79, 94-95 (1915) (observing that an amnesty “is usually, addressed to crimes against the sovereignty of the state, to political offenses, forgiveness being deemed more expedient for the public welfare than prosecution and punishment”); cf. *Knote v. United States*, 95 U.S. 149, 153 (1877) (“[T]he term [amnesty] is generally employed where pardon is extended to whole classes or communities, instead of individuals.”).

366. *Knote*, 95 U.S. at 153.

367. See Barkow, *supra* note 360, at 836-38; Shanor & Miller, *supra* note 362, at 142.

368. See Barkow, *supra* note 360, at 812.

369. See Hoffstadt, *supra* note 357, at 570 n.37.

370. See, e.g., *United States v. Washington*, 887 F. Supp. 2d 1077, 1084 (D. Mont.), *adhered to on reconsideration*, 2012 WL 4602838 (D. Mont. Oct. 2, 2012).

371. U.S. CONST. art. II, § 2, cl. 1.

### *B. Administrative Authorities*

Because the pardon power extends only to criminal violations, presidential clemency cannot help directly in areas of civil or administrative regulation.<sup>372</sup> Nevertheless, particular statutory contexts might provide alternative means of adjusting legal prohibitions. The options available in each particular area will vary, and such legal remedies will rarely provide authority to alter substantive law to the degree executive officials might wish. But such is life in a government bound by law. To the extent such solutions are available, they too may provide a degree of security that would otherwise be quite lacking. For that reason, though, they may be worth the effort and political cost, even if nonenforcement appears to be a path of less resistance.

### *C. Congress's Role*

Finally, Congress might consider devoting more energy to updating old laws. In particular, instead of relying on appropriations riders to restrict enforcement, Congress should more often consider suspending the underlying laws themselves. Doing so would provide greater security to regulated parties, avoid the problems of confusion addressed above, and provide greater clarity as to Congress's ultimate preferences. By avoiding confusion about Congress's desired policy, moreover, such action would render Congress more readily accountable for its policy decisions.

With respect to marijuana in particular, Congress should consider adopting such legislation for the same reasons that President Obama might have considered executive clemency. Again, enforcement bans may often be more politically feasible than either of these alternatives. But legislators should recognize the significant risks of confusion and mistaken reliance that enforcement bans create for regulated parties. If what Congress truly intends by an enforcement ban is a suspension of the substantive law itself, it should enact legislation making that intent clear.

More broadly, Congress should consider developing mechanisms for updating statutory restrictions over time through means other

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372. See *supra* note 293 and accompanying text.



than enforcement discretion. Two leading scholars have argued that Congress effectively elevated front-end enforcement policy's centrality to immigration law by closing down opportunities for more formal, back-end relief for removable immigrants.<sup>373</sup> In many areas of law, Congress holds powerful incentives to engage in this form of duplicitous lawmaking—adopting tough substantive laws while relying on enforcement discretion to better align those laws in application with actual public preferences.<sup>374</sup>

But this sort of legal structure is troubling: it gives enforcement officials too much unguided discretion to determine the law on the ground, while at the same time limiting Congress's accountability for the true breadth of the laws it has adopted.<sup>375</sup> Some degree of enforcement discretion may enable enforcement officials to adapt laws over time to new realities and leverage limited enforcement resources to achieve maximum compliance. But in general, providing affirmative authority to waive legal restrictions ahead of time would afford greater security to regulated parties and greater clarity about executive policy, while at the same time avoiding questions of legal authority that have surrounded DACA, DAPA, and the marijuana guidance.

In the present moment, unified Republican control of the presidency and both Houses of Congress will provide substantial opportunity for legal reform. No doubt Republican leaders will concentrate on a familiar Republican deregulatory wish list, to the dismay of their political opponents. Yet Congress should also take the opportunity to adjust federal laws such as marijuana prohibitions and other over-broad criminal statutes that have outlasted their political support.

To the extent Congress lacks the political bandwidth to address the matter itself, it might also delegate authority to the executive branch to suspend existing statutes. For example, with respect to marijuana, Congress might consider delegating authority to adjust the scope of federal marijuana prohibitions in light of evolving state-level legal regimes. Some have raised constitutional concerns about

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373. Cox & Rodríguez, *supra* note 59, at 132.

374. See generally Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 40-48 (2008) (discussing those incentives).

375. See Stuntz, *supra* note 339, at 547-48.

legislation delegating authority to cancel legal obligations,<sup>376</sup> and the Supreme Court's decision invalidating a line-item veto statute in *Clinton v. City of New York* could suggest such delegation is impermissible.<sup>377</sup> For reasons I and others have addressed elsewhere, however, constitutional objections to this form of negative delegation are mistaken.<sup>378</sup> Provided Congress includes an intelligible principle sufficient to satisfy the current (highly permissive) judicial understanding of the nondelegation doctrine,<sup>379</sup> delegated authority to suspend laws should not present any greater constitutional difficulty than the now-routine delegation of authority to create effective legal obligations.

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Executive or legislative suspensions of enforcement may provide a powerful mechanism for adjusting the effective scope of disfavored or outdated laws. But insofar as they suspend only enforcement and not the laws themselves, such actions necessarily leave regulated parties in jeopardy of future sanctions for conduct that enforcement officials or legislators (or both) effectively encouraged. The due process principles addressed here may help avoid some of the worst effects that such enforcement suspensions create, but countervailing separation of powers considerations necessarily limit the effective scope of these defenses. Both Congress and the President should use the powers they have to provide greater security to regulated parties whom they themselves invited to violate the law.

## CONCLUSION

Recent marijuana and immigration nonenforcement policies have raised a reliance problem that may arise across a range of contexts, and that may well arise in still more acute forms in the future if the

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376. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 126-28 (2014).

377. See 524 U.S. 417, 421 (1998).

378. See, e.g., David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 312-18 (2013); Daniel T. Deacon, *Administrative Forbearance*, 125 YALE L.J. 1548, 1564-67 (2016); Price, *Enforcement Discretion*, *supra* note 29, at 673-75; Price, *supra* note 87, at 259-62.

379. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

Obama Administration's marijuana and immigration policies provide a model for similarly extensive policies in other politically contested areas of law. Drawing on the limited case law addressing this problem to date, I have proposed analyzing such reliance claims by balancing separation of powers concerns about unauthorized executive suspensions of law against risks of confusion and unfairness to particular individuals.

As a general matter, as courts have by and large recognized, this balance should tilt in favor of enforcement. Protecting individual reliance in all cases, or even when concerns about fair notice are substantial, would undermine important legal limits on enforcement officials' authority by giving them effective power to authorize legal violations. Nevertheless, in at least some situations—when the government pursues violations despite authoritatively deeming conduct lawful; when it relies on particular information obtained by promising nonenforcement, or when it pursues violations prohibited only as a secondary means of implementing unenforced primary prohibitions; when Congress, rather than an enforcement agency alone, has mandated nonenforcement; or when an overt nonenforcement policy has persisted without revision or salient violations for an extended period—the balance should tip the other way and reliance defenses should hold broader scope. Even with these doctrinal adjustments, however, future Presidents and Congresses might give greater consideration to mitigating risks of unfairness through means such as executive clemency, administrative action, or substantive legislation that provide more durable protection against future enforcement.